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WEST COAST REPORTER

ISSUED IN WEEKLY PARTS.

CONTAINING ALL THE DECISIONS AS FAST AS FILED

OF THE FOLLOWING COURTS:

UNITED STATES CIRCUIT AND DISTRICT COURTS OF CALIFORNIA, COLORADO, NEVADA, AND OREGON, AND THE SUPREME COURTS OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON AND WYOMING.

ALSO

LEGAL ESSAYS AND EDITORIAL NOTES.

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WEST COAST REPORTER.

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RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

3. *The Property and Other Rights in General of the Prior Appropriator.*—The doctrine is settled by repeated decisions, that an appropriator who has constructed a ditch and is thereby diverting the water of a stream, or any portion of it, for some beneficial purpose, obtains and has no property whatever in the water of such stream while it is flowing in its natural channel or bed, and before it reaches the "head" or commencement of the ditch where the diversion begins. It has even been questioned whether his right to the water after diversion, and while flowing through the ditch, is really a "property," or only an exclusive right of use; but it is settled beyond all question, that he has no property in the water of a natural stream, flowing in its natural current and channel, before the diversion into his ditch or other structure takes place. He can maintain no actions based upon such property. In fact, private property in the running waters of a natural stream, flowing in its natural channel, can not be acquired, separate and distinct from a property in the land through and over which the stream runs.[1] In Parks Canal and M. Co. v. Hoyt,[2] it was held that the water flowing in the stream above the head of the appropriator's ditch is realty, a part of the land, and does not become in any sense his property until it passes into his control in his ditch or other works. He can not, therefore, maintain an action upon an implied contract, as for the price of personal property sold, against a person who has wrongfully diverted the water from the stream above the head of his ditch. His legal remedy for such an injury is by an action on the case to recover damages for the tort. In Los Angeles v. Baldwin,[3] although it

[1] Lower King's River W. Co. v. King's River etc. Co., 60 Cal. 408; Parks Canal and M. Co. v. Hoyt, 57 Id. 44; City of Los Angeles v. Baldwin, 53 Id. 469; Nevada County etc. Co. v. Kidd, 37 Id. 282; McDonald v. Askew, 29 Id. 200; Kidd v. Laird, 15 Id. 161; Ortman v. Dixon, 13 Id. 33.

[2] 57 Id. 44.

[3] 53 Id. 469.

appeared that the city had, by prescription or otherwise, acquired the right to appropriate and use the entire water of the Los Angeles river, yet it was held that the city did not own the *corpus* of the water while flowing in the river. In Kidd v. Laird,[4] the general doctrine was laid down that running water, while flowing in its natural manner in the natural channel of a stream, can not be made the subject of private ownership. A right may be acquired to the *use* of the water in such a condition, which will be protected as though it were a right of property; but this right is not a special property in the water itself—in the *corpus* of the flowing water.

The nature and extent of the right acquired in the water after its diversion, while under the control of the appropriator, in his ditch, canal, reservoir, or other structure, must depend, I think, upon the purpose for which the appropriation is made. Where the appropriation is made for purpose of irrigation, or agriculture, or municipal uses, or mining, or for sale to others to be used by them in any of these modes, where the use wholly or largely *consists in the consumption*, it would seem that the appropriator acquired a higher right, a right more nearly equivalent to absolute property or ownership, than in cases where the appropriation is made simply for the purpose of milling or of propelling machinery of any kind. In the latter case the use is not a consumption, and the water may be returned to its natural channel, after the use, without substantial diminution in quantity. Decisions concerning milling do not, therefore, in my opinion, furnish a necessary rule for other kinds and purposes of appropriation. In Ortman v. Dixon,[5] the court said, concerning one who had appropriated water for a mill: "Whether A., by erecting a mill and dam, becomes entitled to the water *in specie*, or whether he is entitled to anything more than the *use* of the water as a motive power—whether there may not be an appropriation of the mere use, as well as an appropriation of the water itself, the *corpus* of the water, for sale—are questions which need not be and are not now decided." In the later case of McDonald v. Askew,[6] the court laid down a more definite rule on this particular matter: "One who locates on a stream, and appropriates the water for a mill or other machinery, does not obtain a *property* in the water as such, but only a right to the momentum of its fall at that place, and to the flow of the water in its natural channel."

There is, of course, a plain distinction between the appropriator's right to the water which he diverts, and his right to the canal, ditch, reservoir, or other structure through which the water is conveyed. A

[4] 15 Id. 161. [5] 13 Cal. 33. [6] 29 Id. 200.

ditch or canal itself, used for conveying the water to a mine or elsewhere, is not a mere easement or incorporeal hereditament; it is land.[7] If, therefore, a ditch runs from a stream to a mining "claim," and belongs to the owner of the mine, who uses a portion of its water in working his mining claim, it does not follow that the ditch is an appurtenant of the mining claim. And if the owner of a mining claim purchases a water ditch, "and the water rights thereto appertaining," this purchase does not of itself constitute the ditch and water rights, appurtenances of the mining claim.[8] The exclusive right to divert and use the water of a stream acquired by appropriation, as well as the ditch or other structure through which the diversion is effected, may be transferred and conveyed like other property or rights analogous to property. If a person having a possessory right to a parcel of land on a stream has erected a mill thereon, and has acquired a right to the water of the stream for his mill, a valid sale and conveyance of such real property transfers the water right also to the vendee.[9] While a ditch or other similar structure for appropriating and diverting water may be sold, the sale and conveyance must be by a written instrument—a deed—as in the case of other real estate. A mere verbal sale or transfer would be nugatory.[10] A person who enters into possession of such a ditch, under a mere verbal sale to himself, does not succeed to any rights of priority held by the vendor, so as to obtain the benefit of the vendor's prior appropriation; he must date his own appropriation, as against all other opposing claimants, from the time when he enters into possession.[11] In a very recent decision by the supreme court of Nevada, this same rule was declared in the most general form: "Where, in a contest concerning priority, a party claiming a right to water by appropriation *fails to connect himself in interest* with those who first appropriated and used the waters of a stream, his own appropriation of the water must be treated as the inception of his right;" or, in other words, his right of appropriation must be dated from the time when he himself began to use the waters; he can not link his own use on to that of the former occupants, and thus claim to be a successor to their prior rights. Their prior appropriation is virtually abandoned.[12]

Wherever ditches or other structures for diverting and appropriat-

[7] Reed v. Spicer, 27 Cal. 61.

[8] Quirk v. Falk, 47 Id. 453.

[9] McDonald v. Bear River etc. Co., 13 Id. 220.

[10] Smith v. O'Hara, 43 Cal. 371; Lobdell v. Hall, 3 Nev. 507.

[11] Smith v. O'Hara, *supra*.

[12] Chiatovich v. Davis, 17 Nev. 133. This decision plainly formulates a general rule, of which that laid down in Smith v. O'Hara is a particular instance.

ing water belong to two or more proprietors, such owners are, in the absence of special agreements to the contrary, tenants in common of the ditch and of the water rights connected therewith, and their proprietary rights are governed by the rules of law regulating tenancy in common.[13]

Although the appropriator has no property in the water of the stream flowing in its natural channel above his point of diversion, yet he acquires a most important *right* over or with respect to such water. This general right over the stream, of the party who has perfected a prior appropriation, is that the water of the stream should continue to flow in its usual manner, through the natural channel or bed of the stream, down to the head of his ditch, or to the point where his own actual dominion over it commences, to the extent or amount of his appropriation, without diversion or material interruption.[14] In a recent decision the court used the following language descriptive of this right: "The plaintiff's right to have the water flow in the river to the head of his ditch is an incorporeal hereditament appurtenant to his [artificial] watercourse [*i. e*, his ditch]. Granting that the plaintiff does not own the *corpus* of the water until it shall enter his ditch, yet *the right to have it flow into the ditch* appertains to the ditch."[15] In another case a ditch, conveying water for purpose of sale to miners, took its water from a stream near its head in the mountains, and thence ran for a distance of twenty-four miles, the water flowing through its entire length. The title to the upper half of the ditch was vested in A., and that of the lower half in B. A. was held to be entitled to the exclusive use of the water from the stream at the head of the ditch.[16] In Phœnix Water Co. v. Fletcher,[17] it was held that the prior appropriator of a stream on the public lands, for mining purposes, has a right to have the water flow down the stream, above the point of his appropriation, without interruption or diminution in quantity.

The question here arises, What is a "stream," which may thus be appropriated? I do not purpose to enter into any full discussion of this question, which may be regarded as rather speculative than practical throughout these Pacific communities. It is sufficient to say that there must be an actual, natural stream, with defined banks, bed, channel, and current, as contradistinguished from a mere occasional

[13] Bradley v. Harkness, 26 Cal. 69.

[14] Lower Kings River etc. Co. v. Kings River etc. Co., 60 Cal. 408; Parks Canal & M. Co. v. Hoyt, 57 Id. 44; Reynolds v. Hosmer, 51 Id. 205; McDonald v. Askew, 29 Id. 200; Phœnix W. Co. v. Fletcher, 23 Id. 481; Natoma W. & M. Co. v. McCoy, Id. 490; Kidd v. Laird, 15 Id. 161; Barnes v. Sabron, 10 Nev. 217.

[15] Lower Kings River etc. Co. v. Kings River etc. Co., 60 Cal. 408.

[16] Reynolds v. Hosmer, 51 Cal. 205.

[17] 23 Cal. 481.

torrent or flow of surface water from rains or melting snow, through a hollow, or depression in the surface of the soil. The essential nature of a "stream" which can be appropriated was briefly but accurately described by the supreme court of Nevada in a leading case:[18] "To maintain the right to a watercourse, it must be made to appear that the water *usually* flows therein in a certain direction and by a regular channel with banks or sides. It need not be shown to flow continually, and it may at times be dry, but it must have a well-defined and substantial existence." It would plainly be impracticable to require, as an essential element of a "stream" in these Pacific states and territories, that the flow of water should be continuous, uninterrupted, and perennial, during the entire year and from year to year. It is well known that some of the most important and well-defined streams in these regions become dry throughout the whole or a considerable portion of their lengths during certain seasons of each year. It is, perhaps, more correct to say that their waters sink beneath their beds, and flow beneath the surface instead of in their channels on the surface. All these streams, nevertheless, have well-defined beds, channels, banks, and currents, and are in every respect natural "streams."

Such being the appropriator's right over the *stream* as such, I proceed to consider his rights over the water which comes under his exclusive control by means of an actual diversion and appropriation. The general doctrine is settled, by the unanimous consent of the authorities, that the prior appropriator is entitled to the exclusive use of the water, up to the amount embraced in his appropriation, either for the original purpose or for any other or different purpose, provided the amount is not thereby increased, without diminution or material alteration in quantity or in quality; and his use will, to that extent and for such purposes, be protected against all subsequent appropriators or claimants using or interfering with the water, both above and below on the same stream; and to this end he may obtain all proper remedies, legal and equitable.[19] As illustrations, it is held in Kimball v. Gearheart, that when the appropriator has completed his ditch so as to receive the water appropriated, "he is then entitled to

[18] Barnes v. Sabron, 10 Nev. 217.

[19] Hines v. Johnson, 61 Cal. 259; Stein Canal Co. v. Kern Island I. C. Co., 53 Id. 563; Reynolds v. Hosmer, 51 Id. 205; Gregory v. Nelson, 41 Id. 278; Clark v. Willett, 36 Id. 524; Davis v. Gale, 32 Id. 26; McDonald v. Askew, 29 Id. 200; Hill v. Smith, 27 Id. 476; 32 Id. 166; Rupley v. Welch, 23 Id. 453; Phœnix W. Co. v. Fletcher, Id. 492; Natoma W. Co. v. McCoy, Id. 490; Butte etc. Co. v. Morgan, 19 Id. 609; Kidd v. Laird, 15 Id. 161; Kimball v. Gearhard, 12 Id. 27; Ortman v. Dixon, 13 Id. 33; Bear River etc. Co. v. N. Y. M. Co., 8 Id. 327; Ophir Silver M. Co. v. Carpenter, 4 Nev. 534; Barnes v. Sabron, 10 Id. 217; Strait v. Brown, 16 Id. 317; Appleton v. Peterson, 20 Wall. 515.

said water as against all persons subsequently claiming or locating it;" and "possession or actual appropriation is the test of priority in all claims to the use of water, when such claims are not dependent upon the ownership of the land through which the water flows." In Ortman v. Dixon, it is held that "a prior appropriator of water for mill purposes is entitled to it to the extent of his appropriation, and for those purposes to the exclusion of any subsequent appropriation for the same or for other purposes." In Barnes v. Sabron, the supreme court of Nevada held that "the first appropriator, for purposes of irrigation, of the water of a stream running through the public lands has the right to insist that the water flowing therein shall, during the irrigating season, be subject to his reasonable use and enjoyment to the full extent of his original appropriation and beneficial use. To this extent his rights go, but no further, for in subordination to such rights, subsequent appropriators may appropriate the remainder of the water running in said stream." *J. N. P.*

(TO BE CONTINUED.)

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

CAHN v. WONG TOWN ON.

Filed February 4, 1884.

SUB-COMBINATIONS—INDEPENDENT PATENTS.—Where a patent is issued for an invention consisting of a combination of a number of elements, and there is, at the same time, an invention made by the patentee consisting of a sub-combination of a part of the elements entering into the larger combination, and the patent issued does not embrace such sub-combination, the inventor of both, at the same time, may afterwards obtain an independent patent for the sub-combination, provided he applies therefor within two years after the invention has gone into public use or been on sale.

M. A. Wheaton, for the complainant.

J. L. Boone, for the defendant.

SAWYER, Circuit Judge (delivering an oral decision). This action is upon a patent. The patent consists of lapping over two pieces of leather in making the seam of a boot, or any other work of the kind, running a line of rivets along, and then a line of stitching on each side of the line of rivets, so as to make a compact, tight seam. The plea sets up that the patentee in this case, on a prior occasion, procured a patent, and that this other and prior patent is for the same thing, with the addition of a piece of india-rubber inserted between two pieces of leather. The strip of india-rubber having been inserted, a line of rivets is run along with two lines of stitching, one on each side of the line of rivets, the same as in the second patent.

The defendant claims that the second patent is not a new invention. That it is merely a combination of a part of the elements of the first patent, or of the prior invention, and, therefore, that the second patent is void, as not covering a new invention. I think, probably, that would be the case if the patentee were a different inventor—if the patentee in the prior patent had been a different person from the patentee in the second, I am inclined to think it would be so. But the prior patentee is the same man, and, doubtless, if he had made the invention at the time he obtained his first patent, he might have got a patent for the sub-combination, omitting one element—the slip of india-rubber. And it does not appear in the plea that this second invention has been in public use, or on sale, for more than two years, whereby it would be abandoned to the public. He failed, therefore, if he is the inventor of both at the same time, to obtain a patent for all he was entitled to. If he was the inventor at that time, he was entitled to patent the second or sub-combination of elements, omitting the inserted strip of india-rubber, as well as the first combining all the elements. He might, perhaps, have got a reissue covering both, if his invention of the sub-combination is sufficiently indicated in the specifications of the first patent; but he has chosen to obtain an independent patent for the sub-combination.

If he invented it at the same time with the other, he might, undoubtedly, have obtained a patent in the first instance. I think if it was patentable with the additional element of the india-rubber, the sub-combination, without the addition of the india-rubber, invented at the same time, would be patentable. Justice Field says, in the giant-powder case, that this is the proper mode of proceeding, where there is another invention for which an independent patent might have been obtained, but has

been omitted. If he was the inventor of both, he was entitled to patent both—the sub-combination without the strip of india-rubber, as well as the entire combination of the lapping of the leather and the intervention of a piece of india-rubber to make the seam tighter, and better still in combination with the line of rivets and line of stitching on each side of it. He being the first person to invent both, I think it was patentable as to both. He, doubtless, did invent the sub-combination as well as the entire combination at the same time. He embraced the sub-combination in the last patent without the additional element intervening, and it does not appear that it was on sale for two years before the application for the last patent. I think the plea, then, should be overruled.

And it is so ordered.

MARTIN *v.* BALDWIN ET AL.

Filed February 4, 1884.

PENDENCY OF A SUIT FOR PARTITION IN THE STATE COURTS, such suit being in the nature of a proceeding *in rem*, is a bar to a subsequent suit for partition of the same land in the United States courts, brought by a successor in interest, *pendente lite*, of some of the parties to such former suit against the successors in interest of the other parties.

SUIT for partition. The opinion states the facts.

W. S. Woods, for the complainant.

Latimer & Morrow, for the defendants.

SAWYER, Circuit Judge (delivering an oral decision). This is a suit for partition of a ranch, Camilo Martin bringing the suit against Baldwin and Garvey for partition, alleging that he owns a certain portion, and that Baldwin and Garvey own the remaining portions. The plea sets up that W. and F. W. Temple commenced suit in the district court for the district of Los Angeles county, against Baldwin, one of the defendants in this suit, and several other defendants named, being the other owners at the time, for a partition of this same ranch; that said suit is still pending in the superior court for the county of Los Angeles; that it embraces the identical object and subject-matter involved in this suit; that since the commencement of that suit, the plaintiff in this proceeding, Camilo Martin, has purchased the interest of the Temples, and now owns the same interest that the Temples did; that Garvey has purchased the interest of some of the other defendants in the suit, and that Camilo Martin, the complainant in this suit, and Baldwin have also purchased the remaining interest of the other defendants in the suit, so that now Martin, Garvey, and Baldwin are owners of the entire ranch; that though there are other parties to the former suit for partition, yet the parties to the present suit have succeeded to their interests *pendente lite*, and are now the only parties in interest; that the same interests are now involved, the parties to this suit having purchased in subsequently to the bringing of the former suit and the filing of notice of *lis pendens*, and are, therefore, in privity with those other parties; that this suit involves precisely the same questions that the former suit does, and that the judgment or the decree in the former suit would be binding upon all the world. Section 1908 of the code of civil procedure says: "The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the

judgment or order, is as follows: * * * 2. In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing, under the same title, and in the same capacity."

Precisely the same relief is to be had in one suit as in the other, and the judgment in the first suit would be binding upon all the parties. It is true, that these are different jurisdictions, that is to say, one is the jurisdiction of the United States and the other of the state court, and in ordinary cases, the pending of the suit in one of these tribunals would not abate a suit pending in another. But these suits are for partition of the same land, and the two courts might reach a different result, and there be no error in either proceeding upon which the judgment could be reversed. The parties would find themselves in a very embarrassing position if the judgments should be different in the different courts and both of them be valid. The jurisdiction of the two courts is concurrent. The proceeding is in the nature of a proceeding *in rem*. When two courts have concurrent jurisdiction in a proceeding *in rem*, and one court obtains possession of the *res*, ordinarily it would be entitled to proceed to judgment without interference from the other court. Certainly one court would not be entitled to take the *res* out of the possession of another court of concurrent jurisdiction, which in the exercise of its lawful authority has obtained the actual physical possession of the thing in suit. It seems to me, that the same principle should apply to a suit for partition. The action is local, and the courts having concurrent jurisdiction must, necessarily, exercise the same territorial jurisdiction, although the courts may be courts of different sovereignties. The proceeding being in the nature of a proceeding *in rem*, the court first obtaining legal possession or control of the *res* ought, by comity at least, if not otherwise, to be permitted to proceed to an adjudication without interference by the other court. As a matter of sound legal discretion and comity, I think the court is authorized to abate the suit in this court on the ground of the pending of the other suit in the state court, even if the party pleading the matter of abatement is not entitled to have it abated as a matter of strict legal right. The complainant can not complain, for he purchased pending the former suit, and the notice of *lis pendens* filed in pursuance of the statute informed him of the condition of the lands. He purchased into a lawsuit in regard to lands already in the legal control of another court. This court at the commencement of that suit had no jurisdiction whatever of the case—the parties being then all citizens of California—and complainant took his interest *cum onere*.

Let the plea be sustained.

DISTRICT COURT, DISTRICT OF OREGON.

THE ULLOCK, ALEXANDER SWIETOSLAWSKI, Claimant.

Filed February 7, 1884.

OFFER OF PILOT SERVICE BY SIGNAL.—The pilot commissioners of Oregon, under the pilot act of 1882, are authorized and required to declare by rule what shall constitute a valid offer of pilot service on the Columbia-river bar pilot grounds, by a signal addressed to the eye, and in so doing may prescribe the distance within which such signal must be made from the vessel signaled.

SIGNAL FOR AN OFFER OF PILOT SERVICE.—The statute of the United States does not prescribe any signal to be used on a pilot boat in making an offer of pilot service, and the light required by section 4233 of the revised statutes to be carried by a sailing pilot vessel at night is only used to prevent collision, and incidentally to give notice of the character of such craft; but the usual signal by which an offer of pilot service is made is the jack set at the main truck in the day-time, and "flare-ups" at night, and this jack is usually the ensign of the country in which the service is offered. In the United States it is a blue flag charged with a star for every state then in the Union, and called the "union jack."

THE TERM "STATE" CONSTRUED TO INCLUDE A "TERRITORY."—The term "state," in the act of March 2, 1837, 5 Stat. 153, R. S., sec. 4236, regulating the taking of pilots on a water forming the boundary between two states, construed to include an organized "territory" of the United States.

IN admiralty. The opinion states the facts.

Frederick R. Strong, for the libelant.

Erasmus D. Shattuck and *Robert L. McKee*, for the claimant.

DEADY, J. The libelant, George W. Wood, of the pilot schooner J. C. Cozzens, brings this suit to enforce a claim for pilotage against the British bark Ullock, of seventy-six dollars, growing out of an offer to pilot said bark in and over the Columbia-river bar on March 24, 1883, and a refusal to receive the same by the master and claimant, Alexander Swietoslawski.

It appears that the alleged offer was made between four and five o'clock in the afternoon, at a distance of some twenty-five miles from the bar, and consisted in the schooner setting her jack at the main truck until dark, when she set her mast headlight and burned "flare-ups" over the side. The bark was approaching the bar from the south-west. The schooner, which was lying to, north-west of the bar, on observing her, ran down before the wind across the course of the bark. The bark paid no attention to the schooner, but kept on her course about east-north-east, until half-past seven o'clock, when she had the Cape Hancock light on her port bow and was hailed by the steam-tug Brenham and took therefrom a pilot. The schooner in her run down the coast passed astern of the bark, and then jibed sails and followed her. Between nine and ten o'clock the bark tacked and stood off shore, and soon after met the schooner with the libelant on board, who offered his services as pilot, which were declined by the pilot on board, the master being below.

In the testimony of the crews of the bark and schooner, there is the usual amount of flat contradiction concerning the disputed circumstances of the case. The libelant swears that when the fog lifted and he first sighted the bark she was in plain sight, and not more than two or three miles distant, when he put the schooner before the wind and made sail to cut her off, and that when he came within a mile of her he expected the bark to lie to until he could go aboard, but that she kept on her

course, and the schooner had to jibe her sails to follow, whereby the latter fell astern, and that thereafter he kept within from one to three quarters of a mile of the bark until they met.

The master of the bark swears that when he first sighted the schooner she was seven or eight miles away, and when night set in she was still four or five miles distant, and he did not see her afterward until they met as above stated. But the master admits that he saw the schooner, and that he knew she was a pilot boat from the flag at her mainmast, and that he did not lie to or signal for a pilot, because he did not know certainly how far he was from the bar, and he did not want to take a pilot so far out as to incur the payment of "distance" or "off-shore" pilotage.

It is admitted that the master of the Ullock had been in the river four times; that the Cozzens is the only pilot schooner that had been on the bar for about two years before this time, and that she put a pilot on the Ullock under the same master in 1882; that the libelant was a duly qualified bar pilot under the laws of Oregon, and that the pilot from the tug who brought in the bark was a duly qualified one under the laws of Washington territory.

By section 30 of the Oregon pilot act of 1882, Sess. Laws, 20, it is provided, that "the pilot who first speaks a vessel, * * * or duly offers his services thereto, as a pilot on or without the bar pilot ground, is entitled to pilot such vessel over the same," but the master may decline the offer, in which case he shall pay, if inward bound, full pilotage. And section 34 provides, that the pilot commissioners "must declare by rule what constitutes a speaking of a vessel or an offer of pilot service on the bar pilot grounds," within the meaning of the act.

By rule 9, adopted by the commissioners in pursuance of this authority, on November 17, 1882, it is provided, that "the term 'speaking a vessel for pilot service' shall be construed to mean either by the usual form of hailing, or, if out of hailing distance and within one half mile, then the usual code of signal shall be made use of."

This rule preserves the distinction that is made in the pilot act, between "speaking" or "hailing" a vessel, and a mere "offer" of pilot service. The former implies that the parties are within speaking distance, and can only be done by word of mouth, supplemented, it may be, by some such device for projecting the sound of the voice as a speaking-trumpet, or even personal gesticulation: Commonwealth v. Rickertson, 5 Met. 412; 2 Parsons on Ship. & Ad. 109. But an "offer" of pilot service may also be made by some arbitrary but established sign or demonstration, made from beyond ear-shot, and addressed exclusively to the eye. And this offer, according to the rule, must be made with "the usual code of signal," whatever that is.

It is unfortunate that the commissioners did not declare definitely what signal constitutes an offer of pilotage, as required by the act. Declaring that the offer should be made by "the usual code of signal" has thrown no light on the subject, and maybe darkened it. The expert witnesses, including one of the commissioners, do not seem to be very clear as to what this "usual code of signal" is; though the apparent confusion of their testimony may arise from the want of knowledge on the part of counsel who examined them.

For instance, the commissioner having testified that an offer of service was customarily made by the pilot boat putting her "head down

towards the ship, and showing her blue flag," her number being on her mainsail, "and at night by burning a flare," counsel for the libelant said, "Then I understand you to mean the use of the usual signals prescribed by the revised statutes of the United States, to be used on board pilot boats?" to which the witness answered "Yes."

Now there are no signals prescribed by the statutes of the United States for the use of pilot boats in making an offer of pilot services; nor had the witness in any way indicated that that was what he meant when he said that the pilot boat must "show her blue flag." The question was based upon an erroneous assumption, both as to the statute and the previous statement of the witness, while the answer was apparently made upon a total misapprehension of both.

The rule assumes that there is a usual and well-understood signal, by which a pilot boat can make an offer of pilot service to a vessel not within hailing distance, and be understood. But whether that signal is known throughout the civilized world, or whether its use is confined to this coast, or even this port, does not clearly appear from the evidence, or at all from the rule.

But this is a subject concerning which I think the court may supplement the evidence by its judicial knowledge. And first, the use of the word "code" in the rules is misleading. I think there is no "code" of pilot signals, although there may be and doubtless is a signal for "a pilot wanted," in the international code of signals, or that of any country. The usual signal by which an offer of pilot service is made in the day-time is a flag at the mast-head. This, of course, will be the flag of the country in which the offer is made, or that modification or portion of it called the "jack." In the United States it is a blue flag charged with a star for every state in the Union, and called the "union jack."

By section 4233, subdivision 11, of the revised statutes, a sailing pilot vessel is required to carry a white light at her mast-head during the night, and "exhibit a flare-up light every fifteen minutes." But neither of these lights, thus required to be carried, are signals that indicate an offer of pilot service, for they must be carried although all the pilots on the boat have been distributed. Evidently, the statute requires these lights to be burned for the purpose of making known the whereabouts and character of the boat in order to prevent collision, and incidentally to advise any one in need of or desiring the service of a pilot where to apply.

But the burning of "flare-ups," or a flashing light over the side of the boat, at short intervals, is also the customary method of making an offer of pilot service at night. It follows that the libelant made a proper tender of his services as a pilot to the Ullock, both in the day-time and after night, provided he did so within the distance prescribed by the ninth pilot rule.

Without saying so directly, the necessary effect of this rule seems to be to require that an offer of pilot service made otherwise than by hailing—as by signal—shall be made within a half-mile of the vessel signaled. Counsel for the libelant contends, however, that the power of the commissioners does not extend to prescribing the distance within which such offer must be made. But in my judgment it does; and for manifest reasons. They are expressly authorized and required to declare what shall constitute a valid offer of pilot service; and when this may be done by a signal, as by setting a blue flag at the main-truck, the

distance at which the pilot boat is from the vessel signaled is a material element in the transaction. And first, it ought not to be so far away as to leave any room for dispute as to whether the signal was made or seen; and second, a vessel ought not to be compelled to wait for a pilot from a boat that signals her a great way off, when in all probability she can get one sooner and nearer in shore if she is allowed to proceed on her way. And what distance is suitable and convenient for both the party making and receiving the signal, is a matter committed by the pilot act to the judgment of the commissioners. It is urged that a half-mile is a very short limit, and that it might well be a mile or two. But the commissioners are probably better judges of this matter than counsel; and if it is thought they have erred in this respect, they must be asked to correct it. It is not in the power of the court to disregard or modify their action thereabout.

As to whether the offer of the libelant was made within a half-mile of the Ullock, the testimony of the two crews is widely divergent. The reason given by the master of the Ullock for declining the offer is evidently not ingenuous, and ought to have some effect upon his general credibility. He says that he preferred to take a pilot from the schooner because he knew the charges were less than those of the tug pilots; and at the same time, as a reason for not taking this cheaper one when it was offered him, he says that he did not want to take a pilot so far from the bar and thereby incur the additional expense of "distance" or "off-shore" pilotage. But he knew very well that there is no such thing as "distance" or "off-shore" pilotage at the mouth of the Columbia river; and that the charge for piloting a vessel in and over the bar is all one, whether the pilot boards her at the outermost buoy or at any distance beyond.

He had run his reckoning for the Columbia river, and been unable to take an observation for some days on account of the fog, and would naturally be glad to avail himself of the services of the first pilot that offered, unless there was some special and cogent reason to the contrary. It is certain that the reason assigned was not the true one. And probably the fact is that the master really desired to take a pilot from the tug, so as to facilitate a deal for towage, which is a much weightier matter than the cost of pilotage.

But I doubt, even on the evidence of the libelant and others of the crew of the schooner, if she was ever within a half-mile of the Ullock on that occasion, before the pilot of the tug boarded her. The burden of proof in this respect is on the libelant; and he can not prevail unless it appears from the evidence that his offer was made to the Ullock within the legal distance. The strongest statement which the libelant is willing to make on this point is, that he was within from one to three quarters of a mile of the Ullock; and this being taken, as it should be, most strongly against himself, amounts to no more than that he was within three quarters of a mile of said vessel.

But there is another point made in the case by the claimant, upon which I think the decision must be against the libelant. By the act of March 2, 1837, 5 Stat. 153, R. S., sec. 4236, it is provided, that "the master of any vessel coming in or going out of any port situate upon waters which are the boundary between two states may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters, to pilot the vessel to or from such port."

This act was passed, as is well known, on account of the conflicting

legislation and the strife between New York and New Jersey and their pilots for the pilotage of vessels entering the Hudson river and bound to New York or other ports thereon.

It may be admitted that the Columbia river is not a boundary between two "states" in the sense in which the word is used in the constitution, but it is the boundary between one such state and an organized territory of the United States. The case is within the mischief intended to be remedied by the act of 1837. The subject is wholly within the power of congress, and it may apply the rule contained in the act to the case of a water forming the boundary between a state and territory, as well as between two states of this Union. The territory of Washington is an organized political body—a state in the general and unqualified sense of the word—with power to legislate on all rightful subjects of legislation, except as otherwise provided in its constitution, one of which is pilots and pilotage on the Columbia-river bar: The Panama, 1 Deady, 31.

True, this power is derived, for the time being, from congress. But the power of a state of the Union to legislate on this subject only exists until congress sees proper to exercise it. There being no constitutional limitation upon the power of congress in this respect, and it having the same right to regulate the taking of a pilot on a water that forms the boundary between a state and territory as it has between two states proper, I think the word "state" in the act of 1837 ought to be construed to include any organized body politic or community, within the territorial jurisdiction of the United States, having the power to legislate on the subject of pilots and pilotage on a water forming a boundary between itself and a state of this Union.

In the case of The Panama, 1 Deady, 33, in speaking of this act in 1861, I said: "Whether the word 'state,' as used in this act, should be construed so as to include a territory, is a question not free from doubt. This case is within the *mischief* intended to be remedied by the act, and it seems to me might be held to come within its spirit and purview, without any violation of principle. I do not think it comes within the reasoning or considerations that controlled the court in Hepburn v. Ellzey, 2 Cranch, 445, in which it was held that under the judiciary act, giving the national courts jurisdiction of controversies between citizens of different *states*, a citizen of the District of Columbia could not sue in such courts as a citizen of a state, because such district was not a member of the Union."

The ruling in Hepburn v. Ellzey, *supra*, was afterwards applied in New Orleans v. Winter, 1 Wheat. 91, to the case of a territory, when it was said that although the district and the territory are both states—political societies—in the larger and primary sense of the word, neither of them is such in the sense in which the term is used in the constitution, in the grant of judicial power to the national government on account of the citizenship or residence of the parties to a controversy, when it is understood to comprehend only "members of the American confederacy." In Barney v. Baltimore, 6 Wall. 287, these rulings were followed without question, upon the principle of *stare decisis*.

In Watson v. Brooks, 8 Saw. 321, it was said, even of this construction: "It is very doubtful if this ruling would now be made if the question was one of first impression; and it is to be hoped it may yet be reviewed and overthrown. By it, and upon a narrow and technical construction of the word 'state,' unsupported by any argument worthy of the able

and distinguished judge who announced the opinion of the court, the large and growing population of American citizens resident in the District of Columbia and the eight territories of the United States are deprived of the privilege accorded to all other American citizens, as well as aliens, of going into the national courts when obliged to assert or defend their legal rights away from home."

But the special reason for this narrow construction of the word "state" does not apply in this case. Congress had the power to extend the act of 1837 over a water constituting the boundary between the state of Oregon and the territory of Washington. The language actually used in the act may reasonably be construed so as to accomplish this object; and the case is within the mischief intended to be remedied thereby.

The master of the Ullock being then entitled, upon this construction of the law, to take a pilot from either Oregon or Washington, without reference to which made the first offer of his services, the libelant is not entitled to recover as for an offer and refusal of pilot services, even though such offer was duly made.

There must be a decree dismissing the libel, and for costs to the claimant.

SUPREME COURT OF IDAHO.

RUPERT v. BOARD OF COUNTY COMMISSIONERS OF ALTURAS COUNTY.

Filed September 11, 1882.

AN APPEAL FROM AN ORDER OF THE BOARD OF COUNTY COMMISSIONERS declaring the result of an election for a county seat may be taken to the district court of said county, and when so taken, the action is commenced when the notice of appeal is filed with the clerk of the board of county commissioners.

THE BOARD OF COUNTY COMMISSIONERS IS NOT A COURT, it has no judicial functions or power, and can not be vested therewith.

MATTERS DECIDED BY THE DISTRICT COURT ON APPEAL FROM THE ORDERS OF THE BOARD OF COUNTY COMMISSIONERS can only be brought to the supreme court for review by writ of error.

MOTION to dismiss an appeal from the district court for Alturas county. The opinion states the facts.

J. Brumback, for the appellant.

R. Z. Johnson and *Huston & Gray*, for the respondent.

MORGAN, C. J. In the matter of the motion to dismiss the appeal taken by the board of county commissioners of Alturas county, Idaho territory, from the judgment of the district court of the second judicial district in and for the said county of Alturas, entered in the records of said court on the third day of November, 1881.

It appears from the record in this cause that pursuant to law an election was held in Alturas county for the relocation of the county seat thereof, on the twelfth day of September, A. D. 1881. That on the twenty-second day of September, A. D. 1881, the said board of county commissioners canvassed the votes cast at said election, and duly entered the result thereof in their records on said last-mentioned date. That on the first day of October, A. D. 1881, one Joseph A. Rupert, of said county, took an appeal from the order of said board declaring the

result of said canvass to the district court in and for said county. That after hearing said cause final judgment was entered therein as stated, on the third day of November, 1881. From said judgment the said board of county commissioners attempt to take an appeal to this court under and by virtue of 11 Sess. Laws, secs. 641, 642. The question is, Can this cause be brought to this court by this method?

At common law appeals of this character are unknown: See Powell's Appellate Proceedings, 104, sec. 6; Wiscart v. Dechy, 3 Dall. 321; Curtis' Com., sec. 185.

The right to appeal, therefore, and the method of perfecting it, is wholly dependent upon the statutes in force in this territory: See also United States v. Gilson et al., 1 Idaho, 364. Section 1869 of the organic act of this territory states that "writs of error, bills of exception, and appeals shall be allowed in all cases, from the final decisions of the district courts to the supreme courts of all the territories respectively, under such regulations as may be prescribed by law; that is, such regulations as may be prescribed by the laws of the territory. Section 642, 11 Sess. Laws, distinctly and clearly sets forth what class of cases may be brought to this court by appeal, as follows: An appeal may be taken to the supreme court from a district court: 1. From a final judgment in an action or special proceeding, commenced in the court in which the same is rendered; 2. From a judgment rendered on an appeal from an inferior court; 3. From an order granting or refusing to grant a new trial; and from various other orders mentioned in said third clause.

Clearly, it is not the duty of this court to give the words of a statute any other meaning than is expressed by their legal signification. It is not the duty of this court, nor has it the authority, to give a statute any broader scope than that intended by the legislature.

Does this case come within the first clause of said section? Was this an action or special proceeding commenced in the district court? By a virtue of section 28, page 690, revised laws of Idaho, it became the duty of the said board of county commissioners to canvass the votes cast at said election and declare the result, which they did. From the order declaring this result the first clause of section 25, county commissioners' law, Rev. Laws Idaho, 529, gives the right of appeal to the district court. Section 26 gives the method of appeal. Section 28 directs the clerk of the board of county commissioners as to his duties upon receiving the notice of appeal and undertaking. Section 27 authorizes and directs the district court to hear the case anew, and empowers said court to affirm, reverse, annul, or modify the order of the board.

The appeal of the respondent in this court was taken from the order of the board in accordance with the sections above set forth, and the cause was heard in the district court on said appeal. We think it must be held that said action was commenced when the notice of appeal was filed with the clerk of the board of county commissioners; that the order of the board of county commissioners is a constituent and necessary part of this cause and the foundation of the action.

All the proceedings until the appeal was perfected were had before the board of county commissioners, or with the clerk of said board. The notice of appeal is filed with the clerk of the board, and the undertaking, where one is required, is placed on file with him, and he is charged with the duty of approving or disapproving the sureties on the undertaking. Section 28 then directs the clerk of the board of county com-

missioners to make out and certify to the district court a transcript of the order appealed from, the notice of appeal, the undertaking, and any account, bill, etc. Up to the time of placing this transcript on file in the office of the clerk of the district court, said court is utterly ignorant that such proceedings were being had before the board of county commissioners; that any such order had ever been made by said board, or that appeal had been taken therefrom.

An appeal from the order of the board of commissioners necessitates such an order by the board as a priority to the appeal and the foundation thereof. In an action or special proceeding commenced in the district court, it will be found that the papers which commence the action are always first placed on file in said district court with the clerk thereof, and are never an appeal from a judgment, order, or decision of any other court, tribunal, or board whatever.

The ordinary and legal signification of the word "appeal" indicates that there has been an order, judgment, or decision by some inferior board or tribunal. We think it must be held that this cause or proceeding was commenced before the board of county commissioners, and therefore does not come under the first clause of section 642. The second clause of said section allows appeals from the judgments rendered by inferior courts.

A court is a body in the government to which the public administration of justice is delegated. The one common and *essential* feature in all courts is a judge or judges having some sort of judicial functions, power, or authority: Bouvier's Law Dict. 373 et seq.

Section 1907, revised laws of the United States, specifies in what bodies or persons judicial power is vested in the territories, namely, in a supreme court, district courts, probate courts, and in justices of the peace. Boards of county commissioners are not among the number, and have no judicial functions or power, and can not be vested therewith; therefore they are not courts.

This cause is clearly not within the third clause of section 642. Parties deeming themselves aggrieved by the judgment of the district court are not without a complete remedy. Writs of error, aided by bills of exceptions, have for six centuries, under the common law, furnished a complete and perfect means of bringing causes from an inferior court to the appellate court for review, and for the correction of errors, if any there be. All the virtues of this ancient and complete remedy are at the service of the people of this territory.

We think this appeal, not being allowed by the statute, should be dismissed.

And it is dismissed.

PRICKETT and BUCK, JJ., concurred.

VAN CAMP *v.* BOARD OF COMMISSIONERS OF CUSTER COUNTY.

Filed January 25, 1884.

AN APPEAL WILL NOT LIE FROM A JUDGMENT OF THE DISTRICT COURT IN COMMON-LAW ACTIONS or proceedings, unless it is expressly allowed by statute.

NO ONE CAN SUE OUT AND MAINTAIN A WRIT OF ERROR UNLESS HE IS A PARTY or privy to the record, or is prejudiced by the judgment.

AN APPEAL IS NOT THE COMMENCEMENT OF A NEW ACTION or proceeding, but a continuation of the same case, action, or proceeding, being only a transfer from one court, tribunal, or body to another, for final trial and judgment.

COURTS WILL LOOK BEYOND THE MERE TITLE OF AN ACTION or proceeding for the purpose of determining who are interested and affected as parties.

ERRORS APPEARING UPON THE FACE OF THE JUDGMENT ROLL may be taken advantage of upon a writ of error, without a bill of exceptions or statement of the case.

MOTION to dismiss an appeal and writ of error, from the district court for Custer county. The opinion states the facts.

James H. Hawley, *M. Kirkpatrick*, and *E. P. Johnson*, for the appellant and plaintiff in error.

Thomas J. Galbraith and *Huston & Gray*, for the respondent and defendant in error.

PRICKETT, J. It appears from the transcript in this cause that the assessor of Custer county assessed the property of the General Custer Mining Company for the year 1881, as follows: its mill and appurtenances at seventy thousand dollars, and bullion produced by them and in their possession one hundred and seventy thousand dollars; that at the regular meeting of the board of equalization of that county, held in August, 1881, the superintendent of the company appeared and complained that such assessment was too high, and asked a reduction; that upon such complaint the board reduced the assessment and valuation of the mill and appurtenances to thirty-five thousand dollars, and of the bullion to twenty-five thousand dollars; that from such order, James H. Van Camp, a citizen and tax-payer of the county, appealed to the district court of the third judicial district, held in and for Custer county; that the notice of such appeal was addressed and directed to the board of commissioners of Custer county and the General Custer Mining Company, and was served by mail upon the superintendent of the company; that the commissioners appeared by counsel in the district court and moved to dismiss the appeal, on the ground that no appeal lies from the orders of the board of equalization, and that if it does lie in this case, that James H. Van Camp is not authorized or qualified by law to take such appeal, which motion was denied by the court.

Such proceedings were afterwards had in the district court as resulted in a judgment, rendered June 17, 1882, modifying the decision of the board of commissioners, and fixing the value of the mill and appurtenances at thirty-five thousand dollars, as previously ordered by them, and of the bullion at one hundred and seventy thousand dollars, and requiring the board of commissioners, the county auditor, and the assessor and collector of taxes, to proceed and to adjust and collect the proper taxes upon such valuation, in manner and form, now for then, as if the appeal to the district court had not been taken. It was further ordered that a copy of the judgment be served upon the board of commissioners, the county auditor, the assessor and tax collector of the county, and upon the General Custer Mining Company or its attorney.

On the fourteenth day of September, 1882, the General Custer Mining Company filed in the office of the clerk of the district court, and served, a notice of appeal from said judgment to this court, and on the next day gave an undertaking on said appeal, and on the sixteenth day of November, 1883, the said company sued out and caused to be issued from this court a writ of error to said district court.

The respondent in this appeal and the defendant in error, James H. Van Camp, now moves to dismiss both the appeal and the writ of error: the former on the ground that no appeal is allowed by law in the cause; and the latter because the General Custer Mining Company is not a party to the record or judgment in the district court; that it does not appear from the record that the commissioners of Custer county authorized or consented to the suing out of the writ; that it does not appear from the writ of error herein that the board of commissioners or the General Custer Mining Company are injured or prejudiced by the judgment of the district court; that the said company has no standing in this court, because it does not appear by the record that it has paid or tendered the tax on its property upon the valuation thereof as fixed by the board of commissioners; and on the further ground that there is no statement of the case or bill of exceptions in the transcript in support of the writ of error.

At the last term of this court, in the case of Rupert v. The Commissioners of Alturas County, *ante*, 15, it was decided that no appeal would lie to this court from a judgment of the district court rendered upon an appeal from an order of a board of county commissioners, because such cases, although somewhat anomalous in character, do not partake of the nature of suits in chancery, which can be transferred from one court to another in that manner, but were proceedings at law which, in the absence of any statute conferring the right of appeal, were to be reviewed by writ of error, and that there is no statute of this territory authorizing or providing for an appeal to this court in such cases. That decision was rendered on the eleventh day of September, 1882, about the time the notice of appeal was filed in the district court from its judgment in this case, from which fact, and the subsequent suing out of the writ of error, it is reasonable to presume that the General Custer Mining Company abandoned its appeal and concluded to rely upon its writ of error instead.

Indeed, the appeal is not now insisted upon by counsel for the appellant. Upon the authority of the case above referred to the appeal is dismissed.

The objections made by the moving party to the writ of error, and to the right of the plaintiff in error to be heard thereon, will now be considered and briefly discussed; and first: Is the General Custer Mining Company such a party to the record, proceedings, and judgment of the district court, as is entitled to a writ of error to review the same? The rule concerning writs of error at common law (and we have not now any statute extending or changing that rule) unquestionably is that no one can bring error unless he is a party or privy to the record, or is prejudiced by the judgment, and the rule seems to be inflexible: Bac. Abr., Error; Mary Ann Connor v. Peugh's Lessee, 18 How. 394. And, as proceedings in error are in the nature of new actions, this rule probably had its origin in the same general principle that governs in relation to the

parties in personal actions, that the action must be brought in the name of the party whose legal right has been affected.

The origin and foundation of the proceedings in this cause was the complaint made by the General Custer Mining Company, through its superintendent and agent to the board of equalization, that its property was assessed too high. In that initiatory proceeding or step, the company stood in the relation of complainant or plaintiff.

Upon such complaint and the hearing had thereunder, they procured an order favorable to their interests, a reduction in the assessment and a consequent reduction in the amount of taxes to be paid. To the order and decision of the board they had a vested right subject only to a reversal or modification by competent authority in the mode prescribed by law, and although the proceedings before the board neither had nor were required to have a name or title, the General Custer Mining Company were unquestionably interested in such proceedings, and in the order obtained therein.

The statute, Rev. Laws, 529, sec. 25, authorizes appeals to be taken from orders of the board of county commissioners to the district court, and the appeal in this case was taken under that statute. But an appeal, strictly speaking, is not the commencement of a new action or proceeding, but a continuation of the same case, action, or proceeding, being only a transfer from one court, tribunal, or body to another for final trial and judgment. Hence the policy and propriety of the statute which requires the notice of appeal in such cases to be served on "any person having a beneficial interest in the order or decision appealed from," in order that they may have an opportunity to defend their claim and maintain the advantages of the order if they are able to do so. They are still parties to the proceeding, and continue so to be until their rights in the matter are finally adjudicated, whether they appear in the appellate tribunal or not.

Much stress was laid, in the argument, upon the fact that the name of the General Custer Mining Company does not appear in the title of the original notice of appeal or other papers, or in the judgment of the district court, and it is urged that therefore they are not a party to the record or judgment. The papers, proceedings, and judgment are, it is true, entitled, "J. H. Van Camp v. The Board of County Commissioners of Custer County," but the plaintiff in error is not responsible for that name or title, nor do I know of any law requiring the papers, proceedings, and judgment to be so entitled. "Van Camp's Appeal" would perhaps be the more appropriate title. The title or name by which an action or proceeding is called certainly can not change its character or divest interests acquired before the christening. They remain the same.

It is provided by section 711 of our code of procedure, that "an affidavit, notice, or other paper, without the title to the action or proceeding in which it is made, or with a defective title, is as valid and effectual for any purpose as if duly entitled, if it intelligibly refer to such action or proceeding." We think that section applicable to the question under consideration; and even without it, that it would be the duty of the court to look beyond the mere title to ascertain who are interested and affected parties.

As to the judgment, we think it can not be seriously contended or claimed that the direction and order therein contained, that the several revenue officers of the county proceed and collect the taxes upon the

increased valuation of the property, imposes no liability or obligation upon the General Custer Mining Company to pay taxes thereon. As long as laws exist for enforcing the collection of taxes, it must be evident to all that the contrary is the case.

We conclude, therefore, upon this question, that the General Custer Mining Company is a party to the record proceedings and judgment, and that such judgment was and is prejudicial to its interests, in the sense that it increased its liability to the public. There are no pleadings in proceedings of this character in which the fact of payment or tender of the taxes upon the valuation of the property, as fixed by the board, could be alleged, and it is difficult for us to understand how that fact could be made to appear by the record. The bond given as a *supersedeas* is, theoretically and presumptively at least, sufficient to save the defendant in error and the public harmless from all damages they may suffer by reason of the delay in the payment of the taxes, if they have not been paid. This is not a case in which it is necessary for the record to show payment or tender in order to give the party standing in court.

It is not, in the opinion of this court, necessary to entitle a party to a writ of error, that there should be either bill of exceptions or statement; the object of these is to bring into and make of record what was not so. If errors appear upon the face of the judgment roll, they can be shown and taken advantage of upon the hearing.

The motion to dismiss the writ of error is denied.

BUCK, J., concurred.

MORGAN, C. J., did not sit at the hearing.

WARNER v. TEACHENOR ET AL.

Filed January 28, 1884.

SERVICE OF PAPERS—SECTION 685 OF THE CODE OF CIVIL PROCEDURE OF IDAHO, WHICH PROVIDES that service of papers may be made by leaving the same in the office of an attorney in a conspicuous place, etc., is in derogation of the common law, and must be strictly construed.

AN AFFIDAVIT IN PROOF OF SUCH SERVICE must state that all the conditions of the statute authorizing such service have been substantially complied with, or it will be disregarded.

MOTION to dismiss an appeal from the second judicial district court for Ada county.

Huston & Gray, for the appellants.

J. Brumback, for the respondent.

BUCK, J. This cause comes into this court on appeals from final judgment and from an order overruling a motion for a new trial. The respondent appears specially by his attorney and moves a dismissal of the appeal from the judgment, on the ground that more than one year had elapsed from the entry of the judgment until the taking of the appeal; and also from the order overruling the motion for a new trial: 1. For defect in the undertaking; 2. Because the notice of appeal contains simply the surname of plaintiff and respondent, without the Christian name; 3. That the record shows no service of notice of appeal.

The objection that the appeal from the judgment was not taken in time

was not contested by the attorney for the appellant, and the defect in the undertaking having been cured by the filing of a new undertaking, under section 657 of our practice act, there remains only the objection to the contents and service of the notice of appeal to be passed upon. The proof of service of the notice of appeal is contained in the affidavit of the attorney for defendant and appellant, to the effect "that affiant served the notice upon the attorney for respondent and plaintiff by leaving a true copy thereof at his office in Boise City, Ada county, Idaho territory, on the twenty-first of May, 1883."

Section 685 of the code of civil procedure provides that service may be made upon an attorney during his absence from his office, by leaving the notice with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it between the hours of eight in the morning and six in the afternoon in a conspicuous place in the office. This section provides for constructive service instead of personal, and being in derogation of the common law, which required personal service, the statute must be strictly construed.

In Jackson, Norton et al. v. Gardiner, 2 Cai. 94, the court say, speaking of an affidavit of service like the one at bar: "The affidavit is defective; it does not state that there was no one in the office. The notice might have been slipped down without any intimation, and have remained unobserved. To make such service good, it ought to have been stated that there was not any one in the office." This is still more distinctly declared to be the law, in Doll v. Smith, 32 Cal. 475, in a case in all respects identical with the one at bar. It is maintained by the appellant that under section 269, code of civil procedure, the defect in proof should be disregarded.

But service of notice of appeal is a jurisdictional fact which affects the substantial rights of the parties, and the court is of the opinion that the section referred to does not contemplate the disregarding of a defect in proof of a fact necessary to give the court jurisdiction of the matter in controversy. As to the contents of the notice itself, the court is not prepared to say that it is so defective as not to give the respondent sufficient information as to the judgment appealed from. The determination of the court as to the service of the notice of appeal, however, renders it unnecessary to consider the contents of the notice.

The motion of respondent is sustained, and the appeals are dismissed.

PRICKETT, J., concurred.

MORGAN, C. J., not sitting.

SUPREME COURT OF MONTANA.

NORTHERN PACIFIC R. R. CO. v. MAJORS.

Filed January 9, 1884.

CONGRESSIONAL GRANT.—A grant of public land may be made so as to vest an indefeasible and irrevocable title by an act of congress, as well as by a patent issued in pursuance of such act.

ACT OF CONGRESS GRANTING LANDS TO THE NORTHERN PACIFIC RAILROAD CO.—CONSTRUCTION OF.—Section 3 of the act of congress granting lands to aid in the construction of the Northern Pacific Railroad, approved July 2, 1864, operated as a conditional grant *in præsenti* of certain sections to be afterwards located. Such locations depended upon the route of the road, and until such route was designated in the manner prescribed by the act, the title of the company did not attach to any specific tracts. After such route was settled the location became certain, and the title of the company attached to the particular sections granted as of the date of the approval of the act, as fully as if such particular sections had been designated in such act.

THE PROVISIONS OF SECTIONS 5, 6, 8, 9, AND 20 OF SUCH ACT, imposing certain conditions on the company, do not effect the creation or vesting of the estate granted by the act. They are simply conditions subsequent, which render the estate liable to be defeated for default on a breach in the performance of such conditions. Upon the breach of such conditions, congress alone has power to declare or take advantage of a forfeiture.

SECTION 4 OF SUCH ACT, PROVIDING THAT WHEN "SUCH COMPANY shall have twenty-five consecutive miles of any portion of said railroad completed, * * * patents of deeds shall be issued to said company, confirming to said company the right and title to said lands," and "from time to time, whenever twenty-five additional consecutive miles shall have been constructed and completed, * * * then patents shall be issued to said company conveying the additional sections of land," does not limit or restrict the estate granted by section 3 of such act—the effect of the patent issued in pursuance of such section is simply to confirm the title of the company as fast as certain portions of the road are completed, and render it absolute and unconditional.

A GRANT OF PUBLIC LAND BY ACT OF CONGRESS IS THE HIGHEST EVIDENCE OF TITLE. It imports livery of seisin and possession, and is sufficient to sustain ejectment.

APPEAL from a judgment of the third district court for Lewis and Clarke county, entered in favor of the plaintiff. The opinion states the facts.

Harry R. Comly, for the appellant.

W. F. Sanders, for the respondent.

GALBRAITH, J. This is an appeal from an order overruling a demurrer to the complaint. The demurrer avers, as the only ground therefor, that the complaint does not state facts sufficient to constitute a cause of action. The complaint alleges, in substance, that by section 3 of an act of congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from lake Superior to Puget sound, on the Pacific coast," by the northern route," approved July 2, 1864, there was granted to the respondent every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad, as said company might adopt, through the territories of the United States, wherever on the line thereof the United States had full title at the time the line of the road was definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; that by section 6 of the act aforesaid, it was provided that after the general route of the road should be fixed, the president of the United States should cause the lands to be surveyed twenty miles in width on both sides of the line of said road as fast as

might be required by its construction, and that the odd-numbered sections of land granted by section 3 of said act to the respondent should not be liable to sale, entry, or pre-emption, before or after they were so surveyed, except by the said North Pacific Railroad Company; that the general route of said railroad adjacent and opposite to section thirteen (13), township ten (10) north, of range four (4), (the land in question), was fixed by the respondent the twenty-first day of February, 1871, within less than forty miles from said section, by means whereof said section was withdrawn from sale, entry, or pre-emption, except by the respondent, and thereafter, to wit, on the first day of October, 1881, the line of said road at and opposite to said section was definitely adopted and fixed, and a plat thereof filed in the office of the commissioner of the general land office, at which time the said section was free from either sales, reservations, appropriations, pre-emptions, dispositions, claims, or rights than that contained in section 3 of the act aforesaid, granting the same to the respondent; that said grant then and there took effect and attached thereto, and that said company did then proceed and is now proceeding to construct its road upon said line of definite location, opposite and adjacent to and by the said section thirteen (13), which is within the limits of said grant; that said section thirteen (13), on the second day of July, 1864, was public land of the United States, to which they then and there had full title, and except for the grant to the respondent, would yet have full title thereto, and so in the manner aforesaid the respondent says it has full title to and is the owner of said section thirteen (13), and on the first day of October, 1881, was, and ever since has been, entitled to the possession and occupancy and enjoyment thereof. The complaint also alleges entry and ouster by the appellant on the thirtieth day of October, 1881, and demands possession of the premises in question.

The argument of the appellant is, in substance, that the complaint "does not show any such title in the respondent by a grant or patent from the United States as carries with it livery of seisin, nor is there any allegation of actual prior possession which, without such grant or patent, would sustain its action of ejectment;" that the words of present grant, in the third section of the act, are specially restrained by the provisions of other portions of the act, which prescribe certain conditions, and especially by those of section 4, which, it is claimed, determines when the grant shall take effect, viz.: "When twenty-five consecutive miles of the road shall be completed, and after the report of commissioners, etc., patents shall be issued to the company *conveying* the additional sections," etc.; that until this time, viz., when patents shall have issued in accordance with the act, the right of the respondent in the lands by virtue thereof is simply the "grant of an incorporeal right in said lands, accompanied by certain conditions, upon the performance of which conditions the act provides when and how the title shall vest in the company, to wit, the lands shall be *conveyed by patent*, when each twenty-five miles of the road shall be completed, and not before; that by virtue of the act the United States becomes a trustee for the company, and agrees that when it shall have designated its route, "the government will reserve from sale, etc., the odd sections to be conveyed to the company upon the performance of certain acts;" that the legal title is in the United States until the issue of the patent, before which the company has only an equitable estate, and can not

maintain an action of ejectment. The complaint does not allege any patent to the respondent: The questions, therefore, for our consideration are, What is the character of the title in the respondent by virtue of the act before the issue of the patent? And when does it have such a title as that it can maintain thereon an action of ejectment?

In order to solve these questions, we must arrive at the true interpretation of the act of congress making the alleged grant. The proper rule of interpreting this act we believe to be that cited by the appellant, viz.: "The court, if possible, must give the statute such a construction as will enable it to have effect; that is, it must be construed in accordance with the legislative intent:" Cooley's Const. Lim., 223. This is substantially the language of the supreme court of the United States, in Leavenworth etc. R. R. Co. v. The United States, where Davis, J., delivering the opinion of the court, says, referring to the act of congress granting lands to the railroad company: "This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning, nor diminished by strained construction. The interpretation must be reasonable and such as will give effect to the intention of congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but if they admit of different meanings, one of extension and the other of limitation, they must be accepted in a sense favorable to the grantor." The latter portion of this language, and similar language in other decisions, must be considered as referring to terms so ambiguous in their character that a resort must be had to a rule of construction resolving the doubt in favor of one party to the contract rather than to the other; for we are satisfied that it is a rule absolutely binding upon all courts that where the legislative will and intent is discovered in a statute, they must give force and effect to that will and intent when it does not contravene the fundamental law. It is the rule of common law in relation to grants that where the language was so ambiguous as to call for the interposition of a rule of interpretation, the doubt was required to be resolved against the grantor. It was expressed thus: "That the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party:" 2 Bla. Com. 380. In the language of the authorities generally, private grants are strictly construed against the grantors, and public grants against the grantees. But it is only when courts are in doubt as to the meaning of the instrument that resort will be had in either case to the above rule of construction.

Another rule of construction of legislative acts is, that it must be made upon the entire act, and not upon disputed parts of it. Every part of the act should be made to take effect, if possible, and all the words be made to operate in one way or the other. Can, therefore, the intention of congress be discovered from the act itself, without resort to the rule which obtains, where there is ambiguous or doubtful language in an act of the legislature? and what, taking into consideration all the language of the act in question, was such intention in relation to the time when the grant should take effect? The act will be presumed to have been passed by congress with the knowledge of its previous enactments in relation to grants of lands, and the repeated determinations of the supreme court of the United States as to their construction. That court has re-

peatedly held, in construing grants of land made by congress, that "a grant" of lands "may be made by law as well as by a patent issued pursuant to a law," "and such grant vests an indefeasible and irrevocable title:" Fletcher v. Peck, 6 Cranch, 87; Strother v. Lucas, 12 Pet. 454; 9 Cranch, 43; Wilkinson v. Leland, 2 Pet. 498; 3 Washburn on Real Prop., 4th ed., 193, 194.

"It [a confirmation of title by act of congress] was a higher evidence of title than a patent, as it was the direct grant of the fee, which had been in the United States, by the government itself, whereas the patent was only the act of its ministerial officers:" Grignon's Lessee v. Astor, 2 How. 319. "The plaintiff's title [a confirmation by congress] is *prima facie* a good legal title, and will support ejectment on the act of 1836, standing alone, if the land can be identified as confirmed without resort to the patent:" Chouteau v. Eckhart, Id. 344. In Green v. Leiter, 8 Cranch, 229, Story, J., says: "We are entirely satisfied that a conveyance of wild or vacant lands gives a constructive seisin thereof in deed to the grantee, and attaches to him all the legal remedies incident to the state. *A fortiori*, the principle applies to a patent, since, at the common law, it imports a livery in law." For a still stronger reason would this principle apply in the case of an act granting such lands, for, as we have just seen, the supreme court of the United States has held that such an act is higher evidence of title than a patent.

The decisions of the supreme courts of several of the states are to the same effect. "A grant of lands by the government is tantamount to a conveyance with livery of seisin:" 3 Washburn on Real Prop., 4th ed., 191, and cases there cited. "He who takes title to lands from the federal government, draws the actual legal possession to it:" Robinson v. Lake, 14 Iowa, 421.

With this construction of public grants as the uniform rule, congress passed the act in question. Its preamble entitled it as follows: "An act granting land to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast, by the northern route."

Those portions of the act which bear upon the question before us are as follows: Section 3 of the act provides, "that there be and hereby is granted to the Northern Pacific Railroad Company, its successors and assignees, for the purpose of aiding in the construction of said railroad, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line as said company may adopt through the territories of the United States, * * * and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office."

Section 4 provides, "that whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the president of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial, and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the president of the United States, and

patents of lands as aforesaid shall be issued to said company, *confirming* to said company the *right* and *title* to said lands, situate opposite to and coterminous with said completed section of said road; and from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the president of the United States, then patents shall be issued to said company *conveying* the additional sections of land as aforesaid, and so on, as fast as every twenty-five miles of said road is completed and operated."

Section 6 provides, "that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption, before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May 28, 1862, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre."

It will be observed that the preamble, which may be resorted to to aid in the construction of an act of the legislature, 1 Bla. Com. 60, recites that it is "an act granting lands;" that is, the act itself grants. It does not recite that it is an act providing for a grant or conveyance or sale of lands, which in all probability would have been the language used had it been the intention of congress that the patent should operate as the conveyance, but that the act itself is the grant. This language is also indicative of an intention that the grant is a present grant. The word used is "granting," being the present participle; that is, granting now. Again, the object of the grant, as stated in the preamble, was to aid in the construction of the road. The plain and unconstrained meaning of this language would seem to be that these lands were to be available to the road, not after it had been completed, or after any portion of it had been completed; but during the construction thereof. If we are right in this view of the above language, it will also be an indication of the will and intent of congress in the enactment of the law. The language, therefore, of the preamble, so far as it is indicative of and aids us to arrive at the intention of congress in the passage of the act, recites that the act itself is the grant.

The first language used in the act itself, relating to the grant of lands, is contained in section 3, and is as follows: "That there be, and is hereby, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad," etc. The above phrase, "there be, and hereby is, granted," has been several times before the supreme court of the United States, and has received a fixed and definite construction. In construing an act of congress of 1820, granting lands to the state of Missouri, which contained the following language, "that four entire sections of land be, and the same are hereby, granted to the said state, for the purpose of fixing the seat of government thereon; which said section shall, under the

direction of the legislature of said state, be located as near as may be in one body at any time, in such townships and ranges as the legislature aforesaid may select on any of the public lands of the United States, provided that such location shall be made prior to the public sale of the lands of the United States surrounding such location."

Mr. Justice Catron, delivering the opinion of the supreme court of the United States, and referring to the opinion of Chief Justice Marshall in Rutherford v. Green's Heirs, 2 Wheat. 196, says: "The land was granted by the act. It was a present grant, wanting identity to make it perfect; and the legislature was vested with full power to select and locate the land; and we need only here say, what was substantially said by this court in Rutherford v. Green's Heirs, that the act of 1820 vested a title in the state of Missouri of four sections, and that the selections made by the state legislature, pursuant to the act of congress, and the notice given of such location to the surveyor general and the register of the local district where the land lay, gave precision to the title, and attached it to the land selected:" Lessieur v. Price, 12 How. 59. The same court, in Schulenberg v. Harriman, 21 Wall. 44, Field, J., delivering the opinion of the court, says: "That the act of congress of June 3, 1856, passed a present interest in the lands designated, there can be no doubt. The language used imports a present grant, and admits of no other meaning. The language of the first section is, "*That there be, and hereby is, granted* to the state of Wisconsin the lands" specified. The third section declares, "that the said lands *hereby granted* to said state shall be subject to the disposal of the legislature thereof;" and the fourth section provides in what manner sales shall be made, and enacts that if the road be not completed within ten years, "no further sales shall be made, and the lands unsold shall *revert* to the United States." The power of disposal and the provision for the lands reverting both imply what the first section in terms declares, that a grant is made—that is, that the title is transferred to the state. It is true that the route of the railroad, for the construction of which the grant was made, was to be designated, and until such designation, the title did not attach to any specific tracts of land. When the route was fixed, their location became certain, and the title, which was previously imperfect, acquired precision and became attached to the land.

In the case of Rutherford v. Green's Heirs, 2 Wheat. 196, a similar construction was given by the court to an act of North Carolina passed in 1782, which provided that twenty-five thousand acres of land should be allotted and given to General Green and his heirs, within the limits of a tract reserved for the army, to be laid off by commissioners appointed for that purpose. The commissioners, pursuant to the directions of the act, allotted the twenty-five thousand acres, and caused the quantity to be surveyed, and the survey to be returned to the proper office; and the questions raised in the case related to the validity of the title of General Green, and the date at which it commenced. The court held, "that the general gift of twenty-five thousand acres lying in the territory reserved became by the survey a particular gift of the quantity contained in the survey, and concluded an extensive examination of the title by stating that it was the clear and unanimous opinion of the court that the act of 1782 vested a title in General Green to the twenty-five thousand acres, to be laid off within the bounds designated, and that the survey made

in pursuance of the act gave precision to that title, and attached it to the land surveyed."

In the case of L., L. & G. R. R. Co. v. U. S., 92 U. S. 733, Davis, J., delivering the opinion of the court, says, referring to the act under consideration: "It creates an immediate interest, and does not indicate a purpose to grant *in futuro*. 'There be, and is hereby, granted,' are words of absolute donation, and import a grant *in præsenti*. This court has held that they can have no other meaning, and the land department, on this interpretation of them, has administered every similar grant: Railroad Co. v. Smith, 9 Wall. 95; Schulenberg v. Harriman, 21 Id. 60; 1 Lester, 513; 8 Op. Att. Gen. 257; 11 Id. 47. They vest a present title in the state of Kansas, though a survey of the land and a location of the road are necessary to give precision to it and attach it to any particular tract. The grant then becomes certain, and by relation has the same effect upon the selected parcels as if it specifically described them. In other words, the grant was afloat until the line of the road should be definitely fixed."

In the case of the M. K. & T. R. R. Co. v. K. P. R. R. Co., 97 U. S. 491, Field, J., speaking for the supreme court of the United States, says: "Briefly stated, the case of the plaintiff is this: In 1862, congress granted to it certain lands, consisting of odd sections along a railroad to be afterwards constructed. In 1864 congress enlarged the grant, and by subsequent legislation authorized the route of the road to be designated at any time before December, 1866. When designated, lands within a limit sufficiently extended to embrace the granted sections were to be reserved from sale; and when certain portions of the road were from time to time completed, and were accepted by the president as a first-class road, patents for the sections were to be issued to the company. The plaintiff designated the route of its road in July, 1866, and the lands in controversy were, on the twenty-sixth of that month, reserved from sale. By the fourteenth of December following it had completed twenty miles of its road, and by the sixteenth of January, 1867, five miles in addition. Commissioners were appointed by the president to examine and report as to the completion and equipment of the road, and upon their favorable report the section of twenty-five miles was accepted by him, and a patent for the lands was ordered to be issued. The plaintiff therefore claims that it acquired a title to the lands and has a right to the evidence of it; and this claim is well founded, unless there be something impairing its validity in the legislation and proceedings under which the defendant asserts title to the land.

"As between the United States and the plaintiffs, the right of the latter to a patent became perfect on the approval by the president of the report of the commissioners. The act of July 1, 1862, passed to the company a present interest in the lands to be designated within the limits there specified. Its language, 'that there be, and is hereby, granted' to it the odd sections, which words import a grant *in præsenti*, and not one *in futuro*, or the promise of a grant. Similar terms in other acts of congress granting lands have uniformly received this interpretation, unless accompanied with clauses restraining their operation. They were so interpreted in Schulenberg v. Harriman, after full consideration of previous adjudications on their import, and the ruling there was followed in Leavenworth, Lawrence & Galveston Railroad Co. v. United States, 92 U. S. 733. It is true that the route of the road in this case, as

in those cases to aid in the construction of which the act was passed, was to be afterwards designated; and until designated, the title could not attach to any specific tracts. The grant was of sections to be afterwards located, and their location depended upon the route to be established. When that was settled, the location became certain, and the title that was previously imperfect acquired precision and attached to the lands.

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land, and that when no such power exists instruments with words of present grant are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as well as in all other cases, to the legislative will.

"As to the intent of congress in the grant to the plaintiff, there can be no reasonable doubt. It was to aid in the construction of the road by a gift of lands along its route, without reservation of rights except such as were specifically mentioned, the location of the route being left within certain general limits to the action of the plaintiff. When the location was made, and the sections granted ascertained, the title of the plaintiff took effect by relation as of the date of the act, except as to the reservations mentioned, the act having the same operation upon the sections as if they had been specifically described therein."

In the case of the St. Joseph and Denver City Railroad Co. v. Baldwin, 103 U. S. 427, the supreme court also says: "The language of the act here, and of nearly all the congressional acts granting lands, is in terms of a grant *in præsenti*. The act is a present grant, except so far as its immediate operation is affected by the limitation. 'There is hereby granted' are the words used, and they import an immediate transfer of interest, so that when the route is definitely fixed, the title attaches from the date of the act to the sections, except such as are taken from its operation by the clauses mentioned." The limitation in this case was that in case at the time the line of the road was fixed the United States had sold any of the lands, or that the right of homestead or pre-emption had attached thereto, or that the same had been reserved by the United States, then the secretary of the interior should select other lands in lieu thereof for the state. So far, therefore, as the third section of the act under consideration standing alone is concerned, viz., "that there be, and hereby is, granted," the above decisions have determined its construction to be that of words of present grant; that they create "an immediate interest, and do not indicate a purpose to grant *in futuro*." These decisions also determine for us (where the act itself does not indicate the particular lands granted, but leaves their location to be specified in the future) when such a grant shall attach to the particular tracts, and become fixed and certain, until which it is afloat, which in this case would be when the line of the road is definitely fixed, and the lands granted thereto ascertained. This is necessary to be done to give precision to the grant and attach it to the particular tracts of land.

When such line is definitely fixed, and the sections of land designated by the survey, the grant then becomes certain, and by relation, has the

same effect upon the lands thus designated, as if they were specifically described therein. Therefore we must conclude, now having in view simply sections 3 and 6 of the act in question, that the grant takes effect as of date of the act, and becomes attached to the specific tracts when definitely ascertained by the location of the route of the road and the survey of the lands.

The appellant, however, insists that "the words in section 3 of the charter of the Northern Pacific Railroad, which unexplained would import a grant *in præsenti*, are specifically restricted by the provisions of the following sections, to wit: Sections 4, 5, 6, 8, and 9, and perhaps section 20." How far the provisions of section 4 restrict the words of present grant, we will consider hereafter. Section 5 provides principally for the proper construction of the road and telegraph line, and prescribes briefly the manner of such construction. Section 6 specifically exempts certain lands from the provisions of the act, and virtually provides that the lands reserved, shall not be disposed of to any other parties than the Northern Pacific Railroad. Section 8 provides, in substance, that the company accepts the grants, rights, and privileges conferred by the act, and that the same are given upon condition that it shall commence the work in two years from the approval of the act, and complete not less than fifty miles per year after the second year, and finish the road completely by the fourth of July, 1876. Section 9 refers to the grants conferred by the act as conditioned grants, and provides that they are made by the United States and accepted by the company, upon the further condition that if the company make any breach of the conditions thereof, and allow it to continue for more than a year, congress at any time thereafter may do anything necessary to insure a speedy completion of the road. So far as the provisions relate to the language making the grant contained in the third section, they do not affect the creation or vesting of the estate in the lands, but simply the nature and character of the estate.

So far as they impose conditions upon the grantee, these are what are termed conditions subsequent. They do not relate to the creation of the estate, but render it liable to be defeated for default on a breach in performance of such conditions. Upon default or breach of such conditions, congress might declare a forfeiture. "It is settled law that no one can take advantage of the non-performance of a condition subsequent, annexed to an estate in fee, but the grantor or his heirs or the successors of the grantor, if the grant proceed from an artificial person; and if they do not see fit to assert their rights to enforce a forfeiture on that ground, the title remains unimpaired in the grantee:" Schulenberg v. Harriman, 21 Wall. 44.

"If the grant be a public one, it must be asserted by judicial proceedings authorized by law, the equivalent of office found at common law, finding the fact of forfeiture and adjudging the restoration of the estate on that ground, or there must be some legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession or appropriation of the property, or that it be offered for sale or settlement. At common law the sovereign could not make an entry in person, and therefore an office found was necessary to determine the estate; but, as said by this court in a late case, 'the mode of asserting or reserving the forfeited grant is subject to the legislative authority of the government. It may be after judicial investigation or by taking possession directly, under authority of the government, without these

preliminary proceedings.' In the present case, no action has been taken, either by legislative or judicial proceedings, to enforce a forfeiture of the estate granted by the acts of 1856 and 1864. The title remains, therefore, in the state, as completely as when the title by location of the route of the railroad acquired precision and attached to the adjoining alternate sections:" Schulenberg v. Harriman, 21 Wall. 44.

It may be, perhaps, unnecessary, in view of the situation of the case at bar, to say that no such attempt has been made to forfeit the title claimed by the respondent to be vested in it by virtue of the act of congress under consideration. The fact that section 9 refers to the grant of lands as "conditioned grant," does not at all, as claimed by the appellant, change the character of such conditions from conditions subsequent to conditions precedent, or, in other words, from that kind of conditions which operate upon estates already created, and which may defeat or cause a forfeiture of such an estate, to that which effects the vesting or creating of an estate.

So far, therefore, as sections 5, 6, 8, 9, and 20 of the act are concerned, they do not affect the vesting of the estate which is claimed by respondent, to be created and vested by sections 3 and 6, and which must be so created and vested, unless the language of present grant, contained in section 3, is restrained and limited by the provisions of section 4.

This brings us to the consideration of how the language of section 4 affects the words of present grant contained in section 3. It is claimed by the appellant that "section 4 prescribes when the grant shall take effect, and how it shall be completed," to wit: "When twenty-five consecutive miles of the road shall be completed, and after the report of the commissioners, etc., patents shall be issued to the company, conveying the additional sections," etc.

It will be observed that this section provides in the first portion thereof, "that whenever said Northern Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad," etc., completed, and the commissioners have reported thereon as required by the act, their "patents of lands, as aforesaid, shall be issued to said company, *confirming* to said company the *right* and *title* to said lands, situated opposite to and coterminous with said completed section of said road." And again, in the latter portion thereof, "and from time to time, whenever twenty-five additional consecutive miles shall have been constructed and completed," and reported upon by the commissioners, "then patents shall be issued to said company, *conveying* the additional sections of land as aforesaid, and so on, as fast as every twenty-five miles of said road is completed as aforesaid."

A confirmation is a species of common-law conveyance. It is defined as "a deed, whereby a conditional or voidable estate is made absolute and unavoidable by the confirmer, so far as he is able, or whereby a particular estate is increased," referring to Co. Lit. 295 b, and 2 Bla. Com. 325.

We have seen that the act, not taking into consideration section 4, constitutes a conditional grant. The effect of the patent referred to in the first part of section 4 is therefore simply to discharge the condition attached to the grant, so far as relates to the odd sections situate opposite to and coterminous with the completed twenty-five consecutive miles of "any portion" of the road, and make the title thereto absolute in the grantee. If the same language had been used in the latter portion of this section, instead of the term "conveying," there could be no shadow

of doubt as to the object of the entire section. But we think that the difference in the language of the two portions can be easily reconciled. We can not see, taking into consideration the entire act and its object, why any distinction should be made between the twenty-five consecutive miles of "any portion of" the road and the other portions or sections thereof, of twenty-five miles each. So far as relates to the grant of lands, we do not think that congress intended to make any such distinction. Conveyance, as we have seen, is the generic term, of which confirmation is the species. Its operative words include those of a feoffment, which is also a species of a conveyance. We think, therefore, that when the word "conveying" was used in the latter portion of section 4, it was employed as synonymous with the language used in the first portion thereof, viz., "confirming the *right* and *title*." By this construction, section 4 recognizes the estate in the grantee, which is vested in it by virtue of sections 3 and 6, instead of limiting and restraining the words of present grant. "There must be a precedent rightful or wrongful estate in the person to whom the confirmation is made in his own or another's right, or at least he must have the possession of the thing whereof the confirmation is made, as a foundation for the confirmation to work upon:" Smith on Real and Personal Prop. 561; Pres. Shep. T. 312. Keeping in view the above definition of a confirmation, we must therefore conclude that section 4, in providing therefor, recognizes just what the act, without this section, in fact is, viz., a grant upon condition subsequent.

The fallacy of the appellant's argument, in a great measure, arises from confounding the usual office of a patent, which in most cases is the original conveyance of the title to government lands, with its office in those cases where the act is itself the grant, and the purpose and object of the patent is designated in the act or determined by a proper construction of its provisions. Here its purpose is not that of an original title, but that of the confirmation of a title already bestowed. Its office is to discharge the conditions attached to the grant, and extinguish the right of forfeiture for breach thereof, just as fast as certain portions of the road are completed in accordance with the terms of the act. After patents have issued for lands adjacent to and coterminous with such completed portions of the road, then the government can only cause a forfeiture for breach of the condition imposed by the act, of the remaining portions of the grant adjacent to and coterminous with the uncompleted portions thereof. This construction of the act is to accomplish that intention, which is expressed in the preamble and body of the act itself, viz., to assist in the construction of the road.

Again, to hold that the patent is the original conveyance does violence to the recitals of the preamble, viz., that the act itself grants, and that the grant is of the date of the approval thereof. It defines the usual and accepted authorized meaning of the words of present grant contained in the third section, viz., "that there be, and hereby is, granted," which, when employed in a similar connection, or that in which they are used in this act, have been uniformly held to be the highest evidence of title, and to import possession and livery of seisin. It has the same effect upon the words "hereby granted" that is granted by this act contained in section 6. It renders null and void the exclusive power and right of the grantee to sell the land which is conferred in section 6, which is in the following language: "And the odd sections of land here-

by granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company as provided in this act." This section provides that the survey shall be made after the general route is fixed, and as fast as may be required by the construction of the road. It precedes the issue of the patent. This power, given to the company to sell the lands designated before the issue of the patent, is itself an interpretation by congress of its intention to bestow a present grant, contained in section 3.

To hold that the patent is the original conveyance, and that the words of section 3 do not create a present grant, is also inconsistent with the provision that when the lands are surveyed the odd sections are relieved from the operation of the homestead and pre-emption laws, while they are extended to the even sections, which are reserved to the government. The prevention of the operation of the above laws as to the odd sections is not reasonably reconcilable with any other hypothesis except that the government has parted with its title thereto.

The case of Rice v. The Railroad Co., 1 Black, 358, is referred to by appellant to support the position that the title does not pass to the company until the issuing of the patent. In that case it was held that an act giving lands to the territory of Minnesota, to assist in the construction of a railroad, containing the words "that there shall be, and is hereby, granted," etc., taken in connection with another provision in the act, "that no title should vest in the territory, nor any patent issue for any part of the lands, until a continuous length of twenty miles of the road should be completed," did not pass the title to the territory. The principal reason given by the court for this decision was that by express provisions of the act no title should vest in the territory, nor any patent issue for any part of the lands, until a continuous length of twenty miles of the road should be completed.

That this was the view of the supreme court is apparent from the language of Field, J., in Schulenberg v. Harriman, 21 Wall. 44, which is as follows: "The case of Rice v. Railroad Co., 1 Black, 358, does not conflict with these views. The words of present grant in the first section of the act, there under consideration, were restrained by a provision in a subsequent section that the title should not vest in the territory of Minnesota until the road, or a portion of it, was built."

The rule for this construction was given in this case by Mr. Justice Clifford, in the following language: "Whenever the words of a statute are ambiguous, or the meaning doubtful, the established rule of construction is, that the intention must be deduced from the whole statute and every part of it. Intention, in such cases, must govern when it can be discovered, but in the search for it the whole statute must be regarded, and if practicable, so regarded as to give effect to every part." The rule thus cited for holding as the court did in that case sustains the position which we maintain in this. For if the rule that the intention must control when discoverable (and it is the duty of the court, if possible, to discover the intention), and every part of a statute given its proper effect, is invoked to prevent the rejection or disregard of the language "that no title shall vest," etc, when contained in the same act with words of present grant, certainly the same rule is applicable to prevent the rejection or disregard of the words of recital in the preamble, and of the words of present grant in sections 3 and 6, of the power to sell before the issue of the patent, and the relief of the odd sections from the

operation of the homestead and pre-emptions laws, as also provided for in section 6.

"The true construction of the act therefore, in our opinion, is that the patent is the original conveyance of the lands, and that the act itself must amount to a contract to convey, as certain portions of the road are completed, and, therefore, up until the issue of the patent, the respondent has only what the appellant terms an 'incorporeal right' in the lands, but that until the patent issues it is a grant *in præsenti*, upon condition subsequent, which the patent confirms and renders unconditional and absolute in the grantee."

We have considered the main question in this case as if it had not already been decided by a court whose authority is binding upon us; but we think it is no longer an open question. In the case of the M., K. & T. R. R. Co. v. K. P. R. R. Co., 97 U. S. 491, from which we have before quoted, one of the principal questions before the supreme court was in relation to the construction of an act of congress in very many respects similar to the one in question, viz.: An act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean," etc., approved July 1, 1862: 12 Stat. at Large, 489. We have already given, from the language of Mr. Justice Field, who delivered the opinion of the court, a brief statement of the prominent provisions of this act. In addition thereto we will state the language used in relation to the patents, which followed the language of present grant, which was: "Patents shall issue conveying the right and title to said lands to said company. * * * And patents shall in like manner issue as each forty miles of said railroad * * * are completed:" Section 4 of above act.

It will be observed that the word used in connection with the word "patents" is "conveying," being the same word used in connection with the same term in the latter portion of section 4 of the act under consideration, which, as we have already indicated, uses both the words, "confirming the right and title," and "conveying," in connection with the term "patents." Nevertheless the supreme court in this case held that the act passed to the company a present interest in the lands to be designated within the limits there specified. Similar terms in other acts of congress granting lands have uniformly received the same interpretation, unless accompanied with clauses restraining their operation. "That the grant was of sections to be afterwards located, and their location depended upon the route to be afterwards established; when that was settled the location became certain, and the title that was previously imperfect acquired precision and attached to the lands;" that "when the location was made and the sections granted ascertained, the title of the plaintiffs took effect as of the date of the act, * * * having the same operation upon the sections as if they had been specifically described in it;" that, "as between the United States and the plaintiffs, the right of the latter to a patent became perfect on the approval by the president of the report of the commissioners" on each completed portion of the road. Let the above language, "that similar terms in other acts of congress granting lands have uniformly received this interpretation, unless accompanied with clauses restraining their operation," be now observed.

Our attention has been called to the opinion of Deady, J., of the United States district court of Oregon, in the case of the United States v. ——, where it is held that "the clause in section 4, of the act under consider-

ation" (the same which is in question in this case), "concerning the lands granted to the corporation" (the respondent in this case), "as each section of twenty-five miles of the road is constructed and accepted by the grantor, does restrain the operation of the words of present grant in section 3, so that it appears manifest, that while it was the intention of congress to set apart and devote the lands in question absolutely to the construction of the Northern Pacific railroad, yet it did not intend to part with the title to them until and only so fast as they were earned by the completion of the work." Reference is made to support this position to the case of Rice v. Railroad Co., 1 Black, 358, above referred to, where it was held, as stated in the above opinion of Deady, J., that the words of present grants, viz., "There is hereby granted," did not pass the title to the territory, taken in connection with another provision in the act, to the effect that no title should vest in the territory until twenty miles of the road were completed and accepted by the secretary of the interior, when a patent should issue for so much of the grant, and so on, as often as twenty miles of the road were so completed and accepted." The learned judge (Deady, J.) further says: "And although there is no express declaration in the Northern Pacific act that the title shall vest in the corporation until the completion of the road, or portions of it, yet the legal effect of the clauses therein, which provided for conveying and confirming the title of the company by patent only upon the completion of the road or portions of it, is the same."

The act of congress referred to in the case of M., K. & T. R. R. Co. v. K. P. R. R. Co., as we have already seen, contains a provision that "patents shall issue conveying the right and title to said lands," under very similar circumstances as provided for the issue of patents to the Northern Pacific Railroad Company by the act in question. We can fairly presume that the case of Rice v. Railroad Co., *supra*, was in the contemplation of the learned judge (Field, J.,) when he used the language to which we have called special attention, he having written the opinion in Schulenberg v. Harriman, *supra*.

By positive implication, therefore, it is held by the use of the above language, in relation to an act of congress, containing words of present grant, with also thereafter a provision for the issue of "patents," "conveying the right and title," etc., that such a provision does not restrain or limit the words of present grant.

Our conclusion, therefore, both upon reason and authority is, that the title of the respondent took effect at the date of the approval of the act of congress; that the location of the route and the survey of the lands gave precision to that title, and caused it to attach to the particular section as of the date of the approval of the act, as fully as if such particular section had been designated in the act; that the character of the title is that of a grant upon conditions subsequent; and that the office of the patent is to confirm the title as certain designated portions of the road are completed and reported upon by the commissioners, and render it absolute and unconditional: Tievis v. Coover, 10 Cal. 589.

The grant, being by act of congress, is the highest evidence of title, importing, in the case presented, possession and livery of seisin, and is sufficient, in connection with the other allegations of the complaint, to sustain ejectment.

Judgment affirmed.

SUPREME COURT OF NEVADA.

McKELVEY v. CROCKETT.

Filed February 6, 1884.

STOCKHOLDER'S LIABILITY AS GARNISHEE.—A stockholder in a company incorporated under the general corporation law of Nevada can not be held as a garnishee for the debts of the corporation, to the extent of his unpaid and uncalled subscription to its stock.

APPEAL from an order of the seventh judicial district court for Washoe county, granting defendant a new trial. The opinion states the facts.

William Cain, for the appellant.

R. M. Clarke, for the respondent.

BELKNAP, J. The plaintiff commenced an action by attachment against the Reno Savings Bank, a corporation existing under the laws of this state, and garnished defendant Crockett upon the assumption that he was a debtor of the bank. Plaintiff recovered judgment against the bank; an execution was issued and returned *nulla bona*, and thereupon this action was instituted against the garnishee to enforce his liability. The liability is based upon the fact that Crockett was a subscriber to a portion of the capital stock of the corporation. It appeared that the subscriptions to the capital stock had not been fully paid in by the various stockholders, but that Crockett had paid all of the calls made upon him by the corporation.

The question presented, and the only one which we deem it necessary to consider, is whether Crockett's liability for his unpaid and uncalled subscription can be enforced in an action at law against him as the garnishee of the principal debtor. The general corporation law, under which the Reno Savings Bank was incorporated, fixes the manner in which payments may be required upon unpaid stock. It does not require that the capital of a corporation shall be fully paid in upon its organization, but provides for assessments to be made by the stockholders or trustees.

The portion of the statute bearing upon this subject is as follows: "Sec. 10. The stockholders of any corporation framed under this act, may, in the by-laws of the company, prescribe the times, manner, and amounts in which the payment of the sum subscribed by them respectively shall be made; but in case the same shall not be so prescribed, the trustees shall have power to demand and call in from the stockholders the sums by them subscribed, at such times and in such manner, payments, or installments, as they may deem proper."

In the absence of an assessment, it is evident that the corporation can not maintain an action upon an unpaid subscription, and because of this fact it necessarily follows that plaintiff can not maintain this action. Garnishment is a purely statutory proceeding, aiming to invest the plaintiff with the right and power to appropriate to the satisfaction of his claim against the defendant debts due from the garnishee to the defendant. "It is in effect," says Drake, "a suit by the defendant, in the plaintiff's name, against the garnishee, without reference to the defendant's concurrence, and indeed, in opposition to his will. Hence, the plaintiff usually occupies, as against the garnishee, just the position

of the defendant, with no more rights than the defendant had, and liable to be met with any defense which the garnishee might make against an action by the defendant:" Drake on Attach., sec. 452. Upon corresponding facts, the supreme court of Alabama denied the liability of a garnishee. The judgment is rested upon grounds similar to those we have expressed: Bingham v. Rushing, 5 Ala. 405.

In Brown v. Union Ins. Co., 3 La. Ann. 177, the plaintiff having obtained judgment against the defendant corporation, sought to charge, by garnishment, a subscriber to a portion of its unpaid stock. The shares were of fifty dollars each. The garnishee had subscribed for one hundred shares. He did not pay in full for the stock, but made only the cash payment of five dollars per share. The opinion proceeds: "The charter divides the subscription into two distinct portions. The first is composed of the five dollars paid at the time of subscribing, and of twenty-five dollars more which were to be paid on each share by installments fixed by the charter, and all falling due within the year 1836. The other portion is composed of the other twenty dollars, for the payment of which no period is fixed, the directors being authorized to call it in at such time and in such proportions as they might see fit. The twenty-five dollars to be paid at fixed periods were due to the corporation, and formed part of the assets out of which its liabilities were to be satisfied. To the extent of that debt, the garnishment must be sustained, unless it is barred by lapse of time, as alleged by the garnishee. * * * For the twenty dollars remaining on each share the company had no action against the garnishee without a formal call, made upon all the shareholders equally, and then only for the share due by him. His liability to third persons for this portion of the subscription can not be enforced by the process of a garnishment:" Brown v. Union Ins. Co., 3 La. Ann. 182, 183.

The case of Faul v. Alaska G. & S. M. Co., recently decided by the circuit court of the United States for the district of Oregon, Fed. Rep., Feb. 6, 1883, is a case in point. That was an action at law, in which the plaintiff, a judgment creditor of the corporation, sought by garnishment to be subrogated to the rights of the corporation against a subscriber to a portion of its capital stock. Upon examination it was ascertained that the garnishee was a stockholder in the corporation; that its capital had not been fully paid in, and that a definite sum was due from the stockholders to the corporation upon assessments regularly made. The money due from the garnishee upon the assessments was held to be an asset of the corporation that could be reached by garnishment. The court said: "There being, then, a fixed and definite sum due from the garnishee to the defendant at the time of the service of the execution on the latter, the same was a debt or legal asset of the defendants, liable to be levied on or attached by the plaintiff, in satisfaction of his judgment against the defendant. It is a debt absolute, and not contingent, as is the remaining portion of the subscription not yet called in or ordered paid. It is therefore as much a legal asset of the corporation, and as liable to be taken or attached on an execution against it, as a debt due from the garnishee for money loaned or goods sold and delivered:" P. 661.

Appellant principally relies for a reversal of this case upon a decision made by the district court of the United States for the eastern district of Pennsylvania in the matter of the bankruptcy of the Glen Iron Works: Fed. Rep., Aug. 28, 1883. An earlier decision in this same case is re-

ported in 10 Phila. 479. The proceeding was a petition of the nature of a bill in equity, under the summary jurisdiction of the court of bankruptcy: 10 Phila. 491.

The act of incorporation of the Glen Iron Works authorized the payment of subscriptions of stock in real or personal estate appropriate to the corporate business. No power existed in the corporation to accept payment of capital, otherwise than in money or money's worth; nevertheless promissory notes, called "stock notes" or "subscription notes," subject to assessment, were given by the stockholders and accepted by the corporation for the full amount of their subscriptions. The court held that this arrangement concerning the payment of the capital, although valid as between the corporation and its stockholders, was invalid in so far as it postponed the recourse of creditors. "Every stockholder," said the court, "is, with relation to the creditors, under an obligation to pay so much of the amount represented by his share or shares of the capital as may be required to pay the corporate debts. Where he has made no express engagement, the obligation to pay is implied. Where an express engagement has been made upon such a condition as would impair the recourse of creditors, they may proceed as if no such conditional engagement had been made:" 10 Phila. 482.

In this opinion the court reserved from consideration the rights of attaching creditors. That question was determined in the second opinion. The court there held the failure of the corporation to assess as immaterial. And proceeding in accordance with the principles announced in its first opinion, that the charter of the corporation impliedly prohibited the payment of the capital otherwise than in money or money's worth, and treating the payment of the capital by the subscription notes as simulated payments, void as against creditors, sustained attachments against stockholders who had not paid their subscriptions, although no assessment had been levied.

In Sawyer v. Hoag, 17 Wall. 610, a somewhat similar plan was arranged between a corporation and subscribers to its stock to evade the payment of money for capital. The court held that as against creditors of the corporation nothing short of actual payment of the capital in good faith would be tolerated. In summarizing the decision, the reporter says: "An arrangement by which the stock is nominally paid, and the money immediately taken back as a loan by the stockholders, is a device to change the debt from a stock debt to a loan, and is not a valid payment as against creditors of the corporation, though it may be good as between the company and the stockholders." And in the opinion the court characterized such an arrangement as a fraud upon the creditors which should be annulled or disregarded.

There is no necessary conflict between the Pennsylvania case and the one at bar. In that case the corporation, disregarding the requirements of its charter concerning the paying in of its capital, accepted promissory notes instead of money, or property appropriate to the corporate business, at its cash valuation. Courts of equity uniformly treat unpaid subscriptions to the capital stock of a corporation as a fund for the benefit of the creditors of the corporation, and this right of the creditors was not allowed to be postponed by the plan entered into by the corporation and the subscribers to its stock; on the contrary, the court, treating the arrangement as void, allowed the creditors to "proceed," to use its own language, "as if no such conditional engagement had been made."

The statute under which the Reno Savings Bank was incorporated, as we have seen by the quotation from its tenth section, authorized the corporation to prescribe the times, manner, and amounts in which payments of subscriptions to stock should be made. No assessment being unpaid at the time of the service of the writ of attachment upon Crockett, there was no indebtedness upon which the writ could operate. It is true that upon the insolvency of the corporation, the unpaid subscriptions became equitably due, and equitably assets, but only the legal assets of a debtor can be reached by garnishment, and equitable relief can not be granted in a purely legal action.

The order of the district court granting a new trial is affirmed.

BECK *v.* TRUCKEE LODGE NO. 14, I. O. O. F.

Filed February 6, 1884.

APPELLATE COURT WILL NOT REVIEW THE FACTS OF A CASE for the purpose of determining whether the findings are supported by the evidence, unless the same are brought up on a statement of the case after a motion for a new trial.

APPEAL from a judgment of the seventh judicial district court for Washoe county, entered in favor of plaintiff.

William Cain, for the appellant.

J. F. Alexander, for the respondent.

LEONARD, J. This action was brought to recover five hundred dollars and interest, upon a bond executed by appellant in favor of respondent. Appellant does not deny that the findings support and justify the judgment, but he says, in substance, that the findings are not supported by the evidence. No motion was made for a new trial, and this court has uniformly refused to review the facts of the case unless there has been a regular statement and motion for new trial.

In Whitmore v. Shiverick, 3 Nev. 303, the court said: "Doubtless most errors committed during the progress of a trial may, at the option of the appellant, be first brought under review in the court below upon motion for new trial, and upon that court refusing relief, be reviewed here on appeal from the order refusing a new trial; or they may be brought directly before this court on appeal from the judgment. This court can look into bills of exception, statement on appeal, the findings of the court, and the judgment roll, for the purpose of correcting errors shown by any of these records. But for the purpose of setting aside a verdict or finding on the ground of its not being sustained by the evidence, it can only look to a statement on motion for new trial."

Judgment affirmed.

NORTON, EX'R etc., ET AL. v. HAYDON.

Filed February 12, 1884.

NEITHER AN EXECUTOR NOR ADMINISTRATOR IS LIABLE TO PROCESS of garnishment; nor can an allowed and approved claim against the estate of the deceased be levied upon and sold under an execution against the claimant.

APPEAL from an order of the seventh judicial district court, Washoe county, granting plaintiffs a new trial. The opinion states the facts.

Thomas E. Haydon, for the appellant.

Dickson & Varian, for the respondents.

BELKNAP, J. This suit was instituted by the executors of the last will of B. B. Norton, deceased, for the purpose of determining the ownership of an allowed and approved claim against his estate and in favor of the Reno Savings Bank. Appellant Haydon claims by virtue of a writ of garnishment served upon the executors, and an actual levy and sale of the claim under an execution issued upon a judgment in his favor and against the bank. The respondents claim under assignments made subsequent to the proceedings by which appellant claims ownership.

The only matter necessary for consideration is whether appellant acquired any rights by virtue of this garnishment or by the sale, no order for distribution to creditors having been made. The proposition that an executor is not, under these circumstances, answerable to the process of garnishment is abundantly supported by the authorities. The reasons for the conclusion are well expressed in the case of Shewell v. Keen, 2 Whart. 339. The court in that case said: "Another circumstance of weight is that an executor or administrator is, to a certain extent, an officer of the law, clothed with a trust to be performed under prescribed regulations. It would tend to distract and embarrass these officers, if, in addition to the ordinary duties which the law imposes, of themselves often multiplied, arduous, and responsible, they were drawn into conflicts created by the interposition of creditors of legatees, and compelled to withhold payment of legacies, without suit; to suspend indefinitely the settlement of estates; to attend, perhaps, to numerous rival attachments; to answer interrogatories on oath; and to be put to trouble and expense for the benefit of third persons, no way connected with the estate, nor with the duties of their trust. It has been decided that money in the hands of a prothonotary or sheriff can not be intercepted by a creditor of the party entitled to it; but it must be paid over to himself only: 1 Dall. 354. The case of an executor or administrator is analogous to that of a sheriff or prothonotary. He has the fund in his hands as an officer or trustee authorized by law; and if a new party were allowed to levy on it by attachment, there would be no end of disputes and lawsuits; and no business could be certain of ever being brought to a close within a reasonable time. It is of great importance to the interests of heirs, creditors, and legatees, that the affairs of a decedent's estate be kept as simple and distinct as possible; that its concerns be speedily closed, and the estate adjusted. It is moreover settled that an executor can not be sued as defendant in an attachment by a creditor of the testator, and the goods of the testator attached to recover the debt: 2 Id. 73. The reason is, that the estate of the testator ought to come into the hands of the executor, that he may administer it ac-

cording to law, and pay the debts, if the assets suffice; and they ought not to be stopped, and the executor subjected to new responsibilities, by proceedings in attachment. These reasons apply with equal force to the attempt to make an executor garnishee, for the purpose of paying out of the assets in his hands the debt due to a creditor of a legatee. These funds must travel only in the path pointed out by the laws relating to decedents' estates in their various branches, and can not be diverted out of that path without interfering with statutory regulations, and violating some of the most important provisions of the acts of assembly: See also Barnes v. Treat, 7 Mass. 271; Brooks v. Cook, 8 Id. 247; Thorn v. Woodruff, 5 Ark. 55; Stout v. La Follette, 64 Ind. 365; J. I. Case T. M. Co. v. Miroele, 54 Wis. 295; Colby v. Coates, 6 Cush. 558; Thayer v. Tyler, 5 Allen, 94; Welch v. Gurley, 2 Hayw. 334; Young v. Young, 1 Hill (S. C.), 425; Curling v. Hyde, 10 Mo. 374; Winchell v. Allen, 1 Conn. 385; Lyons v. Houston, 11 Harr. 349; Wait v. Osborn, 11 Me. 185; Wilder v. Bailey, 3 Mass. 289; Marvin v. Hawley, 9 Mo. 378; Hill v. La Crosse, 14 Wis. 291; Dawson v. Holcomb, 1 Ohio, 275.

Appellant mainly relies, however, for title upon the alleged levy and sale of the claim, independently of the garnishment. The sheriff seized in execution and took in custody the paper writing, among the files of the clerk of the court, containing a statement of the claim of the Reno Savings Bank against the estate of Norton, regularly allowed by the executors and approved by the district judge.

The same considerations which have moved courts to exempt executors from garnishment require that claims against an estate should not be subject to levy and sale. The vexation and delay which successive attachments would produce would be the same in cases of actual levy as if the proceeding were by garnishment, and one mode as much as the other would tend to divert the money of the estate from the course which the law has prescribed for it. The results produced by either method being the same, a change of means can not change the aspect of the question. There is no just ground for permitting one method of procedure and not the other.

Again, the property which the laws concerning attachments and executions require shall be taken into custody is tangible, visible property, capable of seizure and actual possession. Concerning property such as was sought to be reached in this case, the statutes expressly provide that "debts and credits, and other personal property not capable of manual delivery," shall be reached by garnishment: Secs. 1189, 1191, 1280.

The order of the district court granting a new trial is affirmed.

STATE ex rel. FOOK LING v. PREBLE.

Filed February 19, 1884.

PURCHASE OF STATE LANDS BY CHINESE.—A citizen and subject of the Chinese empire, who is a *bona fide* resident of the state of Nevada, is entitled, under the laws of the United States and of such state, to locate or purchase any of the public lands belonging to such state.

PUBLIC POLICY.—No act authorized by the constitution can be said to be against the public policy of the state.

APPLICATION for *mandamus*. The opinion states the facts.

T. Coffin, for the relator.

Attorney general, for the respondent.

HAWLEY, C. J. This is an application for a writ of *mandamus* to compel respondent, as surveyor general and *ex officio* land register of the state of Nevada, to receive the application of relator to purchase certain vacant non-mineral lands belonging to the state of Nevada.

The only question to be determined is, whether a citizen and subject of the Chinese empire, who is a resident of this state, is entitled, under the laws of the United States or of this state, to locate or purchase any of the public lands belonging to the state of Nevada. The constitution of this state provides, that "foreigners who are or who may hereafter become *bona fide* residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens:" Art. 1, sec. 16.

The rights of foreigners are not confined to those who have declared their intention to become citizens of the United States, or to those who under our laws are entitled to become citizens by naturalization.

The constitution gives to all foreigners who are *bona fide* residents of this state certain rights, which may be enlarged, but can not be abridged, by the legislature. The rights thus guaranteed by the constitution can not be taken away. It is not within the power of the legislature of this state to limit the right to possess, inherit, or enjoy such property to aliens who may become citizens: State v. Rogers, 13 Cal. 159; McConville v. Howell, 17 Fed. Rep. 104.

It is admitted by the pleadings that relator is a resident of this state, and that he has complied with the laws of this state, and is entitled to the relief he asks unless the fact that he can not become a citizen of the United States deprive him of that right.

We are of opinion that the constitutional provision, above quoted, is conclusive in favor of his right to apply for the lands described in his petition. There are no provisions in the constitution of the United States, or in the existing treaties between the United States and China, which deprives him of that right.

No act authorized by the constitution can be said to be against the public policy of the state.

Let the writ issue as prayed for by relator.

JAMES *v.* LEPORT.

Filed February 20, 1884.

AFTER AN APPEAL HAS BEEN PERFECTED THE DISTRICT COURT HAS JURISDICTION to settle and allow the statement on appeal filed in the court below within the time required by statute.

APPEAL from a judgment of the second judicial district court for Ormsby county, entered in favor of the defendant. The opinion states the facts.

R. M. Clarke, for the appellant.

A. C. Ellis, for the respondent.

BELKNAP, J. The appeal having been perfected, appellant afterward prepared and filed in the court below the statement on appeal, and the same was settled and allowed by the district judge.

Respondent has entered his written objections to the hearing of the cause upon the merits, and urges that the statement upon appeal be disregarded, upon the ground that it was filed with the clerk and entered by the judge after the district court had lost jurisdiction of the cause by the perfecting of the appeal.

Section 1391, compiled laws, fixes the various periods of time within which appeals shall be taken, varying in length from sixty days to one year from the time of the rendition of the order or judgment. Section 1393, compiled laws, provides that within twenty days after the entry of a judgment or order against a party having the right to appeal, he may file his statement upon appeal with the clerk of the court, and if no amendments be proposed it may thereafter be presented to the judge for settlement without notice to the opposite party.

The right to have a statement of the case annexed to the record of the judgment or order is not made to depend, in terms at least, upon the fact whether an appeal has been taken. It is absolutely awarded to the party having the right to appeal, but must be exercised within the time limited by the statute, and jurisdiction of the case for this purpose is retained by the district court. A contrary construction would abridge the time within which the statement may be prepared in cases depending upon facts similar to those of this case, and would ingraft in the law a condition which the legislature did not expressly introduce and may never have intended.

The case of Flynn v. Cottle, 47 Cal. 527, decided under a similar statute, supports the conclusion we have reached.

Objection overruled, and the case will be placed upon the calendar.

SUPREME COURT OF WASHINGTON TERRITORY.

CITY OF SEATTLE *v.* BUSBY.

Filed July, 1880.

FAILURE TO NAME AN HOUR IN A NOTICE FOR THE SETTLEMENT OF A BILL OF EXCEPTIONS, when the day for the same has been agreed to by stipulation, is a fault imputable to both parties, and can not be taken advantage of.

BILL OF EXCEPTIONS NEED ONLY CONTAIN SO MUCH OF THE EVIDENCE as is necessary to explain it. What is necessary will depend upon the peculiar circumstances of each case.

A MUNICIPAL CORPORATION IS LIABLE FOR INJURIES RESULTING to a private individual, on account of the negligence of its agents in grading a public street. Nor is it relieved from liability by the fact that such grading is done by a contractor, working under the directions of the city surveyor.

REFUSAL OF THE COURT TO GIVE CERTAIN INSTRUCTIONS AS ASKED is not error when the same are given in substance.

ERROR to the third district court. The opinion states the facts.

Jacobs, Hall & Osborne, for the plaintiff in error.

Larrabee & Hanford, for the defendant in error.

On a motion to strike out the bill of exceptions, the following opinion was rendered:

GREENE, C. J. It is necessary, under chapter 19 of the civil practice act, that a time should be fixed for the settlement of a bill of exceptions not made up and settled on the instant, and that the opposite party to the one who presents it shall have at least three days' notice of the time of settlement, unless the time is fixed by the court or judges. Here, by consent of both parties and the court, a day of settlement was appointed, and the exceptions were settled on that day. Simple naming of a day, without designating a particular hour, might not be enough, where one party was seeking to compel, by notice, the attendance of the other. It seems to us sufficient, however, where the time is determined by stipulation, and the failure to name an hour is imputable to both. How far it is necessary to set out the evidence in order to explain the charge of the judge, under section 261 of chapter 19, will depend in each case upon what the charge is. So much "as is necessary to explain it, and no more," is the statutory measure. In a case like the present, it does not seem to us essential or desirable that the evidence should be set forth in detail or at length. Here it is enough that it appears in the bill of exception that evidence was given that rendered the charge pertinent and intelligible.

So the motion to strike the bill must be denied.

WINGARD and HOYT, JJ., concurred.

Afterwards the following opinion was rendered on the merits:

WINGARD, J. The complaint of Isaac W. Busby, the plaintiff below, is as follows:

Isaac W. Busby, plaintiff, v. The City of Seattle, defendant. No. 2129. Civil action. Damages.

Amended Complaint.—And now comes the plaintiff by his attorneys, with leave of the court, and amends his complaint herein and alleges:

1. That at all the times hereinafter mentioned, and now, the said

defendant was and is a municipal corporation duly organized and existing under and by virtue of the laws of Washington territory.

2. That on the first day of May, A. D. 1876, and from thence continuously until the date of the commencement of this suit, this plaintiff was lawfully in possession, and entitled to have possession of the following-described premises, situated within the corporate limits of the city of Seattle, the defendant herein, and abutting upon the west side of a certain street in said city, called "Front street," to wit, lots seven (7) and eight (8) of block D of A. A. Denny's addition to said city of Seattle, according to the plat of said addition of record, and was, until the injury herein complained of, carrying on his business of miller and dealer in grains, flour, ground feed, etc., upon said premises, having, previously to that time, erected thereon at great expense, to wit, six thousand dollars, buildings suitable for a steam grist-mill and furnished the same with suitable machinery, boilers, engines, and appliances for operating said mill and carrying on said business, and said mill was then and there, all the time, until the happening of the injury hereinafter complained of, propelled by steam, and operated and in use by plaintiff.

3. That between the first day of March, A. D. 1876, and the tenth day of April, 1876, plaintiff, at great expense, to wit, seven hundred dollars, erected upon said premises a certain other building, which he rented to other parties, with the privilege of utilizing the power furnished by the engines and machinery of said mill for the purpose of propelling a turning-lathe and operating a sash and molding factory, at a monthly rental of thirty dollars.

4. That plaintiff did and continued to let said last-mentioned building, and to receive the said rental therefor, and in the use of his said mill, until the injury caused by the defendant's negligence and mismanagement and want of reasonable care and skill, hereinafter alleged and set forth.

5. That between the first day of July, A. D. 1876, and the first day of January, A. D. 1877, said Front street was graded, and opposite to and in the immediate vicinity of plaintiff's said premises filled in and thereby raised considerably above the level of the natural surface in said vicinity, all of which was done by the said defendant and under its direction.

6. That east of said Front street, and in the immediate vicinity of said premises, several natural springs of water issue from the ground, and previous to the grading of said Front street the same flowed past plaintiff's premises into Elliott's bay.

7. That through negligence and from the want of reasonable care and skill in the performance of the work on the part of the said defendant, the work of grading and filling said Front street, opposite plaintiff's said premises, was improperly done in the following particulars, to wit: 1. The natural foundation under said Front street, opposite said premises, was and is too weak and insecure as a foundation to sustain the great weight of earth and cribbing used in filling and raising said street in said vicinity, and said defendant negligently, and from the want of reasonable care and skill, failed to construct any proper or secure foundation for said earth-work and cribbing to rest upon. 2. The said earth-work and cribbing constructed by said defendant, as aforesaid, wholly obstructs the natural flow of the water from the aforesaid springs, and said defendant negligently, and from the want of reasonable care and

skill, failed to construct and provide any conduits or passage-ways for said water, but left the same to flow against and percolate through the aforesaid earth-work and cribbing.

8. That the negligence of the defendant in the particulars aforesaid caused the foundations under the said earth-work and cribbing, and also the foundation under the plaintiff's buildings and mill hereinbefore mentioned, to slide and move westward towards Elliott's bay, thereby rendering it impracticable to operate or use the said engines and machinery in said mill, and rendering said buildings too unsafe for occupancy or use.

9. That in consequence of the disturbance to the foundations of the said mill and buildings, as aforesaid, plaintiff was obliged to and did on or about the first day of February, A. D. 1878, tear down and remove the buildings mentioned in the third paragraph of this complaint, and he has lost the use and rent thereof since said last-mentioned date, and is now wholly deprived of the same; and for the same cause plaintiff was, between the first day of January, A. D. 1878, and the tenth day of January, A. D. 1879, often hindered in the use of his said mill and in the conduct of his said business, and on the last-mentioned date he was compelled to, and did for the same cause, entirely suspend his said business and tear down and remove his said mill and machinery, boilers, engines, and appliances, and he has been ever since prevented from carrying on his said business and from operating his said mill, as he was lawfully entitled to do, and should have done all the time aforesaid but for the disturbance of the foundation thereunder, caused by the defendant's negligence and want of reasonable care and skill in performing the work of grading Front street, as aforesaid, to his (the plaintiff's) damage in the sum of three thousand dollars. Wherefore plaintiff demands judgment against said defendant in the sum of three thousand dollars and costs of this suit, and for general proper relief.

L. B. NASH and LARRABEE & HANFORD,
Attorneys for Plaintiff.

The answer to this amended complaint is as follows:

Isaac W. Busby, plaintiff, v. The City of Seattle, defendant. No. 2129. Civil action. Damages.

Answer to Amended Complaint.—Comes now the defendant by its attorney, J. M. Hall, and in answer to paragraph 2 of plaintiff's amended complaint, says:

1. First, as to whether the plaintiff was in lawful possession, and entitled to have the possession of lots 7 and 8 of block D of A. A. Denny's addition to the city of Seattle, situated on Front street at the time, as set forth in plaintiff's said amended complaint, this defendant denies any knowledge or information thereof, sufficient to form a belief, and therefore demands proof of the same.

And the defendant, further answering as to the matter set forth in said second paragraph, says: As to whether the plaintiff expended the sum of six thousand dollars or any other considerable sum in the erection of buildings on said lots suitable for a steam grist-mill and in furnishing the same with suitable machinery, boilers, and engines, and appliances for carrying on the milling business, this defendant denies any knowledge or information thereof sufficient to form a belief, and therefore demands proof of the same. The defendant, answering as to the matters set forth in the third paragraph of plaintiff's amended complaint, says:

As to whether, between the first day of March, 1876, and the tenth day of April, 1876, the plaintiff, at great expense, to wit, seven hundred dollars, erected upon said premises certain other buildings, which he rented to other parties, for the purpose in said paragraph set forth, at the rental of thirty dollars per month, or any other sum, this defendant denies any knowledge or information thereof sufficient to form a belief, and therefore demands proof of the same.

The defendant, in answer to the matters set forth in the fourth paragraph of plaintiff's amended complaint, says: As to whether plaintiff continued to let said last-mentioned building and to receive the rental therefor, this defendant denies any knowledge or information thereof sufficient to form a belief, and therefore demands proof of the same. The defendant, further answering, denies that any injury, as in said paragraph set forth, was caused the plaintiff by the negligence, mismanagement, or want of reasonable care or skill by the defendant.

Defendant, in answer to matters set forth in the fifth paragraph of plaintiff's amended complaint, denies that the work therein mentioned was done by this defendant, or under this defendant's direction only, as hereinafter set forth.

Defendant, for answer to the matters set forth in the seventh paragraph of plaintiff's amended complaint, denies that through the negligence, or from the want of reasonable care or skill in the performance of this work therein mentioned, that it was improperly done; defendant further denies that said defendant negligently, or from the want of reasonable care or skill, failed to construct a proper or secure foundation for the earth-work and cribbing therein mentioned, denies that the natural formation under said Front street, opposite said premises, was or is too weak or insecure as a foundation to sustain the weight of said earth-work and cribbing. Defendant, further answering, says: As to whether said earth-work and cribbing wholly or at all obstructs the natural flow of the water from the springs therein mentioned, this defendant denies any knowledge or information thereof sufficient to form a belief, and therefore demands proof of the same. This defendant, further answering, denies that defendant negligently or from want of reasonable care or skill failed, or failed at all, to provide any conduits or passage-ways for said water, denies that the same flows against or percolates through the said earth-work and cribbing, and denies that there is or ever was any lack of such proper conduits.

Defendant, in answer to the matters set forth in the eighth paragraph of plaintiff's amended complaint, denies that the negligence of the defendant, in the particulars set forth in the seventh paragraph of amended complaint, or in any respect whatsoever, caused the foundations under the said earth-work and cribbing, and also the foundations under plaintiff's buildings and mill, to slide and move westward towards Elliott's bay; denies further, that through any want of proper care or skill on the part of the defendant said buildings or mill were rendered too unsafe for occupancy or use; further denies that any want of proper care or skill on the part of the defendant rendered it impracticable for plaintiff to operate or use the engines or machinery in the same.

For answer to the ninth paragraph of plaintiff's amended complaint, the defendant denies specifically each and every allegation thereof, and says the same are not true.

2. For a statement of other and new matter constituting a defense to

plaintiff's cause of action set forth in his amended complaint, the defendant, further answering, alleges that said defendant is a municipal corporation, duly organized under the laws of Washington territory, and that in its capacity as such corporation has power to construct and repair sidewalks, and to curb, pave, grade, macadamize, and gutter any street, highway, and alley therein for the use and accommodation of the people thereof and the public generally; that in pursuance of said power a grade was duly established on said Front street, on the report of its surveyor (an officer appointed by the common council and whose appointment is expressly required by law), and by the ordinance of this common council, duly made in this regard, and entitled "Ordinance No. 112, to provide for the grading of Front street," and approved by the mayor of said city January 8, 1876, as will more fully appear by a true and correct copy of said ordinance hereunto appended.

This defendant further alleges that, in pursuance of said ordinance, on the ninth day of July, 1876, a contract was duly let to one George Edwards for the grading of said Front street, and that a supplemental contract was made with said Edwards on the thirtieth day of August, 1876; said contracts to be executed and the work done therein mentioned under the supervision of the city surveyor, an officer of said city required to be appointed by law, as hereinbefore set forth. This defendant avers that the whole of the grading of said Front street was done by said Edwards under the supervision of the city surveyor. This defendant further avers that it has no control over said contractor or his servants, and that said surveyor was a public officer, as aforesaid. This defendant further alleges that the whole of the grading of Front street, as set forth in said amended complaint, was done by said contractor and his servants, under the supervision of the said city surveyor, acting in the capacity of a public officer, and not as the servant of the defendant. Wherefore defendant prays to go hence, with its costs and disbursements most wrongfully sustained. (Signed) J. M. HALL, Attorney for Defendant.

The plaintiff below demurred to all the new matter in the aforesaid answer, which demurrer was sustained by the court below, and an exception was taken to the ruling of the court, and said ruling is here assigned for error. We think the demurrer was properly sustained.

The city surveyor was the servant of the city. The contractor was not an independent contractor, but did the work as supervised by the city's officer. The plaintiff in error was therefore amenable to the rule of *respondeat superior:* Laws, 149, sec. 31; Id., 157, 76; Dillon on Mun. Corp., sec. 791, and note 792, 793; Whart. on Neg., secs. 180–185, 190–194. It is claimed that the averment in the complaint, to wit, "That the plaintiff was lawfully in possession and entitled to have the possession," etc., contains two propositions; so, indeed, it does, but the denial in the answer is only a denial in manner and form, and admits the allegations of the complaint. The following are the assignments of error:

1. The court erred in sustaining the plaintiff's demurrer to all the new matter set up in defendant's answer to the plaintiff's amended complaint, which demurrer was filed August 22, 1879.

2. The court erred in refusing to give the jury the first instruction asked for by the defendant in the identical language used by defendant.

3. The court erred in refusing to give the jury the second instruction asked for by defendant in the identical language used by defendant.

4. The court erred in refusing to give the jury the third instruction asked for by defendant in the identical language used by defendant.

5. The court erred in refusing to give the jury the fourth instruction asked for by defendant in the identical language used by defendant.

6. The court erred in instructing the jury, as follows, to wit: "For the purposes of this case you will consider plaintiff's structures as if they had been built when he had a right to build them. The question whether the tide ebbs and flows over the land on which plaintiff's structures stood, or whether any part of his structures stood on land below the ordinary line of high-water mark, is not one which affects the plaintiff's rights to recover in this case upon these pleadings. Neither does the question whether or not any of his buildings were situated in an alley affect his right to recover here. The defendant has no right to litigate before you upon this trial the issue whether plaintiff had title or possession of the soil on which he had his buildings."

7. The court erred in instructing the jury as follows, to wit: "If under the foregoing instructions you find for the plaintiff, then you will assess, as his damages, a sufficient sum in dollars and cents to compensate him fairly for the damage done him; the compensation proper for him to receive may be classified for your convenience under two heads: 1. Actual damage done to the plaintiff's structures; 2. Loss of the use of his structures during the time he was actually and necessarily deprived of the use of them."

8. The court erred in instructing the jury as follows, to wit: "The actual and necessary cost of putting the buildings again in as good repair as that in which they were before the injury is the proper measure of the damage to the buildings themselves. The fair and reasonable rent of them during the time and to the extent the plaintiff was deprived of the use of them is the proper measure of damages for the loss of the use of them."

The refusal of the judge below to give the instructions asked would be error, for which this court would reverse the judgment, provided that the instruction requested was pertinent and consistent with the law and evidence of the case, and that such refusal has worked an injury to the party requesting the same: Stat. 1877, p. 46, sec. 4.

It seems that the judge below did not give the instructions asked, "in the identical language used by defendant." An examination of the charge, however, satisfies us that he did give substantially what was requested in the instructions asked, so far as the same was pertinent and consistent with the law of the case, and that the failure or refusal to give the instructions in the identical language could not, and did not work an injury to the defendant below.

The objections urged to the charge that "there was no limitation of *time* in the rule given by the court" respecting damages, we think is manifestly untenable in the light of the context; nor is there within the charge anything to be found in conflict with the doctrine that "the jury ought to judge of the action of the defendant by the facts present at the time the work was done," but on the contrary, that doctrine is clearly indicated throughout. Let the judgment of the court below be affirmed.

GREENE, C. J., and HOYT, J., concurred.

THE STEAMER ZEPHYR v. BROWN ET AL.

Filed July, 1880.

THE CERTIFICATE OF THE CLERK TO THE RECORD IN AN APPEAL IN ADMIRALTY should distinctly state that the matter sent up included all the pleadings, proofs, stipulations, decrees, and also everything filed or done by way of effecting an appeal.

THE MANNER OF TAKING AN APPEAL IN ADMIRALTY IS GOVERNED BY THE RULES of the civil law.

AN APPEAL FROM THE DISTRICT COURT IN A CASE IN ADMIRALTY will not be considered by the supreme court unless the same was allowed by the district judge. Such appeal must be taken during the term in which the decree appealed from was rendered, and must be made to the next term of the supreme court.

APPEAL from a decree of the second judicial district court. The opinions state the facts.

H. G. Struve, for the appellant.

Allen Brothers, for the appellees.

On a motion to dismiss the appeal the following opinion was rendered:

GREENE, C. J. Gauged either by the civil practice act or by the civil law, the clerk's certificate to the records in this case lacks fullness. Obviously, it should be broad and clear enough to show that this court is put in full possession of the cause. Distinctly apparent on the surface of the certificate should be the fact that the matter sent up included all the pleadings, all the proofs—whether testimony or exhibits—all the stipulations, on account or negation of all funds, all the decrees, and also everything filed or done by way of effecting an appeal. In this, the certificate before us is imperfect.

Such an appeal as is had in admiralty comes within no rules of practice prescribed in our territorial statutes. Legislatures of the territory have always been at liberty to provide, but have never provided, the manner of taking it. Our recourse, therefore, is to the civil law. Very few and simple steps, under that law, suffice to work an appeal. Everything that is necessary is clearly and seasonably to make it appear upon the files of the court below, and to the opposing party, that an appeal is intended and allowed, and that due security against damage from it has been given, and then to procure the pleadings, etc., to be brought into the higher court, with an accompanying certificate, showing that they embody the entire case.

Amendment of this certificate will be allowed, if desired, otherwise the motion of appellees will be granted.

HOYT and WINGARD, JJ., concurred.

Upon a subsequent motion to dismiss the appeal, the following opinion was rendered:

GREENE, C. J. In the former motion to dismiss this appeal, the reason urged was, that the clerk of the district court had failed in his certificate to specify that he had sent us all his files and proceedings. Now, three new grounds are pressed, namely: 1. That the record does not disclose any allowance of appeal; 2. That it does not show that the appeal was taken during the sitting of the district court nor at rendition of judgment; and, 3. That it does not show that the appeal was taken to the next term of the supreme court. That the record fails to show these things is clear, and, indeed, appellant's counsel so admits. He admits, also, as we understand him, what we have already on the previous motion

held to be true, that this appeal should have been taken according to the practice at the civil law. Yet he insists that the omissions of the record do not furnish good cause for dismissal.

Let us have recourse to the authorities to determine how this may be. In Phillips' treatise on the practice in the United States supreme court, p. 48, it is said, that "an appeal allowed, or writ of error served, is essential to jurisdiction," citing Minor v. Tillotson, 2 How. 392, and County of Washington v. Durant, Dec. Term, 1865. Great weight can not be accorded this statement, because the first case cited does not appear pertinent, and the second is not in the reports. However, upon searching other books, we gather that no appellate court will assume jurisdiction until it is first satisfied that an appeal has been allowed by the judge of the court below.

The allowance seems to have been invariably requisite, both in ecclesiastical and admiralty appeals, and was effected by the granting of apostles—literally, matter to be sent up—from the judge—short letters dismissory, stating briefly the case and sentence, and declaring that the judge will for further apostles transmit the proceedings now prepared for him and by him signed. His signature to these constituted his allowance of the appeal: 1 Browne's Civil and Adm. Law, 495; 2 Id., 438. Any particular formality by which the allowance is made to appear is not material: Hodgins et al. v. Kemp et al., 8 How. 530; Railroad Company v. Bradleys, 7 Wall. 575; Phillips' Pr. 47; and the allowance may be sufficiently evidenced by an agreement of parties in the appellate court to the fact: The Steamboat New England, 3 Sumn. 495, 509; yet actual allowance is regarded as essential, and *mandamus* will, therefore, lie to compel it where improperly refused: The Steamboat New England, 3 Sumn. 497, 509; Mussina et al. v. Carazo et al., 20 How. 280; 2 Abb. Pr. 239. Latitude exists as to proof of allowance, but none as to allowance itself: United States v. Haynes et al., 2 McLean, 155.

Let us next turn to the question of the time within which an appeal must be taken.

When there are neither rules of court nor statutes to govern, it seems that in this country the appeal must be taken during the sitting of the court granting the decree, or at least *apud acta; i. e.*, among other things done at the time of sentence: Norton v. Rich, 3 Mason, 443; The Steamboat New England, *supra*. Even were the mode of taking an appeal from a definitive sentence, within ten days, by writing, before a notary, in vogue in the United States, the appeal here would be bad, as neither taken in that mode nor within that time.

So far we have discussed only the first two grounds of the motion. Either of them, we think, constitutes a good reason for dismissing this appeal. Each is well founded in authority and is plainly decisive. Leaving them, we come to the third.

In the absence of rules to the contrary, we are of opinion that an appeal must be taken to the next term of the appellate tribunal holden subsequent to entry of the sentence. Good faith demands that the appellant prosecute with diligence. Having an appellate court provided to hear him at an early day, he should seize the day, and not keep his adversary waiting. This agrees with the practice in appeals from the district to the circuit courts of the United States under the forty-fifth supreme court rule, and though such appeals are not strictly analogous

to appeals from a district to the supreme court in this territory, and that rule is therefore of questionable application; we regard the procedure upon them as indicative of a practice fitting for us to follow.

Motion granted.

WINGARD and HOYT, JJ., concurred.

SEATTLE AND WALLA WALLA R. R. CO. v. AH KOWE ET AL.

Filed July, 1880.

AN OBJECTION TO A JUDGMENT, THAT IT IS INCONSISTENT with the pleadings, may be considered by the appellate court without producing the evidence.

CERTIFICATE AS TO THE EVIDENCE INTRODUCED AT THE TRIAL.—Where a trial was partly had in the district court, with the aid of the official reporter, and then discontinued on account of the retirement of the judge, and upon a rehearing by his successor the notes of the reporter were used as correctly presenting the evidence, the only certification as to the evidence introduced at the trial required, so as to bring the cause before the supreme court, is the certificate of the judge who tried the cause.

THE MECHANICS' LIEN LAW OF 1877 was intended as a substitute for and repeal of the law of 1873. No lien under the act of 1873 survived such repeal except as the same was continued by the act of 1877.

THE TIME WITHIN WHICH A MECHANIC, NOT THE ORIGINAL CONTRACTOR, MAY FILE HIS NOTICE of lien for work done on a railroad is limited by the act of 1877 to thirty days from the completion of the work or from cessation of labor thereon. Unless such notice is filed within such time the right to a lien is lost.

APPEAL from a judgment of the third judicial court. The opinions state the facts.

McNaught Brothers, for the appellant.

Thomas Burke and *Allen Brothers*, for the appellees.

Upon a motion to dismiss the appeal, the following opinion was rendered:

GREENE, C. J. In this motion to dismiss, the appellees urge that what purports to be the evidence is not sufficiently well certified to fulfill the requirements of section 453 of the civil practice act and section 10 of the act creating an official short-hand reporter. We do not understand it to be questioned, but that, aside from the evidence, the clerk's certificate sufficiently informs us that we have a full transcript. It therefore becomes material to inquire, whether the issues, which the appeal presents, are such as to call for a review of evidence. Looking into the record, we discover that at least one objection to the judgment below arises from an alleged lack of support in the pleadings. Light to explore the legal sufficiency of these pleadings can not be furnished by testimony. Given, however, pleadings good in law to sustain the judgment, and it then becomes necessary to produce the proofs and decide whether they too are sufficient. Objection is made that the complaint contains no cause of action. Inspection of the clerk's certificate, transmitting the transcript, shows that we have the complaint and the judgment here. No evidence can be anything but surplusage in determining the question of jurisdiction thus presented. To compel a defendant resisting a bad complaint to bring up evidence would be folly and oppression, for the transcript is full and complete without it. He was subjected to vexation and cost enough, in being obliged to push through the lower court over proofs unreasonably arrayed against him. Entering this

court to get redress, he ought not to be compelled to transport and marshal against himself, at his own expense, the futile forces of his adversary. Several certificates in this transcript would seem to have been procured out of commendable caution, and yet to be in fact entirely superfluous.

The parties had, it appears, begun to try the cause in the district court, and had proceeded so far, with the aid of the official reporter, as to have put in all their testimony and exhibits when the proceedings were interrupted by the incoming of a successor to the presiding judge. Rehearing before the new official followed as of course. Expense of reintroduction of proofs was obviated by both parties tacitly treating the notes of the reporter and the exhibits as if they correctly presented the evidence. Neither party ever questioned the propriety of hearing and determining the cause upon that basis, and accordingly thus it was heard and thus it was determined.

Getting the evidence up into this court by proper certificates seems to have been, under the circumstances, a matter of some perplexity, and it was sought to be accomplished by procuring one certificate from the retiring judge, a second from the incoming judge, and a third from the clerk, all under section 453, and still a fourth from the reporter under section 10. These certificates were all valueless except that from the incoming judge. He alone tried the case, and he alone could certify what constituted all the evidence on which he tried it.

Only when the evidence consists wholly of written testimony can it be certified by the clerk: Sec. 453; and written testimony is such only as after reduction to writing has received the assent of the witnesses: Coleman v. Lesler, 1 Wash. T. 591–593. For the reporter's certificate there could be no use, because the cause was not tried on the evidence taken down by him as upon evidence taken under the reporter's act, but rather as upon a certain mass of writing, having no longer any official solemnity or sanction for the purposes of that trial, but utilized by consent of parties for convenience' sake, to speak the facts as they would be spoken if the witnesses were recalled.

Gowan v. Petit et al., Pincus et al. v. Light, and Coleman v. Lesler have been cited by counsel to sustain this motion. Of these cases the first two differ from the one before us in not presenting any question of insufficiency of the pleadings, and the last differs from all in having, aside from the evidence, a defective clerk's certificate. Dismissal in the last case was granted upon the simple ground that the certificate brought up nothing at all. In delivering its opinion the court intimated that they were satisfied from what they saw in the record that all the evidence could not be produced before them, and that consequently it would not be likely to avail the appellant to get an amendment of the certificate. We did not at the time have fairly before us the question whether, if the pleading were objected to, we would insist on having the evidence brought up on pain of otherwise not hearing the case, and our suggestions about the impossibility of reaching the evidence must be taken as importing that the complaint was not regarded open to the exceptions urged to it. It is our present opinion that when the objection to the judgment is that it does not consist with the pleadings, then it is not necessary to bring up the evidence, but that otherwise the production of the evidence is essential.

Let the motion be denied.

HOYT and WINGARD, JJ., concurred.

Afterward the following opinion was rendered on the merits:

GREENE, C. J. The appellees filed their complaint below to enforce labor liens, and after decree in their favor, are brought here on appeal. Hasty reading of their complaint might impress one that under our code system of pleading it does not sufficiently set out the fact of indebtedness, and on this ground it is assailed by the defendant. Evidently it was modeled on a common-law count of *indebitatus assumpsit*, and we do not doubt its allegations would have stood good, as such a count, at common law. Enough appears in it, we think, to support proof either of a special or implied *assumpsit*. A court might, in its discretion, upon motion to make such a complaint more definite and certain, allow the motion, especially if peculiar facts were shown rendering it likely that justice would be thereby promoted. Refusal, however, would be no ground to invoke the action of an appellate tribunal, unless there was a plain abuse of discretion. The facts, as we gather them from the pleadings and proofs, show labor of such a description as would entitle to liens, either under sections 2 and 5 of the lien law of 1873, or sections 19 and 23 of the lien law of 1877, and may be briefly stated, with sufficient fullness and precision to answer all present purposes, as follows: Heavy excavation and grading was needed to construct that part of appellants' road-bed which lies between Rentonville and Newcastle. In order to accomplish the work, the appellant, on the twenty-second day of June, 1877, entered into a contract with one L. D. Frank, whereby the latter was to move, at agreed rates, whatever earth, gravel, or stone might be encountered in the course of the undertaking. Subordinate workmen were procured by Frank under an agreement made between him and certain Chinese, not parties to this litigation, who, by the terms of the latter agreement, and in consideration of a share in the profits of his contract with appellant, agreed to and did supply him with laborers for his enterprise.

These appellees were among the laborers so supplied. Held by no special contract made with themselves, they worked by the day or half-day, and were to be paid at the rate of so much a month, according to the actual time spent in labor. Each belonged to a gang of twenty-five or thirty, superintended by an overseer or "boss," who kept in a book a tally of their time. Lack of the time-books thus kept is one of the features in this case, and either because of that lack or from want of memory in the witnesses, or from some other cause, the days on which any particular plaintiff worked is—save in three instances—involved in impenetrable obscurity. On the testimony it perhaps sufficiently appears that none of the appellees were paid for any work done in November or December, and that many of them worked continuously during both months till and including December 17th, but who any of them, save three, were, does not appear.

Really, it is impossible by any process to pronounce upon some probably meritorious claims, because we can not tell to whom by name the claims belong. During the months of November and December, however, up to and including the seventeenth day of the latter month, Hom Wah, Guom King Goi, and Lee Kee, three Chinese bosses, worked for Frank, as appears from the testimony, at the rate of thirty dollars per month, for such a number of days as to have earned respectively the sums of seventeen dollars and ninety cents, thirty-two dollars and forty cents, and twenty-five dollars and sixty cents. Some of this work of

theirs was done prior to the eighth day of November, the day on which the last mechanics' lien law was approved and went into effect, and the rest of it was done subsequently. An apportionment of the whole amount between the period before the approval of that act and the period after can not be arrived at upon the testimony, unless by applying some principle of computation. No notice of lien was filed in the auditor's office by these three, or by any others of the appellees, until the sixteenth day day of January, 1878, on which day all of them, without exception, caused to be filed in that office notices good and sufficient in form, that they claimed liens upon the railroad for their work.

Diligent search for the somewhat voluminous transcript in this case, and careful examination of the testimony, have assured us that the foregoing are all the facts material to our decision. The judge of the district court seems to have been able to find an indebtedness in a sum certain in favor of each of the appellees, but no satisfactory basis for such a finding is disclosed to us, either in the pleadings or evidence. He appears to have found further regarding all, that they worked until and including the seventeenth of December. Evidence or admission to sustain this in case of any, except the three already mentioned, is, we are convinced, entirely wanting. From this survey of the facts, we pass to inquire as to the law which must control our judgment. Under the lien act of 1873, or that of 1877, or both, the rights and remedies intended to be given are to a great degree alike, and the general aim of the two acts is for the most part, so far as they deal with similar matter, the same; and yet, on a careful comparison of the two throughout, we are thoroughly satisfied that the latter is intended as a substitute for, and not in any of its provisions as a continuation of, the former. Liens or rights accrued, and actions or proceedings commenced, under the old law, are fully kept alive by section 38 of the new, but the old law itself is repealed. No lien, right, action, or proceeding survives because of the survival of the old law, but rather only because in the destruction of the old it is rescued and revived by the new.

Every proceeding to enforce a right accrued under the older statute must conform as far as practicable to the requirements of the younger. Sixty days after the completion of the work in hand, or in case of railway labor or material, from the last day of the month in which the labor was done or material furnished, was the time granted to all persons, by the law of 1873, within which to file their lien notices. Sixty days from the completion of the work, or from cessation of labor thereon, is, under the law of 1877, allowed to the original contractor only, and every person save him has but thirty days. The lien claimants in any case, whose labor ended on the day the old law perished, would be obliged to file their notices under the new law, and unless they were original contractors would have no more than the thirty days limited therein within which to do it. Here the labor of appellees, prior to November 8th, was not done under any continuing contract to which they were privy, and which as an entirety ran on beyond that day, and was, upon supervention of the new statute, recognized therein and preserved for completion, but it was a service from day to day, freely divisible, to which the new law put a full stop. Every shovelful of excavation afterwards was lifted under the new law.

Referring now to the character of appellees' services, and to the time when their notices were filed, we see at once that none of them were

original contractors, and none of them filed their notices within thirty days after the approval of the new law. Energy, therefore, to create or preserve a lien for work done prior to that date did not reside in the notices, and liens as to any such work must be denied an existence. Only the three overseers above named have proved their claims with sufficient certainty to entitle them to judgment for labor since that date. For determining what the fair money value of this part of the entire labor of the overseers is, we think it equitable, under all the circumstances, to resort to the method of average. The whole time overspread by their unpaid work is forty-seven days, eight of which had expired before the new law became operative. Hom Wah, Guom King Goi, and Lee Kee are therefore entitled to liens for thirty-nine forty-sevenths of seventeen dollars and ninety cents, thirty-two dollars and forty cents, and twenty-five dollars and sixty cents respectively. Each of them will have judgment accordingly, and the judgment of the district court as to each of the other appellees will be reversed.

Let the three named appellees be allowed an attorney's fee of one hundred dollars, and their costs and disbursements in this court and the district court, and let this cause be remanded to the district court for further proceedings.

WINGARD and HOYT, JJ., concurred.

SUPREME COURT OF WYOMING.

McLAUGHLIN v. UPTON, Assignee, etc.

Filed April, 1883.

MOTION FOR NEW TRIAL, WHEN MUST BE MADE.—Court has no power to extend the time for making a motion for a new trial upon the oral *ex parte* application of the party desiring to move. Such extension can only be made upon written grounds showing how the moving party has been unavoidably detained. The provisions of the compiled laws governing this subject, sections 308 and 309, are mandatory, and unless they are observed the appellate court acquires no jurisdiction.

AN OBJECTION TO A MOTION FOR A NEW TRIAL ON THE GROUND that the same was not made in time is not waived by arguing such motion.

ERROR to the district court for Laramie county. The opinion states the facts.

C. N. Potter, for the plaintiff in error.

W. W. Corlett, for the defendant in error.

SEWER, C. J. This was a civil action, brought in the district court for the first judicial district, in and for Laramie county, by Clark W. Upton, assignee of the Great Western Insurance Company, against Daniel McLaughlin, as a stockholder in said company, to recover the balance alleged to be due and unpaid on his stock. The case was tried on the pleadings in the court below, by a jury, and a verdict rendered for the plaintiff for one thousand and eight dollars. Upon the case coming into this court, the judgment below was reversed upon the former hearing, on the ground that the action was barred by the statute of limitations, which claim was first made in this court, and the case was thereafter heard in the United States supreme court, and remanded here for hearing

upon other questions, this court being reversed upon the question of statute of limitations: *Vide* 15 Otto, 640. The petition in error puts in issue in this court several questions respecting the admission of testimony and the instructions of the court to the jury.

The defendant in error raises for consideration here, in his brief, the fact that the motion for a new trial in the court below was not filed in time, and submits it to the consideration of this court. The case was tried in the court below, and a verdict rendered on the fifteenth of December, 1876, against the defendant, and in favor of the plaintiff: *Vide* page 60 of the printed record. The motion for a new trial was filed on the sixteenth of February, 1877, or a period of more than sixty days thereafter. The reasoning, authorities cited, and conclusion reached in Kent v. Upton, Assignee, 1 West Coast Rep. 700, this day decided, apply to, and should govern, we think, in the decision of this case. The records are slightly different. In this case we find the following journal entry in the record before us, page 55:

"November term, 1876. Monday, December 18, 1876. Clark W. Upton, Assignee in Bankruptcy of the Great Western Insurance Company, v. Daniel McLaughlin.

"On application of Thomas J. Street, Esq., of counsel for defendant, it is ordered that the time for filing a motion to set aside the verdict and grant a new trial herein, be extended until the end of the present term of the court."

Preceding this, but no part of the journal entry, is this statement: "And thereafter the court, on the request of the defendant, and for good cause shown, made the following order in said case." It looks as if this was inserted to cure the plainly invalid order of December 16, 1876. Does it do so? Plainly, we think not. The most that can be said of it, we think, is, that it is to be treated and considered as if embraced in the body of the order of December 16, 1876. If this be conceded, it is still liable to the objection that it was purely *ex parte;* but it may be claimed that it should have been excepted to. If this be insisted on, the answer is, that by the compiled laws of Wyoming the party excepting must do so at the time the decision was made: *Vide*, sec. 300, c. 13, p. 71. How could this be done if the party were not present in court either in person or by counsel? and there is no pretense in the order that both parties were present. But there is another journal entry that it may be claimed cures this. It is the journal entry made on the thirty-first of March, 1877, when the bill of exceptions was allowed. It is in that order recited, both parties being in court by their attorneys, that the defendants present their bill of exceptions, which is agreed upon by both parties to this suit. The answer to this is, that it states only that what is set forth is true. Giving to this all the weight it is entitled to, it results that nothing more is to be inferred than that such a journal entry was by the court made orally and *ex parte*, and for what the court, upon an *ex parte* hearing, deemed good cause, in spite of the fact that by sections 308 and 309 a motion for a new trial can only be on written grounds.

Nor is the defendant in error to be deemed to have waived any of his rights by appearing and arguing the motion for a new trial. The defendant in error, it is true, might have moved to dismiss the motion, because not filed in time; but there is nothing statutory requiring this. He may have relied upon this very fact in the argument of his motion in the court below; and that court may have considered and acted on

the fact that the motion on written grounds was not filed in time, and may have, upon reflection, come to the conclusion, as it should have done, that it had no authority to grant any such *ex parte* order as it attempted to do by its order of December 16, 1876, although there is nothing to show this. But it is unnecessary in any common-law order for the court to give its reasons, though it sometimes happens that a trial court will say, for reasons stated in writing, and filed with the papers, it reaches a given conclusion.

There is nothing in this record to show that the order of December 16, 1876, was a consent order, or to show that the defendant had been or would be unavoidably prevented from filing his written motion within the statutory time. There is nothing to show that the party asking for this oral and *ex parte* order was unavoidably prevented. These are strong words, and, as we have said before, they are mandatory words. To dispense with the requirement of being "unavoidably prevented," something more is required than the mere will of the judge, or the wishes of one party to the suit. In this record these two things alone can be relied on. Surely it could not have taken sixty days to prepare and present such a motion as the one filed with the transcript in this case. The extension of time granted on the sixteenth of December, 1876, being, as the record shows, *ex parte*, does not relax the rigor of the statute, although purporting to be for good cause shown, does not bind the defendant in error, or preclude him from relying on the plain letter of the law in this court, as it ought to have availed him in the court below. In reaching this conclusion we are aware that we are reversing an opinion rendered by this court at its March term, 1879, but in our opinion the conclusion reached is so manifestly erroneous that we deem it a bounden duty to do so. That opinion, which must have been hastily reached and rendered, says that whether the oral motion of December 16, 1876, was treated as jurisdictional or merely a conditional limitation of the discretion of the district court, or whether the statute is to be treated as directory, the motion to dismiss on either ground should be denied, that motion having been then made.

In the views heretofore given in this case in this opinion and in that of Kent v. Upton, Assignee, 1 West Coast Rep. 700, we have by reasoning and authority shown that the statutes of this territory regulating the granting of new trials are neither matters of discretion nor directory statutes; and further, we hold that every motion for a new trial must be upon written grounds, and that any party coming in after his right to file his motion for a new trial has expired must do so upon written grounds filed at the time of coming in, and then showing how and in what manner he has been unavoidably prevented. This being true, it follows that the question is a jurisdictional one; but jurisdictional as to this court, and not as to the lower court. A party can only bring his writ of error or appeal here as the statutes allow. When the statutes are followed as they are written, this court acquires jurisdiction. When they are not followed, this court lacks jurisdiction. And no consent of parties, nor *ex parte* unauthorized order of a *nisi prius* judge, can give it jurisdiction. Whenever that act is made to appear in any stage of the case from the record, it is not only the right but the duty of this court to release its hold improperly obtained; because the steps necessary to be taken in the lower court to give us jurisdiction here not having been taken, and imparting to the judgment of the court below the verity it is always entitled to until error is

shown in it or the proceedings by which it was obtained, it is our duty to affirm it, there being no error before us here to examine. We do not look into the record. Let the judgment be affirmed.

PARKS, J., concurred.

BLAIR, J., dissented.

HALLACK ET AL. *v.* BRESNAHEN.

Filed November, 1883.

WRIT OF ERROR MAY BE DISMISSED WHERE NO ABSTACT OF THE RECORD IS FILED as required by the rules of the supreme court.

REFUSAL, DURING THE TRIAL, OF AN AMENDMENT TO AN ANSWER setting up a new defense is not error when the defendant fails to affirmatively show that he did not know of such defense before.

A FINDING WILL NOT BE DISTURBED when the evidence is conflicting.

BUILDING CONTRACT—LIABILITY OF CONTRACTOR UNDER.—When a party contracts to build a house of suitable materials and in a workmanlike manner, and violates his contract, the party injured may either refuse to pay the contract price of the building to the amount to which he is damaged, or he may pay for and take possession of the building and then sue and recover of the builder the amount of his damages. Such recovery may be had whether the breach of the contract was known at the time of payment or not.

SUCH PAYMENT IS NOT A WAIVER OF THE RIGHT OF ACTION for failure to perform the contract so as to discharge the contractor or his sureties.

AN ESTOPPEL CAN NOT BE FOUNDED UPON WORDS, ACTS, OR SILENCE, unless they were intended to lead the party who seeks to set up the estoppel to act upon them, and he did so act to his injury.

ERROR to the district court for Albany county. The opinion states the facts.

C. N. Potter and *Decker & Yonley*, for the plaintiffs in error.

Corlett & Rosendale, for the defendant in error.

PARKS, J. In this case the defendant in error filed his motion to dismiss the writ of error, and supported it by a number of points, arguments, and authorities. The third point made and insisted on is that the plaintiff in error did not file with the clerk of this court printed abstracts of the record at the time, in the manner, and in the form required by law.

The statute of this territory provides that the rules of practice of this court shall be as binding upon the several courts and the parties practicing and having business therein as though the same were enactments of the legislative authority of this territory. One of the rules of this court requires "that the plaintiff in error shall deliver to the clerk fourteen printed copies of an abstract of so much of the record as is necessary for a full understanding of all the questions presented to this court for decision," and "if the defendant in error shall deem the abstract of the appellant or plaintiff in error imperfect, he may, within twenty days after the delivery of said copies to the clerk, deliver to the latter fourteen printed copies of such further or additional abstracts as he shall deem necessary to a full understanding of the questions presented to this court for decision."

The abstract here made imperative is not the transcript, which is a full copy of the record, but an epitome, abridgment, or compendium, in which is condensed the substance of the record so as to enable the court,

in the language of a learned judge, to extract the controversy in the case from the mass of matter unconnected with it without performing hours of labor which ought to have been done by the counsel for appellant under the rule which is so reasonable in itself and so necessary, and indeed indispensable, to the progress of the court in the discharge of its duty."

Perhaps there never was a case in this court that more clearly illustrates the utility of this rule and the necessity of its enforcement than the present one. The transcript consists of four hundred and forty-two pages, and the errors assigned were originally seventy. No abstract has been filed, and as the case stands the court is obliged to examine this entire record. The supreme courts of Indiana, Illinois, Missouri, California, and other states often dismiss cases for similar violations of their rules. In the Buckley cases, in 60 Illinois, the court say, among other things: "Appellant in each case has failed to prepare and file an abstract of the record, but there has been filed in each case a printed index to the transcript. We presume the attorney was aware of the rules of the court, and has intentionally disregarded them. As the cases have not been prepared as required by the rule, we decline to consider them, and affirm the judgments." And so we should be obliged to dispose of this case had it not been continued with the express understanding that it should be heard and decided upon its merits.

The case is fairly stated by both parties, and is substantially as follows: The defendant in error brought an action against the plaintiffs in error upon a bond given by them to the defendant in error in the sum of five thousand dollars, conditioned that if the firm of Dawson & Hawes, who had made a contract with the defendant in error to erect, build, and complete a two-story brick building for him, should well and truly perform said contract in all things, according to the specifications, the bond should be void, otherwise in force.

The petition in the case alleged the making of said building contract, and the bond to secure the performance of the contract, and that said Dawson & Hawes proceeded to erect said building, but failed to comply with the terms of the contract under which the building was to be erected, in that they built the walls of the cellar of said building of half-burned casing brick, and laid up the walls of the building with bank-sand mortar, whereas, by the terms of the contract, said cellar walls were to be built of arch hard-burned brick, and the walls were to be laid up with fresh lime and sharp-sand mortar.

The petition further alleged, that in consequence of the failure of said Dawson & Hawes to erect said building in the manner required by their contract in the particulars before stated, it fell down, became entirely ruined, to the damage of the plaintiff five thousand dollars, for which he asks judgment. In due time Hallack Bros. made answer in the case, setting up six defenses. Dawson & Hawes were not served with process, and did not make any appearance in the case.

The defendants, Hallack Bros., made, in substance, the following defenses:

1. They admitted the contract between Dawson & Hawes and the plaintiff in the action, Mr. Bresnahen, for the construction of the building, and also admitted the execution of the bond conditioned for the performance of the contract; they further admitted the allegations of the petition in respect to the character of the brick which were to be used in the con-

struction of the cellar walls and the character of the mortar to be used in laying up the walls, as fixed by the terms of the building contract; they also admitted that Dawson & Hawes did construct the said building, but deny that they failed to comply with the terms of said building contract in the respect set out in the petition; they admit that the building fell down, but deny that it fell in consequence of the failure of Dawson & Hawes to comply with the terms of their contract; they deny that any furniture or other property of the plaintiff was injured by the fall of the building.

2. The second defense set up by the defendant is, in substance, that the plaintiffs, when the building was in course of construction, made the payments therefor as provided by the contract, and when the building was completed that he accepted the same as completed under the contract, and remained in the same until it fell, without notice to Hallack Bros. of any objection on account of any supposed failure on the part of Dawson & Hawes to perform their contract. It is further alleged in this defense that by the construction contract disputes on account of imperfect construction of the building were to be settled by arbitration, wherefore it is further alleged that the plaintiff waived his right to a strict performance of the contract, and by his acquiescence deprived the defendants Hallack Bros. of their indemnity as sureties, and of their opportunity to have any disagreement between Bresnahen and Dawson & Hawes adjusted by arbitration.

3. The third defense is substantially the same as the second, except that it is alleged that the plaintiff paid the several sums to be paid by him under the contract, including the last payment, without insisting that said building was not completed according to the contract, although at the time of making the last payment it is alleged that the plaintiff well knew of the defects in the building of which he complains in his petition, from which it is concluded that plaintiff accepted the building and waived strict performance, etc.

4. The fourth defense alleges that after the completion of the building, differences arose between Dawson & Hawes and the plaintiff as to the manner in which said contract had been performed, which were submitted to arbitration, pursuant to the contract, an award made thereon, and performed, from which it is concluded and averred that there was an accord and satisfaction as to all such matters of difference in respect to the construction of said building.

5. The fifth defense is, in substance, that at all times from the completion of the building until shortly before the commencement of this action, the said Dawson & Hawes each were solvent, but since and before the bringing of this action, became insolvent, wherefore the defendants say that by virtue of the several acts of the plaintiff as aforesaid, the defendants were led to suppose that plaintiff had waived or settled his objections to the want of strict performance of the building contract, and that Hallack Bros. were thereby prevented from seeking their indemnity against said Dawson & Hawes before the accruing of their several insolvency.

6. Hallack Bros., as a sixth defense, aver that after the making of said building contract, and during the construction of the building, the plaintiff, without the consent of Hallack Bros., agreed with Dawson & Hawes that the work of the construction of said building should be otherwise than as prescribed by the specifications of the contract, and that

the building should not be constructed until after the tenth of November, 1875, and that the building was constructed in a manner otherwise than according to the contract, and was not completed until after November 10, 1875, without the consent of defendants, Hallack Bros.

Upon the issues thus formed the case came to trial in Albany county, where it had been taken by change of venue by Hallack Bros., and was tried by the court without a jury on the thirtieth and thirty-first days of March, and the first and second days of April, 1881. The plaintiff, to maintain the issues on his part, put in evidence the bond sued on and said building contract, and they were received without objection. The defendants, Hallack Bros., then produced certain evidence. The plaintiff then furnished certain rebutting evidence. On the fourth day of August, 1881, the court announced and filed its decision, with findings of law and fact; to each and all of which findings, and the order for judgment thereon, the defendants excepted. Hallack Bros. then filed a motion for a new trial on the fifth of August, 1881, setting forth sixty-seven grounds therefor. Said motion for a new trial was overruled on the twenty-fourth day of August, 1881, to which Hallack Bros. excepted, and a bill of exceptions was allowed and signed on the said twenty-fourth day of August, 1881. At the February term, 1881, and on the second day of April of said term, an order was made and entered giving the parties until and including the first day of the next term of the court to reduce all exceptions to writing which were taken on the trial of the cause. On the fourth day of August, 1881, the same day on which the finding and decision of the court in the case were made and filed, judgment was entered in favor of Bresnahen, and against Hallack Bros., for five thousand dollars.

In examining the mass of matter contained in this record, we find that the merits of the case may be properly disposed of by deciding the questions involved in the motion to amend the answer by adding what is called the seventh defense, and growing out of the alleged *waiver* of his rights under the bond sued by the defendant in error, as set forth in the second and third defenses.

Upon the third day of the trial, and after the greater part of the evidence had been introduced, the plaintiffs in error moved to amend their answer by adding the following at the end of it: "For a seventh answer thereto, defendants say that after the making of said contract, and during the construction of said building, the plaintiff, without the consent of these defendants, made payments to and for the use of the defendants Dawson & Hawes, on account of the construction of said building, in advance of the time specified in said contract for the payment" thereof.

This defense was ably and thoroughly argued, and had it been pleaded in the right time and manner, and sustained by proof, it might have been a bar to the action. But to give plaintiffs in error a right to this proposed amendment to their pleading at that stage of the trial, they should have shown affirmatively that they did not know of the defense before. For aught that appears in the record, they may have known this before the trial. Counsel say in their argument in this court that they did not know it. But the record does not show that the court was in any way properly advised of that fact.

On the contrary, the inference is strong from the cross-examination of Bresnahen, on the two hundred and fifteenth page of the transcript, that plaintiffs in error knew of that defense before the examination of Bres-

nahen, for the attorney who conducted that cross-examination for them first disclosed in a question to Bresnahen that there had been a discount of fifty dollars. It was not Bresnahen who disclosed that fact to him. He must have learned it from his clients.

As to the alleged waiver, the district court found as a matter of fact that the plaintiff neither excused nor waived a strict performance by Dawson & Hawes of the contract, nor induced the sureties to believe that he had so done, or had waived, settled, or discharged any claim for the want of such performance.

The question upon this finding is not whether it is sustained by a preponderance of the evidence, but whether it is so much against the weight of the evidence as on the first blush to shock the sense of justice. While it is true that there is considerable evidence on the question in favor of the plaintiffs in error, it is also true that there is strong evidence on the other side. The testimony of the defendant in error himself is very decided and positive, and it is sustained by part of the testimony of Durbin, and by other facts and circumstances in evidence. It is proved that he not only occupied the building for business, but that both he and his nephew slept in it from the time it was finished, and that they were lodging in it when it fell. These facts can hardly be reconciled with the belief that he knew how insecure the building was, owing to the bad material put in it by Dawson & Hawes. The testimony as to what was said and done by the parties when Bresnahen objected to Dawson & Hawes putting poor brick in the building, and one of them promised him it should not be done, shows that he did not intend to waive his rights under the contract and bond. As to the bad mortar which, according to the testimony, more than the unsuitable brick was the cause of the falling of the building, there is but little evidence to show that he knew its true character till after the building fell. He says positively that he did not.

When a man contracts to build a house upon the land of another of suitable materials and in a workmanlike manner, and violates his contract, either as to the work or materials, to the substantial injury of the other, the party injured may either refuse to pay the contract price of the building to the amount to which he is damaged, or he may pay for and take possession of the building and then sue and recover of the builder the amount of his damages. And he can recover whether he knew of the breach of contract by the other party at the time of payment or not. In neither case is there any waiver of his rights under the contract. Where there is a bond, as in this case, the only limit to his right to recover is the five years prescribed by the statute of limitations.

The theory of the plaintiffs in error seems to be that though this may be true of the principals, the sureties on the bond were released by the conduct of the defendant in error, and especially by his making the last payment and occupying the building without objection till it fell.

An examination of the testimony of E. F. Hallack, one of the sureties and plaintiffs in error, leads us to the conclusion that he must have known quite as much about the materials that went into this building as Bresnahen. He was an experienced builder, had built several houses in Cheyenne, and knew what kind of materials were necessary to the erection of a good building there. He was there about the time this building was begun, when it was finished, and immediately after it fell, and probably during the time of its construction. He furnished part of the

materials, and was interested to have the final payment made by Bresnahen to Dawson & Hawes, so that he might get his money for the materials he had furnished. He seems to have been there at that time for that purpose, and, as a matter of fact, did then get his money. It may be that his interest in the building was one reason for his executing the bond. The Hallacks, as sureties on the bond, were deeply interested pecuniarily in a proper construction of the building. They were under obligation to know the character of the materials used in its construction, and had ample opportunities of learning all about it. The doctrine of constructive notice and of waiver applies to them quite as strongly as to Bresnahen. The reasonable inference from their conduct is, that they consented to the final payment in order to get their share of the money, and took their chances of whatever might afterwards happen from its bad construction.

At the close of their argument upon the defense of waiver, plaintiffs in error claim, but do not very strongly insist, that defendant in error is estopped by his conduct from recovering in this action. But an estoppel can not be founded upon words or acts or silence, unless they were *intended* to lead the party who seeks to set up the estoppel to act upon them, and he did act upon them, and act to his injury. In this case no estoppel is pleaded and none is proved. Or, rather, if there be any estoppel in the case, plaintiffs in error are estopped by their silent acquiescence in Bresnahen's making the final payment to Dawson & Hawes, and their prompt action in taking their share of the money. Had they objected to that payment, they might perhaps have made out an estoppel *pro tanto.*

For reasons suggested above, we decline to go into any further discussion of this case. Before the close of the trial in this court, the greater part of the errors assigned were either expressly or by implication abandoned. It is evident, from the argument upon the two principal defenses we have been considering, that plaintiffs in error relied principally upon them. Upon one of them, the defense of waiver, the argument was exceptionally lengthy, earnest, able, and determined. These two principal defenses are so far decisive of the case that plaintiffs in error would be entitled to a reversal of the judgment if they had sustained either of them. On the other hand, failing in both, they could not succeed, for they involve the entire defense. But be that as it may, this court, after careful consideration of all the errors assigned and insisted upon in argument, feels constrained to say that the court below committed in the trial and decision reached in this case no such error as can or ought to vitiate or reverse the judgment rendered below and now here under review.

The judgment of the district court in overruling the motion for a new trail is affirmed.

All concur.

DONOVAN *v.* THE TERRITORY OF WYOMING.

Filed February, 1884.

GRAND JURORS—CERTIFICATE OF DRAWING.—Where the certificate of the county clerk, sheriff, and justice of the peace recited that certain named persons were "drawn to serve as grand and petit jurors at the September term of the third judicial district of the territory of Wyoming, to be held at Sweetwater county," the omission of the word "court" from such certificate will not vitiate an indictment found by such grand jurors.

A WRIT OF ERROR TO REVIEW THE JUDGMENT of the district court in criminal cases will be allowed only when the appellate court is satisfied, from an inspection of the transcript of the record, that error has been committed.

PETITION for a writ of error to the district court for Carbon county. The opinion states the facts.

Blake & Brown, for the plaintiff in error.

Merrill & Corlett, for the defendant in error.

SENER, C. J. Leroy Donovan, *alias* Jack Lee, by counsel, applies by petition for a writ of error to a judgment and sentence of death, rendered against him in the district court in and for the third judicial district, sitting in and for Carbon county, on the twenty-third of October, 1883, in order to bring the case, as shown by the record, into this court for review. There is filed with said petition, and made a part of it, a transcript of the record. From an examination of said transcript it appears that a motion for a new trial was made in the court below on the eighteenth of October, 1883, which was argued and denied, and to the court's order of denial an exception was taken, and there the matter ended. There was no bill of exceptions taken, and no time was asked for in order that a bill of exceptions might be prepared and presented. The district court for the county of Carbon has adjourned for the term, and it is now too late to bring the evidence and any record into this court for review, save such as is presented in the transcript before us.

The only question which the record presents is the action of the court below in sustaining a demurrer to a plea in abatement to the indictment. The ground on which it was sought to avoid the indictment by plea in abatement was, as shown by the record, this: The certificate of the county clerk, sheriff, and justices of the peace, as returned to the clerk of the district court, certified certain named persons "drawn to serve as grand and petit jurors at the September term of the third judicial district of the territory of Wyoming, to be held in Sweetwater county, September 17, 1883," the word "court" being omitted from the certificate.

It is not pretended that the jurors, grand and petit, were not drawn as required by law, but for this defect, *i. e.*, the omission of the word "court" after the word "district" in the certificate, it is claimed that the indictment should have been abated. The certificate shows the drawing was had in the clerk's office of the county clerk of Sweetwater by the county clerk, sheriff, and two justices of the peace.

We judicially know that the first day of the term of court for that county was on the seventeenth of September, 1883, and that under the laws of this territory there was no other court in that county at that time for which jurors, grand and petit, or grand or petit, could have been drawn, except the district court for Sweetwater county, in the third judicial district, which court, by the laws of this territory, had jurisdiction of offenses such as the one charged in the indictment against this convict.

The trial court properly disposed of a demurrer to this plea in abatement to the indictment by sustaining it, even if it be conceded that this was the proper way to reach and to take advantage of such an objection.

Sections 188, 189, 190, and 191 of the compiled laws point out how criminal cases on writs of error may be brought into this court for review, and provide that writs of error may be allowed by this court, or any two judges thereof, in cases punished capitally, for good cause shown. Here there is not only no good cause shown, but absolutely no cause.

It is provided by section 1869 of the revised statutes of the United States that writs of error shall in all cases be allowed from the final decision of the district courts, *under such regulations as may be prescribed by law.* The regulations to be prescribed by law, we take it, mean *the rules of law by which this right is to be exercised.* It does not mean that every criminal shall have the right to suspend and supersede the judgment of a district court, for such judgments import verity, and that they were correctly rendered, until the contrary be affirmatively shown. It means that where a criminal feels aggrieved, he may file, as in this case, a transcript of the record, together with his petition, which the court or judges shall inspect, and if there shall seem, upon such inspection, to be error in the record which should be reviewed, then the supreme court, or judges, will allow the writ of error, suspend the execution of the sentence, order argument, and fully consider the case. In civil cases, the writ of error is a writ of right, because no party can supersede a judgment in a civil case until he, she, or they shall have executed an undertaking, with good and sufficient security, to pay all costs, interest, and damages to the extent of five per cent., if it shall turn out that there was no good cause for suing out such writ of error and having the case determined in the appellate court, or if it shall appear to an appellate court that the writ of error was prosecuted for delay only. If, in criminal cases, judgments and sentences of the district courts could be superseded and suspended at the whim of criminals, or merely at the suggestion of counsel, it is not hard to see that the criminal code of the territory might easily be set at naught.

Such was never the intention of congress or the territorial legislature, and its legislation is in harmony with the law of congress. We have no hesitation in pronouncing such an act as that of this territory regulating writs of error in criminal cases to be in the line of legislation contemplated by congress as the regulation prescribed by law governing such writs of error. This court, acting under it, are unanimously of opinion that there is no error in this record, and not only no good cause shown, but no cause shown why a writ of error should be granted.

Writ of error unanimously denied.

All concur.

SUPREME COURT OF CALIFORNIA.

No. 8,523.

ANTHONY, Adm'x, etc., *v.* CHAPMAN ET AL.

In Bank. Filed February 18, 1884.

A RECITAL IN A DEED THAT THE CONSIDERATION THEREFOR WAS PAID by the grantee is presumptively true. Such presumption may be overcome by parol evidence, but to have that result, the evidence must be full, clear, and satisfactory. The evidence in this case in support of a finding that the consideration for the conveyance of the property in question was not made by the grantee named in the deed, reviewed, and held not to comply with these requirements.

AN EXECUTOR WHO STATES in his petition for letters testamentary, and in the inventory of the estate, that certain property belonged to the testator, is not estopped from afterwards claiming such property as his own.

AN AUTHENTICATED COPY OF THE RECORD OF A DEED IS PRIMA FACIE EVIDENCE of the genuineness, due execution, and delivery of the original deed.

APPEAL from a judgment of the superior court for Santa Clara county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. This was an action of ejectment brought by the administratrix of the estate of Mary A. Smith. The plaintiff claimed title by virtue of a conveyance from one Bird. The defendants claimed that such conveyance was made to Mary A. Smith, in trust for J. P. Smith, who paid the consideration therefor, and under whom they derived title. The further facts appear in the opinion.

Moore, Laine & Johnston, for the appellants.

Burt & Pfister, for the respondent.

SHARPSTEIN, J. The most important question presented by the record is, whether the finding that the consideration for the conveyance from Bird to Mary A. Smith was furnished by J. P. Smith is justified by the evidence. The deed recites that the consideration was paid by Mary A. Smith, the grantee therein, and while the express declarations of the deed, in that respect, may be controlled by parol proof alone, it is well settled that such evidence must be full, clear, and satisfactory. Nothing appearing to the contrary, the presumption is that the consideration was paid by the grantee in the deed; and while this presumption may be overcome by parol evidence, to produce that result such evidence must be of the character above stated.

In this case there is no direct evidence that the purchase price of the demanded premises was paid by J. P. Smith, or that the money paid therefor had ever belonged to him. There is evidence tending to prove that he was at one time possessed of means sufficient to pay said purchase price, and that Mary A. Smith was not. But there is no clear or positive evidence of this. Aside from evidence of her circumstances before she came to this coast, there is nothing beyond what some of the witnesses testify to her having said to them, in loose conversations, more or less remote from the date of said purchase, to indicate that she was not able to pay for it with her own money. In Willis v. Willis, 2 Atk. 71, it is said: "There is another way of taking a case out of the statute, and that is by admitting evidence, within the rules laid down by this court, to show the trust, from the mean circumstances in the pretended owner of the real estate or inheritance which make it *impossible* for him to be the purchaser." But there is nothing in the evidence introduced

by the defendant which makes it appear impossible or even incredible that Mary A. Smith was the purchaser of the premises conveyed to her. It does not appear that any of the witnesses professed to be familiar with her circumstances, or to have stood in any such relation to her as would naturally make them conversant with her affairs.

One witness testified to conversations with Mary A. Smith, in which she said "Smith had lost considerable money by not taking her advice. He then told her that in the future she might manage his business, as she had a better head than he had. * * * She said it was easier transacting business to have it done in her name. It was Mr. Smith's money that was used all the time. She said she never did anything, however, without consulting Mr. Smith. She never claimed to have the exclusive ownership of the property." It does not appear at what time this conversation was had, or that the property in controversy, or the purchase of it was even alluded to in it. Another witness testified that Mary A. Smith told him "she had everything in her own name, because, as a general thing, the women were smarter than the men." And further, that she never conveyed the idea to him that it was her husband's money exclusively that bought the property; and he (witness) "supposed it belonged to both of them." It does not appear what property the witness alluded to. But he said: "After the purchase of the Bird tract, we didn't have much talk."

After stating that in all cases of this character the facts "must be proved with great clearness and certainty," Mr. Perry, in his work on trusts, says: "For this purpose, all competent evidence is admissible, as the admissions of the nominal purchaser and grantee in the deed * * and even circumstantial evidence, as that the means of the nominal purchaser were so limited that it was impossible for him to pay the purchase money. But loose and equivocal facts ought not to control the evidence of deeds:" Sec. 137. We are unable to find in this record any evidence of admissions, made by Mary A. Smith, that J. P. Smith furnished the money which was paid for the purchase of the demanded premises. Nor is it made clear by the evidence that her means were so limited that it was impossible for her to pay the purchase money. The facts relied on to establish her inability, as we view them, are "loose and equivocal," clearly insufficient to overcome the evidence of the deed.

This conclusion is based wholly on the evidence relied upon to establish a resulting trust. If there was a conflict of evidence as to who *actually* paid the purchase money of the property, we could not disturb the finding on that question. But there is not. There is no direct evidence that Mary A. Smith did not pay it, or that her circumstances were such that she could not; or that she ever admitted that J. P. Smith paid it.

The alleged trustee and beneficiary are dead. Both died before the commencement of this action. And the evidence in support of the alleged trust consists mainly of verbal statements and admissions made by the alleged trustee: In Kennedy v. Kennedy, 57 Mo. 71, the court said: "That evidence of verbal statements and admissions alleged to have been made by a deceased person in regard to the ownership of the money which forms the basis of such trust is, unless supported by strong corroborative evidence, as, for instance, that the claimant's money was placed in the hands of the deceased for investment, wholly insufficient." Otherwise but little reliance could be placed in deeds.

The appellant contends that by representing in his petition for letters

testamentary of the will of Mary A. Smith, that said property belonged to her estate; and filing an inventory of her estate, which included said property, J. P. Smith was estopped from afterwards claiming that it was his own. In Carter v. McManus, 15 La. Ann. 676, the court says: "That admissions made by an executor or administrator in the course of judicial proceedings are made for the benefit of the estate represented by him, and do not conclude his individual right by way of estoppel." Another case, very much in point, is Werkheiser v. Werkheiser, 3 Rawle, 326. The facts in this case fall short of what is required to constitute an estoppel.

The objection to the introduction of a duly certified copy of the record of a deed from Thomas Edmonds, jun., to Robert J. Bell, "on the ground that it was irrelevant and immaterial, and that there was no proof as to the genuineness, due execution, or delivery of the original deed," was properly overruled. The authenticated copy of the record was *prima facie* evidence of the genuineness, due execution, and delivery of the original deed.

Judgment and order reversed.

MORRISON, C. J., and MCKINSTRY, ROSS, MYRICK, and THORNTON, JJ., concurred.

No. 10,898.

PEOPLE *v.* WHEELER

Department Two. Filed February 19, 1884.

INFORMATION—FILING OF.—A district attorney is authorized to proceed against a defendant by an information charging him with the crime of an assault with a deadly weapon, after an examination and commitment by a magistrate.

SUMMONING A JURY.—An order of the court directing the clerk "to draw the names of thirty-five good and lawful men," to be summoned from the body of the county, is a substantial compliance with sections 214 and 215 of the code of civil procedure.

MISCONDUCT OF DISTRICT ATTORNEY DURING ARGUMENT.—It is not misconduct sufficient to warrant a reversal for the district attorney to address the defendant personally during his argument, advance towards and point his finger at him, saying, "You sought this trouble with him [referring to the prosecuting witness], and made a cowardly attack upon him."

IMMATERIAL ERROR.—A judgment of conviction will not be reversed for an immaterial error.

INSTRUCTIONS CONCERNING INSANITY, IF ERRONEOUS, will not authorize a reversal when there was no evidence that the defendant was insane.

WHEN A DEFENDANT IS A WITNESS IN HIS OWN BEHALF, the court may instruct the jury that in weighing his evidence they must consider the circumstances under which he testified, and his interest in the result.

APPEAL from a judgment of the superior court for Modoc county, convicting the defendant for an assault with a deadly weapon. During his argument the district attorney addressed the defendant personally, advanced towards and pointed his finger at him, saying, "You sought this trouble with him [referring to the prosecuting witness], and made a cowardly attack upon him." This was excepted to and assigned as error. The further facts appear in the opinion.

J. J. May and *E. V. Spencer*, for the appellant.

Attorney general, for the respondent.

MORRISON, C. J. Defendant was tried on an information for the crime of an assault with a deadly weapon with intent to commit murder. Ver-

dict of guilty, as charged; motion for a new trial and denial thereof; appeal from judgment and order denying new trial. Numerous errors are assigned on this appeal, which will be briefly examined by the court.

1. The first point is that there was error in the refusal to set aside the information. In our opinion the information was good and was filed in a proper case. There had been an examination and commitment of the defendant by a magistrate, and that was sufficent to authorize the district attorney to proceed against him by information: Const., art. 1, sec. 8.

2. The second assignment is that there was error in summoning a jury. We do not think the objection well taken. The court made an order directing the clerk "to draw the names of thirty-five good and lawful men," to be summoned, etc. This was a substantial compliance with the law, and the jury was properly formed: C. C. P., secs. 214, 215.

3. In the third place it is claimed that there was misconduct on the part of the district attorney. The record fails to show any such misconduct as would justify this court in disturbing the judgment.

4. The fourth objection, conceding that the same is well taken, is too slight and unimportant to call for a reversal of the judgment.

5. The fifth point presents an objection to the charge of the court on the subject of insanity. In reference to this objection it is sufficient to say that there was no evidence that the defendant was insane.

6. The last assignment of error challenges another part of the charge. The defendant was a witness on his own behalf, and the court told the jury that in weighing his evidence they must consider the circumstances under which he testified, being the defendant in the case, and having such important interests dependent upon the result of the case. There was no error in this part of the charge, and it was very properly given: People v. Morrow, 60 Cal. 146.

Judgment and orders affirmed.

MYRICK, SHARPSTEIN, and THORNTON, JJ., concurred.

No. 10,892.

PEOPLE v. HOLLIS.

Department One. Filed February 20, 1884.

NO APPEAL LIES FROM AN ORDER IN A CRIMINAL ACTION DISMISSING THE SAME for want of prosecution. Such attempted appeal may be either dismissed or stricken from the calendar.

APPEAL from an order of the superior court for the city and county of San Francisco. The defendant was charged by information with having published a libel against one William Hale. The further facts appear in the opinion.

Attorney general, for the appellant.

George W. Tyler, for the respondent.

The COURT. The appeal is by the people from an order dismissing the action for want of prosecution. Such an order is not appealable: Pen. Code, sec. 1238. When an attempt is made to appeal from an order which is not appealable, this court has sometimes stricken the cause from the calendar, because not brought here by the attempted appeal, and sometimes dismissed the formal appeal.

Appeal dismissed.

No. 9,116.

ROUGH *v.* BOOTH.

Department Two. Filed February 23, 1884.

TRANSFER OF CAUSE TO FEDERAL COURT.—An order of the lower court refusing a motion to transfer the cause to the federal court can not be reviewed on an appeal from the judgment alone.

THE BOND REQUIRED ON SUCH TRANSFER MUST BE SIGNED by the principal.

APPEAL from a judgment of the superior court for Siskiyou county. The opinion states the facts.

W. H. H. Hart, for the appellant.

Gillis and *Edgerton*, for the respondent.

The COURT. The appeal in this case was taken from the judgment alone. On the appeal, the plaintiff seeks to review an order of the court below denying his motion that the cause be transferred to the federal court. Under section 670, code of civil procedure, the petition and bond for transfer and the order thereon do not constitute a part of the judgment roll; and there being no bill of exceptions, and no exception, we have nothing before us for consideration but the roll itself. Even if the proceedings for removal were before us for decision, we should consider the bond insufficient, it not being signed by the principal. This was one of the reasons stated by the court for denying the motion; and we think the ruling correct.

No error appearing, the judgment is affirmed.

MYRICK, THORNTON, and SHARPSTEIN, JJ., concurred.

No. 9,117.

ROUGH *v.* SIMMONS.

Department Two. Filed February 23, 1884.

JUDGMENT AFFIRMED ON THE AUTHORITY OF ROUGH v. BOOTH, No. 9,116, *supra.*

APPEAL from a judgment of the superior court for Siskiyou county. The facts presented were the same as those in Rough v. Booth, No. 9,116, *supra.*

W. H. H. Hart, for the appellant.

Gillis and *Edgerton*, for the respondent.

The COURT. On the authority of Rough v. Booth, No. 9,116, *supra*, opinion this day filed, the judgment is affirmed.

WEST COAST REPORTER.

WHOLE NO. 10. MARCH 6, 1884. VOL. II. NO. 2.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

WHENEVER a prior appropriation has been made for a certain kind of purpose or use, at a certain place, the appropriator may, as against other parties whose rights have accrued subsequently to his own, change the place of his use for the same purpose, if the amount of water taken by him is not thereby increased beyond that of his original appropriation; and it seems that he may, as against such parties, change the nature of the purpose or use to which the water was applied, provided the amount of water thereby taken is not increased, or the interference with or burden upon the subsequent claimants or appropriators is not augmented. But such a change of place or of purpose is not permitted, as against parties who have acquired subsequent rights, when it would enlarge the amount of water used beyond that of the original appropriation, or otherwise increase the burden imposed upon them by such appropriation. These conclusions seem to be established by the decisions. In Woolman v. Gawiger,[1] it was held that a prior appropriator for mining purposes, at a certain place, may extend his ditch, and use his water, to the extent of his original appropriation, at any other place, for the same or *for other purposes.* Such an appropriator, who has duly constructed his dam and ditch, need not give an actual notice to subsequent appropriators of his intention to extend his ditch, and reclaim his waste water, and use the water at another place. In Maris v. Bicknell,[2] the rule was stated that a mere change of the use from one mining place to another, where the appropriation was for mining purposes, does not forfeit nor abandon nor affect the prior right of the appropriator. In McDonald v. Bear River etc. Co.,[3] after declaring that the appropriation of water for mill purposes stands on the same footing as an appropriation for mining, the court said that when a party has erected a saw-

[1] 1 Mont. 535. [2] 7 Cal. 261. [3] 13 Id. 220.

mill and appropriated the water of a public stream for it, he may use the water for a grist-mill which he subsequently erects. In Kidd v. Laird,[4] the doctrine on this subject was announced in the following broad and general manner: "A person entitled to divert a given quantity of the water of a stream may take the water at any point of the stream, and may change the point of diversion at pleasure, if the rights of others are not injured by such change. This right of change does not depend upon the mode of acquiring the right to use the water, whether by express grant or by prescription, or whether by parol license or presumed consent of the proprietor. The difference as to the origin of the right affects the mode of determining its existence and its extent [*i. e.*, the amount of water appropriated], *and not the manner of its exercise and enjoyment.* The proper limitation upon this doctrine was stated in the subsequent case of Butte T. & M. Co. v. Morgan,[5] which held that a party appropriating and diverting water at a certain point can not afterwards change the place of diversion so as to prejudice another person whose rights have subsequently accrued. And it was further said that the case of Kidd v. Laird does not hold anything conflicting with this conclusion, and the decision in that case, as there explained and limited, was reaffirmed. In Davis v. Gale,[6] the court again laid down the general rule in the most unequivocal manner: "A person who has appropriated the water of a stream, and caused it to flow to a particular place by a ditch, for a special use, may afterwards change the use and the place at which he used it, without losing his priority as against one who dug a ditch from the same stream before the change was made. Such a person appropriating water for the working of a particular mine may, after he has worked out and abandoned said mine, extend the ditch, and use the water at other points, without losing his priority as against a person who acquired rights in the stream subsequently to his appropriation. Appropriation and use of water for beneficial purposes are the tests of right in such cases, and not the place and *character of the particular use.*" In Nevada W. Co. v. Powell,[7] the negative side of the rule was again applied, and the court said: "If a person has appropriated a *portion* of the water of a stream, and has made a dam and ditch amply sufficient to render his appropriation available, and has thereby acquired to use said portion only of such

[4] 15 Cal. 161.
[5] 19 Id. 609.
[6] 32 Id. 26.
[7] 34 Id. 109. The facts of this case, however, to which the decision applies, show an increase in the quantity of water used—in the extent of the appropriation, rather than a change in the place or in the kind of the use.

water, and in said manner only, this will not prevent other persons from acquiring a right to the *surplus* water of the stream, or to its bed or banks, or to the adjacent land, to any extent which will not interfere with the right previously acquired. When rights of subsequent appropriators once attach, the prior appropriator can not encroach on them by extending his use beyond the first appropriation. In such a case the first appropriator can not extend his claims or change the manner of his appropriation, to the injury of the second appropriator, any more than the second can do so to the injury of the first; each is, in respect to his own appropriation, prior in time and exclusive in right." On this ground, it was held that the prior appropriator was not authorized, by raising the height of his dam, to cut off or diminish the flow of the *surplus* water which had been thus appropriated by the defendants.

Such being the rights of the appropriator, any interference with the water of the stream itself, either above or below the point of his diversion, which hinders the full enjoyment of those rights, and any interference with the water while in the ditch, dam, or reservoir, or with these structures themselves, are injuries, for which suitable remedies may be obtained.

A ditch may be injured, or even destroyed, by mining under it, thereby causing the surface of the soil over which the ditch runs to crack and settle. In such a case the mine owners are liable to the proprietor of the ditch when the injury has been caused by their negligent or unskillful manner of conducting their mining operations; but whether they are liable for such an injury in the absence of all negligence and unskillfulness is more than doubtful.[8] In this case, which was brought to restrain the mining operations under such circumstances, the court say that the plaintiff has a right to a ditch on the surface of the soil, and the defendants have a right to mine under the surface. These rights are not *necessarily* incompatible or conflicting. To the two parties so situated the maxim, *Qui prior est tempore potior est in jure,* does not apply, but rather the maxim, *Sic utere tuo ut alienum non lædas.* How far a court of equity will relieve against such an injury when no negligence or lack of skill is charged, the court expressly refrain from deciding, and suggest the following query: "Whether ditch property in the mining regions, although conceded to be real estate, is to be regarded by courts of equity with the same measure of favor as that which is extended to land held by owners for its own sake, and not put to use for an

[8] Clark v. Willett, 36 Cal. 534.

ulterior object, is doubted, but not decided." It is abundantly settled that parties engaged in mining operations will be restrained from interfering with, or destroying, or washing away the ditch belonging to another person. The rights of a prior ditch owner as against persons engaged in mining were fully established by the case of Gregory *v.* Nelson,[9] in which the following points were decided: If the complaint avers ownership by the plaintiff of a certain ditch, and that the ground over which it runs was vacant and unoccupied when it was dug, and the plaintiff has used it for years for mining purposes, and the answer does not deny these allegations, nor set up any prior right of defendants to said ground, nor any claim or right of defendants to destroy the ditch, the court should enjoin the defendants from destroying or interfering with the ditch upon the pleadings, regardless of the testimony. If a party owns a ditch, and the right of way for the same, to conduct water for mining purposes, and has acquired such right by prior appropriation, the court, in an action brought to restrain the defendants from washing away the ground, should not allow the defendants to wash away the ditch, provided they build a flume or other aqueduct in place of the ditch of sufficient capacity to carry the water flowing through it. A court of equity had no power to make such a decree under these circumstances. A court should not license a trespass to ditch property in the mining regions, nor compel the owner to exchange his ditch for some other means of conveying the water flowing therein.

Interference with the water to which the appropriator is entitled, whether flowing in the stream or running through his ditch, may either diminish its *quantity* or deteriorate its *quality*. These two kinds of inquiries will be considered separately.

Of course the mere use of the water by another person, when its quantity is not thereby lessened nor its quality deteriorated, is no injury to a prior appropriator. If, therefore, A. owns a ditch and has the right to divert the water of a certain stream by its means, and B. subsequently takes water from the same stream at a place above the head of A.'s ditch, and uses it for his own purposes, but returns it back undeteriorated in quality into the stream before it would reach A.'s ditch, or even into the upper part of the ditch itself at a point before A. has use for it, no injury is thereby done to A., and he has no cause of action against B. therefor.[10] Whenever the rights of a prior appropriator exist, they are equally protected from interference and consequent injury by parties subsequently locating on the stream

[9] 41 Cal. 278.

[10] Yankee Jim's Union W. Co. v. Crary, 25 Cal. 504.

or using its water either above or below him.[11] The diversion of the water of a stream is a private nuisance to the prior appropriator who is injured thereby, and he can maintain an action for such nuisance. For a past diversion the only remedy is a recovery of damages; but when the diversion is continuing, equity will interfere by injunction.[12] It seems the injured party may himself abate the nuisance. When A. attempts to erect a dam for the purpose of diverting the water of a stream at a certain place, and such diversion is unlawful as against B., who is a prior appropriator and has a dam at a lower point on the stream, it is held that B. may oust A. from possession, and may prevent the construction of his dam.[13] Where a party has located on a stream, erected a mill, and appropriated the water for its use, in an action against a mere trespasser to recover damages for diverting the water, it is sufficient that the complaint alleges the plaintiff's *possession* of the land, the mill site, and the mill, without averring riparian *ownership* or a prior appropriation of the water.[14] In a suit to obtain relief against an injury to the plaintiff's rights as a prior appropriator, it is no defense whatever that the defendant's works are the more valuable or his interests the more important.[15] Where an appropriation has been made at a particular point, a person subsequently locating or constructing works on the same stream above must not impede the regular flow of the water, if the prior appropriator would be injured thereby. A mere trivial or temporary irregularity caused in the flow does not constitute a cause of action; but a sensible injury will be restrained by injunction, as well as compensated for in damages.[16] Where a ditch owner uses a ravine as a part of his ditch to conduct the water of a stream which he has appropriated, the natural waters of such ravine belong to him as the first appropriator thereof, and an action will lie in his favor for an appropriation or diversion of such waters by a third person.[17]

With respect to deterioration in the *quality* of the water, caused by subsequent locators or claimants higher up the stream, there was at an

[11] Hill v. King, 8 Id. 337.

[12] Tuolumne W. Co. v. Chapman, 8 Id. 392; Parke v. Kilham, 8 Id. 77. In Brown v. Ashley, 16 Nev. 312, the court held that where the act complained of is committed under a claim of right, which, if allowed to continue for a certain length of time, would ripen into an adverse right, and deprive the plaintiff of his property, he is not only entitled to an action for the vindication of his right, but also for its preservation. In actions, therefore, for the diversion of water, where there is a clear violation of an established right, and a threatened continuance of such violation, it is not necessary for the plaintiff to show actual damages, or even a *present* use of the water, in order to authorize a court to issue an injunction restraining the actual or threatened diversion, and to make it perpetual.

[13] Butte T. M. Co. v. Morgan, 19 Cal. 609.

[14] McDonald v. Bear River etc. Co., 13 Id. 220.

[15] Weaver v. Eureka Lake Co., 15 Id. 271.

[16] Phœnix W. Co. v. Fletcher, 23 Id. 481; Natoma W. & M. Co. v. McCoy, 23 Id. 490.

[17] Hoffman v. Stone, 7 Cal. 46.

early day some doubt; but the rule is now settled that an interference of this kind producing injury will be treated in the same manner as an interference with the quantity. In the early case of Bear River etc. Co. v. New York M. Co.,[18] the plaintiff was the prior appropriator of water for mining purposes. The defendants took the water at a point higher on the stream, used it for their mining purposes, and then sent it down the stream undiminished in quantity but filled with mud, sand, gravel, and other mining *débris*. In regard to this the court, after stating the rule concerning diminution in quantity, said: "As to deteriorations in *quality* by the water being used for mining above the plaintiff, this is *damnum absque injuria*. Any other rule would prohibit any use of the whole water of a stream, so as to preserve a small quantity of it first appropriated." The conclusion reached in this decision was antagonistic to the claims of the prior appropriator, and if final, would plainly render his rights very precarious, and liable, in fact, to complete destruction by such a pollution of the water as would make it wholly unfit for his purposes. In the subsequent case of Hill v. Smith,[19] this former decision was entirely abandoned, and a rule was established which fully protects all the rights of the prior appropriator. The court held that if parties engaged in mining operations above the head of a ditch belonging to a prior appropriator, on the same stream, injure the water by means of mud, sand, sediment, or other mining *débris*, they are liable therefor to the ditch owner, and their liability is not at all a question of negligence or unskillfulness; if the ditch owner is *in fact* injured, the miners are liable, even though such injury is not caused by their negligent or unskillful methods of mining. As between ditch owners and miners using the same stream, the law does not tolerate *any* injury by one to the prior rights of the other. In regard to the basis of these rights, the court say that the reasons which underlie the common-law rules concerning riparian rights have not lost their force in the mineral regions of this state. The rule thus settled can not be restricted to the pollution of water by mining operations alone; it must extend to all modes of deteriorating the quality of water by which injury is done to a prior appropriator. This view is taken of it by the supreme court of Utah, which holds that when the water of a stream had been appropriated and diverted by a ditch for purposes of irrigation and for domestic uses, the pollution of the stream above the ditch is a private nuisance.[20]

J. N. P.

(TO BE CONTINUED.)

[18] 8 Cal. 327.

[19] 27 Id. 476; and see S. C., 32 Id. 166.

[20] Cramer v. Randall, 2 Utah, 248.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

THE GIANT POWDER COMPANY v. SAFETY NITRO POWDER COMPANY.

Filed February 18, 1884.

INOPERATIVE PATENT—REISSUES.—A patent need not be inoperative in its entirety to entitle the patentee to a reissue. If it be inoperative in part, so far as not to secure all that the inventor is entitled to claim, and what he is entitled to claim appears in his specifications, it is inoperative within the meaning of the provisions of the statute, and entitles the patentee to a reissue in such form as to cover his entire invention.

FRAUD IN REISSUE IS A QUESTION FOR THE PATENT OFFICE.—Whether a patentee innocently or fraudulently seeks a reissue of his patent is a question of fact for the officers of the patent office alone to determine; and their decision is conclusive in a collateral attack upon the patent.

REISSUES IN IDENTICAL LANGUAGE OF A PRIOR PATENT VALID.—The owner of patent 78,317, surrendered it and obtained a reissue in patent No. 5,619. The latter was surrendered and reissued in patent No. 5,799, for the purpose of correcting a clerical error. Reissue No. 5,799 was held by the circuit court of the ninth circuit to be void, as embracing more than was shown or claimed in the original patent. There were conflicting decisions in different circuit courts upon the validity of the last reissue. After it had been adjudged void, the owner surrendered patent No. 5,799, and procured another reissue in the identical language of original patent No. 78,317. *Held*, that the last reissue is not void under the circumstances, in consequence of its being in the identical language of the original patent.

PLEA SHOULD PRESENT A SINGLE ISSUE.—The object of a plea, is, to present and try a single issue, which may decide the suit, without putting the parties to the expense of trying all the issues in the case. But one issue can be presented by plea, without leave of the court, and in a suit upon a patent the court will not ordinarily permit a party to present and try upon pleas all the issues that can be raised, except the single issue as to infringement.

DELAY IN ASKING LEAVE TO FILE SEVERAL PLEAS will not be encouraged.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

MOTION for leave to file an amended plea.

Hall McAllister and *George Harding*, for the complainant.

M. A. Wheaton, for the respondent.

By the Court, SAWYER, Circuit Judge (delivering an *oral* decision). In the case of the Giant Powder Company v. The Safety Nitro Powder Company, a motion for leave to file an amended plea, setting up several distinct defenses, has been argued in connection with the argument as to the sufficiency of the plea already filed.

The Giant Powder Company was the owner of original patent, No. 78,317. This patent was surrendered and reissued as patent No. 5,619. Afterward, for the purpose of correcting a clerical error, patent No. 5,619 was surrendered and reissued as patent No. 5,799. A suit upon this last patent was decided by Mr. Justice Field in this court, in which it was held that the reissue was broader in its scope than the original invention as described in the original patent No. 78,317, being for a combination of nitro-glycerine with some non-explosive absorbent material, while the reissue embraced explosive as well as inexplosive absorbents, and Mr. Justice Field held that in that particular the reissue was broader than the originally patented invention, and for that reason void: Giant Powder Co. v. Cal. Vigorit P. Co., 6 Saw. 509. In consequence of this decision, patent No. 5,799 was surrendered and reissued again in patent No. 10,267, and in patent No. 10,267 both the specification and the claim are identical

with those of the original patent No. 78,317, which had before been surrendered and reissued in the patents before mentioned.

These facts are set up in the plea, and it is claimed that patent No. 10,267 is void, it being identical with the original surrendered patent No. 78,317. That patent was surrendered as being inoperative, and as a reissue can only be had where the patent is inoperative, it is claimed that the original patent must have been held to be wholly inoperative. I think counsel are mistaken in that proposition.

A patent may be inoperative, in my judgment, when it is inoperative in part. I do not think it must be absolutely inoperative in its entirety. If it is inoperative so far as not to cover all that the party is entitled to claim, and what he is entitled to claim appears in the specifications, it being inoperative to that extent, I think it would be inoperative within the meaning of the provisions of the statute, and entitle the party to a reissue covering his entire invention. It does not necessarily follow that patent No. 78,317 was wholly inoperative, or void, or useless. I am not aware that it has ever been held by any court to be utterly invalid in all its parts. It was not even claimed at the argument that the patent, as originally issued, was inoperative, in fact, as to the combination of nitroglycerine with inexplosive absorbents.

The question of fraud in procuring the reissue, in my opinion, does not arise on this plea, because the question as to whether a mistake has been innocently made in not covering by the patent all that the party was entitled to cover—the question whether there is a fraud in the surrender and application for a reissue—is one of fact, for the officers of the patent office alone to decide, and their determination is conclusive in a collateral proceeding. This court can only examine and pass upon what appears upon the face of the patent, and see whether there is anything to indicate its invalidity or render it void upon its face. All questions of fact behind the patent are to be examined, heard, and conclusively determined by the commissioner of patents. This principle has been affirmed over and over again by the supreme court.

I do not think the fact that the patent was reissued in the identical terms of the original patent No. 78,317 renders it void. The specifications of the patent last surrendered were amended by omitting the objectionable parts. Patents are constantly reissued for portions of the specifications and claims in the identical language of the original patent. Each claim in its nature substantially and in effect covers a distinct and separate invention, and is an independent patent in substance and effect. It might be the subject of an independent patent; and if in any reissue, so far as the patents are identical, those claims are valid in the reissued patent having another or additional valid claim, or a modified claim, or some other change in the specification, I do not perceive why they would not be valid in a patent limited to them alone. If they can all stand together, I do not see why a reissued patent, covering the identical claims by themselves, may not stand and be valid.

Patents may be reissued in divisions. It is not necessary that all claims in the reissue should be included in one patent. They are often issued in divisions, and I suppose that a patent might be reissued in divisions in the identical language as to some of the claims, the changes being included in another and separate division or patent; that is to say, all claims, or inventions, which are fully covered and operative, may be reissued by themselves in one division in the identical language of

the original surrendered patent; and all other claims, on amendments to the specifications, and covering the invention shown by the amended specifications, in another division or patent. I do not see why a part of original claims may not be reissued in one division in identically the same language as in the original patent and the rest in another. If this can be done without affecting the validity of the reissues, and a party finds that he has made a mistake and surrendered a valid patent and obtained a void reissue, I do not perceive why he may not fall back upon his old patent and have it reissued on a newly amended specification embracing that portion which is valid. If parts which are identical are valid in connection with other parts in a reissue, I do not perceive why they should not be valid in a reissue containing no additional matter.

In this particular class of cases it is quite extensively claimed by the bar, I think, that the supreme and some of the circuit courts have made something of a departure in some of their late decisions upon reissues, including the reissue in question. Mr. Justice Field held patent No. 5,799 to be void, while several of the circuit judges at the east held it to be valid, and the supreme court has recently repeatedly affirmed the principle of the decision of Mr. Justice Field on the circuit. Where courts make a mistake, it may, very properly, be conceded that a patentee may well make an honest mistake himself. On the argument of the plea, my attention was called for the first time to the case of Gage v. Herring, 107 U. S. 646, in which I think the principle involved in the plea is distinctly determined. The court says:

"*The invalidity of the new claim in the reissue does not indeed impair the validity of the original claim, which is repeated and separately stated in the reissued patent.* Under the provisions of the patent act, whenever, through inadvertence, accident or mistake, and without any willful default or intent to defraud or mislead the public, a patentee in his specification has claimed more than that of which he was the original or first inventor or discoverer, his patent is valid for all that which is truly and justly his own, provided the same is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right; and the patentee, upon reasonably recording in the patent office a disclaimer, in writing, of the parts which he did not invent, or to which he has no valid claim, may maintain a suit upon that part which he is entitled to hold, although in a suit brought before a disclaimer he can not recover costs: R. S., sec. 4917, 4922; O'Reilly v. Morse, 15 How. 62, 120, 121; Vance v. Campbell, above cited. *A reissued patent is within the letter and the spirit of these provisions.*"

If a reissued patent is within the letter and spirit of these provisions, as stated, and "the invalidity of the new claim in the reissue does not indeed impair the validity of the original claim, which is repeated and separately stated in the reissued patent," it is not apparent to my comprehension why a second reissue, embracing the valid claim, alone, of the original patent, would not be valid. I can not, therefore, say that the patent (No. 10,267) is void by reason of anything asserted in the plea upon the grounds set forth. The plea must therefore be overruled.

With reference to the filing of the proposed so-called amended plea, I think it is not within the reasonable discretion of the court to allow it to be filed at this late day. In view of the circumstances of this case, as they appeared before this court in the various stages of the proceedings, I think it would be an abuse of its discretion to allow the plea to be

filed, if it were otherwise a proper plea. In fact, the proposed amended plea sets up all the defenses that can be made to a patent, and it would involve the trial of the whole case, with the exception of the single question of infringement.

The object of a plea, where there is some certain, single issue, requiring but little evidence, that will dispose of the whole case if sustained, is, to try that issue without putting the parties to the expense of the trial of the case at large, and pleas are limited to a single defense or issue unless, by permission of the court, the defendants are allowed to plead double. If the court allows this so-called amended plea to be filed, it would allow parties to try all the issues in the case with the exception of the one issue as to infringement, and it would be necessary to try the whole case on the merits by piecemeal. Besides, it comes too late.

After this plea was originally filed, it was stipulated that it stand for an answer so far as it was available as a defense. An answer and replications were filed, and the parties commenced taking testimony. In the course of taking the testimony the attorney for the defendant ascertained the importance of having the case decided on his plea, provided it was good, and thought that he was at a disadvantage in his then position, as on the question of infringement he would be obliged to disclose the secrets of his composition. He therefore moved, upon affidavits, to be relieved from the stipulation, taking the plea for an answer. He claimed, among other things, to have misunderstood the practice of the court. After argument, the court, thinking that there might be something in the plea, as this exact point had never been decided, so far as it was aware, and, if good, it would save the expense of a trial, relieved the party from the stipulation, and allowed the plea to be set down for argument. It was supposed that the exact question had never been presented before, and when the argument was made upon the stipulation, the court had not seen the case of Gage v. Herring, *supra*, which, it is thought, decides the principle. I thought that there was, perhaps, something in the plea.

At all events, I thought that it was worthy of being carefully considered, for if the plea is good, and the patent absolutely void upon its face, I saw no occasion for putting the parties to the great expense of going to a trial of all the issues in the case. I therefore set aside the stipulation, and allowed the defendant to withdraw its answer in the case, and set the plea down for a hearing. It was set down for a hearing, and continued from time to time, until finally it came up for argument, counsel from Philadelphia coming out to argue the case on the validity of the plea. When the plea was called for argument, it was found that there had been a change of attorneys, and an application was made by the substituted attorney at the moment for leave to file the proposed so-called amended plea, which presents all the issues in the case with the exception of the one issue of infringement. I think, under the circumstances, that it would be improper, and it would be an abuse of discretion, to allow this so-called amended plea to be filed at this late day.

Leave to file the proposed amended plea is therefore denied.

IN RE LEONG YICK DEW, ON HABEAS-CORPUS.

Filed February 25, 1884.

RESTRICTION ACT, WHEN TOOK EFFECT.—The act of congress of May 6, 1882, commonly called the Chinese restriction act, does not state when it was to go into operation, and, consequently, it took effect immediately upon its approval by the president.

CHINESE LABORERS—EVIDENCE OF FORMER RESIDENCE.—A Chinese laborer who was a resident of the United States on the seventeenth day of November, 1880, the date of the treaty with China, but who left the same after the taking effect of the restriction act, and after having an opportunity to obtain the certificate required by section 4 thereof, can not re-enter the United States, either by land or sea, or having re-entered remain therein, unless he proves the fact of his former residence by such certificate. No other evidence of such fact is admissible.

THE SAME.—Chinese laborers who were in the United States on November 17, 1880, the date of the treaty with China, and who left before the passage of the restriction act on May 6, 1882, and those who came into the United States and departed therefrom between such dates, or afterwards before June 6, 1882, the date on which the collector of the port of San Francisco was prepared to issue the certificates provided for in section 4 of such act, in the form prescribed by the secretary of the treasury, are entitled to re enter the United States upon satisfactory evidence of their former residence other than that furnished by such certificate.

Before SAWYER, Circuit Judge, and HOFFMAN and SABIN, District Judges.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

T. D. Riordan, for the petitioner.

S. G. Hilborn, United States attorney, for the government.

By the Court, SAWYER, Circuit Judge. The petitioner, a Chinese laborer, who was residing in the United States on the seventeenth day of November, 1880, left San Francisco for China, by steamer, on June 16, 1882, without obtaining the certificate provided for in section 4 of the act of congress of May 6, 1882, commonly called the restriction act. He has now returned, and he seeks to land without such certificate, upon other proof of his residence in the United States at the date of the conclusion of the late treaty with China than the certificate provided in said section 4 of the restriction act. The question is, whether he is entitled to land upon other satisfactory proof of former residence, without having obtained and produced such certificate.

The treaty with China authorized the government of the United States to "regulate, limit, or suspend" the coming of "Chinese laborers" to, or residence in, the United States. But it provided that "the limitation, or suspension, *shall be reasonable*, and shall apply *only to Chinese who may go to the United States as laborers, other classes not being included in the limitation.*" And it was further expressly provided that "legislation taken in regard to *Chinese laborers will be of such character, only, as is necessary to enforce the regulation, limitation, or suspension of immigration.*" It is still further provided, that "*Chinese laborers* who are *now in the United States* [at the date of the treaty, November 17, 1880] *shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions* which are accorded to the citizens and subjects of the most favored nation."

This treaty having been ratified by the contracting parties, congress, on May 6, 1882, passed "An act to execute certain treaty stipulations relating to Chinese," commonly called the restriction act, under which the questions at issue now arise. As it is not stated in the act when it should

go into operation, we have no doubt that it took effect immediately upon its approval by the president.

Section 1 of the act provides: "That from and after the expiration of ninety days next after the passage of this act, * * * the coming of *Chinese laborers* to the United States be, and the same is hereby, suspended; and during such suspension it shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain in the United States."

Section 2 provides: "That the master of any vessel who shall, knowingly, bring within the United States, on such vessel, or *land*, or *permit to be landed*, any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and shall be punished by fine of not more than five hundred dollars for *each and every such Chinese laborer* so brought," etc.

It will be observed, that the language of the provisions of these two sections is broad, comprehensive, and sweeping, and that it in express terms prohibits "any" and "each and every" Chinese laborer from coming, or being brought into, or landed, or permitted to be landed in the United States, or having come, to remain; and standing alone, would exclude each and every Chinese laborer, whether he had been in the country before or not. It would be difficult to express that idea more explicitly. But section 3 puts a limitation upon the comprehensive language of the two preceding sections, and makes an exception in the following terms: "The two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days after the passage of this act, *and who shall produce to such master, before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence, hereinafter in this act required, of his being one of the laborers in this section mentioned.*" Thus the exceptions are not Chinese laborers who were merely in the United States on the day mentioned, but Chinese laborers who were not only in the United States on that day, but who, in addition, "shall produce to such master, before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, *the evidence hereinafter in this act required, of his being one of the laborers in this section mentioned.*"

Such is the plain language of the act defining the exceptions; and we are not authorized to enlarge the exceptions thus plainly defined by any latitudinarian or unwarranted construction. We can not take half of the definition of the exception and reject the other half. We must take it as we find it, and that requires the *certificate as evidence* of residence, *as well as the residence*. It seems clear to us that congress, with reference to Chinese laborers leaving the country, and having an opportunity to obtain the requisite certificate, intended to prescribe the evidence upon which they should be permitted to re-enter the United States; and that the evidence prescribed is a limitation upon, and forms a part of, the definition of the exceptions intended to be made to the comprehensive language of the preceding section of the act. And that evidence is the certificate to be furnished to the laborers departing from the country by the collector, or his deputy, of the port whence he takes his departure, provided for in the next section, being section 4 of

the act. This we think is the only evidence of prior residence and a right to return of a departing laborer contemplated by the act of congress. The sweeping language of sections 1 and 2 quoted, it will be seen, are not permissive in form, but expressly prohibitory, and excludes in unmistakable terms each and every Chinese laborer, and but for the exceptions, also explicitly defined in the next section, none of that class could be admitted. None but those coming within the plain meaning of the language of the exception can be taken out of the excluding provisions. There is no other provision in the act to indicate a different policy, or that congress did not intend to make the required certificate the only evidence of a right to return, as to all those Chinese laborers who, having a right to the certificate and the ability to obtain it, depart from the country without obtaining it. On the contrary, the only other sections affording any inference or light on this point are section 5, pointing out the mode in which the same class of persons desiring to depart *by land* shall procure similar certificates; and section 12, which provides "that *no Chinese person* shall be permitted to enter the United States by land without producing to the officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel."

This provision is, positively, prohibitory also, and not permissive; and it particularly and expressly forbids an entry without the particular evidence prescribed by this act. There could scarcely have been intended one rule of evidence for those entering by land, and another for those landed from vessels. We think, then, that the certificate provided for is the only evidence of the right to re-enter the United States, or having re-entered, to remain, of a Chinese laborer, who has departed from the United States having the opportunity afforded by the act to obtain the certificate required, whether he comes by land or by sea.

We do not wish to be understood as questioning the construction adopted by the district court, in the case of Chin Ah On, 18 Fed. Rep. 506, in regard to those Chinese laborers who were living in the United States at the date of the conclusion of the treaty, November 17, 1880, or subsequently, and who left the United States prior to May 6, 1882, the date of the passage of the restriction act. On the contrary, we are fully satisfied of the propriety of the construction given in that case. Congress could not possibly have intended to require that class of Chinese laborers to procure the required certificate where it was a physical impossibility for them to obtain it; and it would be absurd, under the circumstances, to hold that congress intended to, arbitrarily, exclude that class in direct violation of the express terms of the treaty protecting them. Congress had declined to enact any such legislation as is contained in the restriction act while the Burlingame treaty was in force, for the reason that it would be an act of bad faith on the part of the United States towards China; and a direct violation of the solemn stipulation of the treaty between the two governments. The United States went to the trouble, expense, and delay of sending a special mission, composed of three distinguished gentlemen, to China, for the express purpose of procuring a modification of the Burlingame treaty, in order to enable the United States to adopt the legislation now in question without committing an act of bad faith towards China, and without violating the treaty stipulations between the two nations. A treaty was made with the modifications sought, which was ratified by, and apparently satisfactory to, both nations. And the modified treaty, in express

and the most explicit terms, protected the class in question in their right to remain in the United States, or "to go and come of their own free will and accord," and also provided that they "shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

It is expressly stipulated in the supplementary treaty that the "legislation taken in regard to Chinese laborers will be of such character *only as is necessary* to enforce the regulation, limitation, or suspension of immigration," and that "the limitation or suspension shall be reasonable." Conceding the legislation requiring Chinese laborers departing from the United States after the passage of the act in question, and having an opportunity to do so, to procure and produce the required certificate to be "necessary" and "reasonable," still such a requirement as to those who departed after the date of the treaty, and before the passage of the act, or before it was practicable or possible to obtain the certificate, could neither be necessary nor reasonable. If congress, then, intended, by this act, to make this provision requiring the prescribed certificates applicable to those Chinese laborers who were in the United States at the date of the treaty, and who left before the passage of the act of May 6, 1882—before it was possible to obtain the certificate—then it was the deliberate intention of congress to act in bad faith towards the government of China, and to violate the solemn obligations of the very treaty it had taken so great pains to obtain, in order to enable it to honorably legislate at all upon the subject. Why take all this trouble to negotiate a treaty if it was intended at last to flatly disregard it, and legislate in direct violation of its most solemn and vital stipulations? Congress might, with just as much propriety, have ignored and disregarded the Burlingame, as the supplemental, treaty. There would be just as much propriety in wholly repudiating the treaty as to repudiate it in this vital part, which the Chinese government took care to have inserted. It would be to the last degree absurd, under the circumstances, to suppose for a moment that congress intended to make the provisions of sections 3 and 4, relating to certificates, applicable to the class of Chinese laborers referred to. We can not attribute to congress a deliberate intention to commit any such act of bad faith without provisions manifesting such a purpose far more explicit than any found in the act.

Again, the same section which requires the certificate gives to the departing Chinese laborer an absolute, indefeasible right, without cost or expense, to have the certificate, in order that he may be able to produce it as evidence of his right to re-enter the United States. The necessity to produce it, and the right to have it, in order that he may produce it, are correlative conditions. The one provision is the complement of the other. They are reciprocal, and must go together. The obligation to produce the certificate presupposes the practicability, or, at least, the possibility, of procuring it, in order that it may be produced. The two provisions go together, and form but one legal conception. The obligation to produce, and the right and ability to obtain it, are *dependent*, and *not independent*, conditions. One is the counterpart of the other, and it is not to be supposed that congress would have adopted one branch of the proposition without the other, otherwise it would have distinctly done so in terms. If, then, it is impossible to comply with the condition, the impossible condition must be regarded as not intended as to this class of laborers; or if intended, it must be void. The law requires nothing

impossible—*Lex non cogit impossibilia:* Bouv. Law Dict., Maxims; Broom's Maxims, 242; and *Lex non intendit aliquid impossibile:* Bouv. Law Dict.—the law intends not anything impossible, are among the most venerable maxims of the law. In a statute, "No text imposing obligations is understood to demand impossible things:" Sedg. Stat. Law, 191. "Provisions in acts of parliament are to be expounded according to the ordinary sense of the words, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to, the declared or implied intention of the framer of the law; in which case, the grammatical sense of the words may be modified, restricted, or extended to meet the plain policy and provision of the act:" Dwarris on Stat. 582. The rule is to construe words "in their ordinary sense, unless it would lead to *absurdity, or manifest injustice,* and if it should, so vary them as to avoid that which certainly could not have been the intention of the legislature, we must put a reasonable construction upon the words:" Id. 587; see Donalson v. Wood, 22 Wend. 309; Lake Shore R'y Co. v. Roach, 80 N. Y. 339.

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to *injustice, oppression, or an absurd consequence.* It will always, therefore, be presumed that the *legislature intended exceptions to its language which would avoid results of this character.* The reason of the law in such cases should prevail over the letter:" U. S. v. Kirby, 6 Wall. 486. "In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. * * * To require a heavy and almost impossible condition to the exercise of this right, with the alternative of payment of a small sum of money, is, in effect, to demand payment of that sum:" Henderson v. Mayor of New York et al., 92 U. S. 268; see, also, Brewer v. Blougher, 14 Pet. 198; U. S. v. Truman, 3 How. 564. So in the case of the class of Chinese laborers now under consideration: to require them to produce a certificate as the *only* evidence of their right to land, when it was impossible or impracticable to procure it, would be, in effect, to absolutely and unconditionally exclude them. Yet, it is manifestly the policy, intent, and reason of the law to carry out in good faith the stipulations of the treaty, that they "shall be *allowed to go and come of their own free will and accord;*" and "*be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.*"

We are, therefore, fully satisfied that those Chinese laborers who were in the United States on November 17, 1880, and left before the passage of the restriction act, and those also who came into the United States and departed therefrom between that date and May 6, 1882, and even afterward, before the collector was prepared to issue the certificates provided for in section 4 of the restriction act, "in such form as the secretary of the treasury shall prescribe," are entitled to re-enter the United States upon satisfactory evidence other than the certificates provided for in said section 4.

The secretary of the treasury *first* issued his circular, notifying the various collectors of the ports of the United States of the passage and terms of the restriction act, and indicating the form of certificate to be used—*which form, under the act, is to be prescribed by him alone*—on May 19, 1882; and that circular was received at the port of San Francisco on May 26th, in time for the outgoing steamer for China which sailed on

June 6th. The secretary, however, did not send out his blanks, or authorize any to be printed by the collector, or furnish full instructions in time to arrive before August 4th, the date at which the right of Chinese laborers to enter the United States expired. They were in fact received at this port on August 8, 1882. The Chinese consul, on consultation with the officer in charge of the collector's office, had blank certificates printed, at his own expense, upon the same sheet with a certificate or passport issued by himself, which were issued by the collectors to outgoing Chinese laborers, and which, by direction of the secretary of the treasury through telegraphic correspondence, were marked "Temporary." The first of these certificates was dated June 6th. From that time till August 8th these temporary certificates were issued, at first on the same sheet with the other issued by the Chinese consul, and afterward separately. These certificates have been recognized by the collector when presented by returning Chinese laborers. Up to the date of the circular of the secretary of the treasury received at San Francisco May 26th, the secretary had not prescribed the form of the certificate, and clearly the collector's office at San Francisco was not in a condition to execute the law according to its terms in time for any Chinese laborers departing prior to the sailing of the steamer which left on June 6th. We therefore hold that those Chinese laborers who departed from San Francisco prior to June 6th, could not reasonably procure the prescribed certificate, and they must be admitted, on their return, on other satisfactory evidence of their having been in the United States between November 17, 1880, and the date of their departure.

On and after June 6th, the collector was prepared to carry out the law according to its real intent, and all Chinese laborers departing from the port of San Francisco on and since that date, having had an opportunity to procure the required certificate, will be required to produce it.

DISTRICT COURT, DISTRICT OF OREGON.

LUNG CHUNG, Administrator etc., *v.* NORTHERN PACIFIC R'Y CO. BUCHANAN v. NORTHERN PACIFIC R'Y CO.

Filed February 8, 1884.

RIGHT TO APPEAR SPECIALLY.—A defendant in an action upon whom a summons has been served illegally may appear therein specially, for the purpose of having such illegal service set aside; and there is nothing in sections 61 and 520 of the Oregon code of civil procedure derogatory of such right.

ACTION IN NATIONAL COURTS.—Subdivision 1 of section 54 of said code, when applied to actions in the national courts, must be construed as if the word "county" read "district."

CORPORATION—SERVICE OF SUMMONS ON.—In an action against a corporation in the United States circuit court for the district of Oregon, if the summons is served under said subdivision 1 of section 54, on any agent of the defendant other than its president, secretary, cashier, or managing agent, unless it appears that the cause of action arose in the district, such service is illegal, and will be set aside on the application of the defendant.

CAUSE OF ACTION—WHEN AND WHERE IT ARISES.—A cause of action given by statute to an administrator, to recover damages for the death of his intestate, arises out of such death and where it occurred, and not the appointment of the administrator or the place where it was made.

MOTION to set aside the service of a summons in an action for injury to the person. The opinion states the facts.

John H. Woodward, for Lung Chung.

O. P. Mason, for Buchanan.

Cyrus A. Dolph, for the defendant.

DEADY, J. These actions are each brought to recover damages for an injury to the person, caused by the negligence and misconduct of the defendant.

In Lung Chung's case, it appears from the complaint that on June 21, 1883, Lung Ban was at work on the grade of defendant's road, in Montana, about ten miles to the westward of Herron's siding, when he was killed by the wrecking of a train on which he was being carried from the place where he was working to the camp of the contractors, On Chung Wa Co., under whom he was employed; and that on November 23, 1883, the county court of Multnomah county, Oregon, granted letters of administration upon the estate of the deceased to the plaintiff, who is a citizen of China.

In Buchanan's case, it appears that the plaintiff is a citizen of Nevada, and that on February 18, 1883, he was at work for the defendant, as a carpenter, repairing bridges on the line of its road in Washington territory, when, by the falling of timbers from a platform car, he had his arm and wrist broken, and was otherwise injured.

In each case it appears that the defendant is a corporation, formed under a law of the United States; and in Buchanan's case it also appears that its principal place of business is at New York; while in Lung Chung's case it is also alleged that the defendant was so organized for the purpose of constructing and operating a railway from Minnesota to Oregon and Washington territory; of all of which, except the place of business, the court takes judicial notice.

A summons was duly issued in each case, and from the return of the marshal thereon it appears that, not being able to find the president, secretary, cashier, or managing agent of the defendant in this district, he served the summons on Homer D. Sanborn, "the purchasing agent" of the defendant herein. The defendant now moves to set aside the service of the summons in each case, having given the plaintiffs written notice of its appearance for that purpose; and by consent of parties the motions are heard together.

And first, the counsel for the plaintiff in Buchanan's case insists that the defendant can not appear for this purpose only—that it must either appear fully and without reserve, or not at all; citing sections 61 and 520 of the Oregon code of civil procedure. By the first of these sections it is provided in effect, that a voluntary appearance of the defendant shall, for the purpose of giving the court jurisdiction, be equivalent to a personal service of the summons; while the latter declares, that "a defendant appears in an action or suit when he answers, demurs, or gives plaintiff written notice of his appearance; and until he does so appear, he shall not be heard in such action or suit or in any proceeding pertaining thereto, except the giving of the undertakings allowed to the defendant in the provisional remedies of arrest, attachment, and the delivery of personal property."

Section 61 contemplates, of course, a full and unqualified appearance, and declares the effect of it on the jurisdiction of the court; but it has

no bearing on the question whether a defendant has a right to make a qualified appearance for a special purpose, as to set aside an attachment or the service of a summons. So an appearance under said section 520, by delivering a demurrer or answer to the complaint, is, in the nature of things, an unqualified appearance. There is only one other way for a defendant to appear, and that is by giving the plaintiff written notice thereof.

And the question is, Can that appearance be something short of a general appearance, and for a particular purpose? There is nothing in the code to the contrary. The statute says the defendant may appear by a written notice. This does not necessarily imply a full appearance, or exclude a qualified one. If the defendant desires, in the language of the statute, to appear, not to the action, but in a "proceeding pertaining thereto," why may he not? And what is there in section 520 or the nature of the proceeding to prevent it?

The right to appear specially and move to set aside the service of a summons is one thing, and the allowance of the motion is another. When the summons, or the service thereof, is merely defective, or wanting in some matter of form or method, which does not affect the substantial rights of the defendant, the motion to set aside will be disallowed, or a counter-motion allowed to amend.

But where the service is unlawful, and can not give the court jurisdiction of the defendant, it ought to be set aside or quashed; and unless the party upon whom it is made is allowed to appear for that purpose, he must run the risk of having a judgment given against him for want of an answer, in a case where, it may be, there is no appeal, and if there was, the illegality of the service is not apparent on the face of the record.

In Lyman v. Milton, 44 Cal. 635, and Kent v. West, 50 Id. 185, it was held in the one case that a party was entitled to appear specially and move to set aside the service of an illegal summons, and in the other, to set aside the illegal service of a legal summons; and further, that the wrongful denial of such motion was an error that was not waived by the defendant's subsequent appearance and trial of the case.

To the same effect is the case of Harkness v. Hyde, 98 U. S. 476, in which it was held that the service of a summons from a district court in Idaho, upon a defendant while on an Indian reservation, from which the jurisdiction of the court was by law excluded, was unlawful, and that the defendant was entitled to appear specially to have such illegal service set aside; and further, that the error committed in denying the motion to set aside was not waived by the defendant's subsequent appearance and submission to a trial of the cause.

The cases under consideration are within the rulings made in these cases, and I see nothing in the code to take them out of it. Nothing less than the express language of a statute or the necessary implication therefrom would be construed by any court of justice as forbidding or preventing a party to appear in an action for the purpose of having the service of a summons set aside, on the ground that it was illegally served upon him—not in manner but in substance—and under such circumstances as not to give the court any jurisdiction of his person or authority to proceed to judgment against him.

By the act of 1875, 18 Stat. 470, it is provided, that "no civil suit shall be brought before any circuit court against any person by any original process or proceeding in any other district than that whereof he is an

inhabitant or in which he shall be found at the time of serving such process or commencing such proceeding"—saving certain exceptions not now material. Whether the defendant is an "inhabitant" of this district, within the meaning of this act, need not now be considered. If it is such inhabitant, it can not be brought before this court as a defendant in this action unless by the due service of a summons upon it; nor can it be "found" here for such purpose, only so far as it can be so served here. And in either case, we must look to the local law prescribing the method of serving a summons on a corporation, to ascertain what constitutes such service, and the effect of it. The defendant, being a mere legal entity, can not be directly served with process. From the nature of the case the service must be a substituted one. Generally, it is made upon some natural person for it. This person is usually designated by the local law, upon the theory that his relation to the corporation is such that notice to him will result in notice to it.

By section 54 of the code of civil procedure, as amended in 1876, Sess. Laws, 37, it is provided, that in case of an action against a private corporation, the summons shall be served on "the president, or other head of the corporation, secretary, cashier, or managing agent," or in case none of these officers "shall reside or have an office in the county where the cause of action arose, then on any clerk or agent of such corporation who may reside or be found in the county; or if no such officer be found, then by leaving a copy thereof at the residence or usual place of abode of such clerk or agent." Allowing that the practice in this court, in this respect, must conform "as near as may be" to the directions of this section, as provided by section 914 of the revised statutes, still the word "county," as used therein, must in this court be understood to mean the "district," or territorial limit of the court's jurisdiction.

The defendant, although an inhabitant of this district, can not be brought before this court in a civil action, unless it is served with a summons in the mode prescribed in this section. If the action is transitory in its character, and service of the summons is made within the district on the president, secretary, cashier, or managing agent of the defendant, the court acquires jurisdiction without reference to where the cause of action arose. But if neither of them can be so served, the action can not be maintained in the district unless the cause of action arose therein. For the statute, in giving a plaintiff the right to serve a summons against a corporation upon any inferior agent or clerk thereof, where the superior ones can not be found in the district, limits the same to cases where the cause of action arose in the district.

Now, in each of these cases, the cause of action arose without the district, and therefore the service of the summons thereon upon an agent of the corporation who does not appear to be its "managing" one, nor its secretary, cashier, or president, is unauthorized and illegal. The illegality arises, not from a defect in form or method, but in substance, and is, therefore, incurable. In effect, the law does not, under these circumstances, permit the defendant to be brought before this court in a civil action without its consent, upon a cause of action that arose without the district.

The suggestion of counsel for the plaintiff, in Lung Chung's case, that the cause of action ought to be considered as having arisen within the district, because the plaintiff's letters of administration were granted here, is ingenious but not sound. On the contrary, the cause of action

arose in Montana, on the death of the deceased—the law of that territory giving an action to his heirs or personal representatives for damages on that account. The plaintiff's right to sue on this cause of action may be said to have originated here, but the grant of administration to him did not create or originate the cause of action, though it gave him a certain control over it.

The motions are allowed, and the service set aside.

SUPREME COURT OF COLORADO.

ALEXANDER, County Clerk, ET ALS. *v.* PEOPLE ex rel. SCHOLFIELD.

Filed January 18, 1884.

REMOVAL OF COUNTY SEAT—LEGISLATIVE AUTHORITY OVER.—The act of February 11, 1881, regulating the removal of county seats, and providing that "not less than two thirds of all the legal votes cast shall be necessary to effect the removal of the county seat of any county in this state," is not in conflict with section 2, article 14 of the constitution, which declares that "no county seat shall be removed unless a majority of the electors voting on the proposition vote therefor."

ERROR to the district court of Custer county. The opinion states the facts.

John R. Smith, A. J. Rising, H. Townsend, and *Wells, Smith & Macon,* for the plaintiff in error.

Blackburn & Dale, for the defendant in error.

BECK, C. J. By an act of the legislature entitled "An act to regulate elections for the removal of county seats," approved February 11, 1881, it was, among other things, enacted, "that not less than two thirds of all the legal votes cast shall be necessary to effect the removal of the county seat of any county in this state."

The record before us presents the question whether the provision above cited is in conflict with section 2 of article 14 of the constitution of this state, which is as follows: "Sec. 2. The general assembly shall have no power to remove the county seat of any county, but the removal of county seats shall be provided for by general law, and no county seat shall be removed unless a majority of the qualified electors of the county voting on the proposition at a general election vote therefor; and no such proposition shall be submitted oftener than once in four years, and no person shall vote on such proposition who shall not have resided in the county six months and in the election precinct ninety days next preceding such election."

In their interpretation of the above section, counsel for plaintiffs in error lay much stress upon the clause "the general assembly shall have no power to remove the county seat of any county." They argue that the legislature is thereby prohibited from making any enactment respecting the vote requisite for a removal different from that named in said section 2, the same being unalterably fixed therein.

They say the negative form of expression employed in the clause "no county seat shall be removed unless a majority of the qualified electors of the county voting on the proposition at a general election vote therefor," carries with it by necessary implication the affirmative

proposition, that if a majority do vote therefor the county seat shall be removed. Hence they affirm with great confidence that a bare majority is the ultimatum of the constitution as to the vote which shall authorize a removal, and that the legislature has no power to say that the vote shall be either greater or less, its power being restricted to the single duty of prescribing the necessary machinery for the removal.

On the part of defendant in error it is contended that the vote mentioned in section 2 was only intended as a limitation upon the power of the legislature to authorize a removal by a smaller vote.

In support of this view counsel cite the familiar doctrine that state constitutions are not grants of power to legislative assemblies, but limitations only; that plenary power in the legislature for all purposes of civil government is the rule, and that prohibition to exercise a particular power is an exception.

They insist that the ordinary meaning of the clause in issue is that the general assembly shall not enact that less than a majority vote may remove, but may require a greater vote. Also that there is no provision in the constitution, expressed or implied, which prohibits the passage of a law requiring a greater vote to authorize a removal.

The questions involved in the case have been ably and thoroughly discussed. Counsel on both sides say they are all easy of solution, yet they manifest a confidence little short of absolute certainty that the propositions which they announce in support of their respective theories are impregnable, and that the reasons assigned and authorities cited to sustain the same are conclusive.

Perhaps the great confidence entertained in these opposing views may be accounted for in part upon the theory suggested by Judge Cooley in his Constitutional Limitations, p. 49, that the different points of view from which different individuals regard constitutions incline them to different views of the instruments themselves. The whole controversy depends upon the solution of the single question whether that portion of the law of 1881 which requires a two-thirds vote to remove a county seat is in conflict with the constitutional provision that no county seat shall be removed unless a majority of the electors voting on the proposition vote therefor.

The nature of the investigation upon which we are about to enter renders the following citation from the pen of Chief Justice Shaw peculiarly appropriate: "The delicacy and importance of the subject may render it not improper to repeat what has been so often suggested by courts of justice, that when called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light on the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt:" Wellington et al., Petitioners, etc., 16 Pick. 95.

The following is also appropriate respecting the duty of courts in such investigations: "Being required to declare what the law is, in the cases which come before them, they must enforce the constitution, as the paramount law, whenever a legislative enactment comes in conflict with it:" Cooley on Const. Lim., 5th ed., 193.

There would be greater force in the arguments employed to demon-

strate the invalidity of the law of 1881 if the state constitution, like the national constitution, was a grant of enumerated powers. In such case we would look into the constitution to see if the grant was broad enough to authorize the legislature to declare what vote should be necessary to remove a county seat. But the legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation upon that power, we look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited. Another rule is, that when the validity of an act of the legislature is assailed for a supposed conflict with the constitution, the legal presumption is in favor of the validity, and before the court will be warranted in declaring it void a clear conflict with the constitution must be shown to exist.

The removal of county seats is a subject over which the law-making power has plenary jurisdiction and control. In the absence of constitutional restriction, a removal could be authorized upon any vote, great or small, which that body deemed advisable, or without any vote at all.

Looking into section 2, article 14, of the constitution, we note four principal limitations upon the power of the legislature over this subject: 1. The power to remove a county seat without a vote of the people is taken away. 2. The minimum necessary to effect a removal is prescribed. 3. A minimum limit is fixed as to the number of years that must elapse between successive submissions of the question. 4. The power of the legislature is limited as to the qualifications of the voters.

The section requires the passage of a general law on the subject; the evident purpose of the requirement being that such law shall provide the regulations and prescribe the qualifications and requirements necessary and proper for the exercise of the right under consideration. And but for constitutional limitations, this law might provide for submitting the question of removal every year; it might qualify as an elector any resident of the county, without reference to the time of his residence therein, or the precinct in which he resides; or it might enact that a plurality instead of a majority vote should effect a removal. Such a law would clearly be in conflict with constitutional restrictions. It would seem, on principle, however, that above and beyond, or outside the minimum limit, the jurisdiction would be unrestrained. This being so, the legislature would be as free to exercise its power and discretion in the *unlimited* jurisdiction as if no minimum limit on its powers had been imposed.

The application of this principle to the present controversy would show that the supposed conflict of the statute with the constitution does not exist, but that the legislature, in the passage of the act of 1881, acted within the scope of its jurisdiction. This view being opposed to the theory upon which this writ of error is prosecuted, we pause here to note objections which have been interposed to the constitutionality of the statute referred to.

Counsel for plaintiffs in error lay down the following propositions concerning the constitutional principles involved: "The power of the legislature is expressly prohibited from removing a county seat, and is expressly limited to providing the mode and manner and machinery for the removal. * * * The affirmative proposition implied in the negative expression, 'no county seat shall be removed unless a majority of the qualified electors * * * vote therefor,' is a constitutional right and power in the majority, and is a positive direction to that effect."

Under these assumptions as to the force and effect of the constitutional provisions, they inquire: "Will the courts entertain a construction that enables the legislature, under a pretext of regulating a removal, to prohibit the exercise of the right thus granted to the majority of the qualified electors of the county?"

The question is easily answered. If the premises were as stated, the courts would unhesitatingly answer, No. But we are compelled to say that the premises stated are not warranted by any language employed in the constitution. The authority cited in support of the conclusion drawn from the assumed premises is sound, but its application to the clause of the constitution referred to is not perceived.

The leading authority cited relates to the constitutional right of suffrage, and is as follows: "The legislature may regulate as to places, mode, and manner, and whatever else may be required to insure its full and free exercise. But this duty and right inherently imply that such regulations are to be subordinate to the enjoyment of the right, the exercise of which is regulated. The right must not be impaired by the regulation. It must be regulation purely, not destruction. If this were not an immutable principle, elements essential to the right itself might be invaded, frittered away, or entirely exscinded under the name or pretense of regulation, and thus would the natural order of things be subverted by making the principal subordinate to the accessory:" Page v. Allen, 58 Pa. St. 347.

These views were announced by Chief Justice Thompson in defining the rights of electors under the constitution of Pennsylvania. The learned jurist prefaces his observations by quoting *in hæc verba* section 1 of article 3 of the constitution of that state. This section treats of the qualifications of electors. It divides them into three classes and enumerates in detail the qualifications of each class. As to an individual of the first class, possessing the specified qualifications, the section declares "he shall enjoy the rights of an elector." A person of either of the other classes having the prescribed qualifications, it declares "shall be entitled to vote." It will be observed that nothing remained for legislative action in this case but regulation purely. The qualifications were defined, fixed, and enumerated in the constitution, and it was affirmatively declared those possessing them should be entitled to vote. It was correctly said of rights thus solemnly vested, they *must not be impaired by regulation. It must be regulation purely, not destruction.*

Now, in order to make a plausible application of the authority cited to the negative phrase of our own constitution, "and no county seat shall be removed unless a majority of the qualified electors of the county * * * vote therefor," it is assumed that this phraseology vests an absolute right of removal in the majority; that the language employed is self-executing and prohibitory, leaving nothing for legislative action save to provide the mode and manner of carrying the right into effect.

This is assuming the very thing in dispute. If the framers of the constitution intended to vest such absolute rights, free from legislative interference, this is surely a case where they have not expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible "to implication," which the authorities say they are presumed to have done: Cooley on Const. Lim. 71.

If we were to adopt the interpretation contended for, it would be equiv-

alent to inserting limitations in the constitution which its framers did not put there, for they are neither clearly expressed, nor do they arise, as we think, by necessary implication.

The clause, "the general assembly shall have no power to remove the county seat of any county," is referred to as strengthening the construction contended for. That clause has not the remotest relation to the question whether the legislature may fix the vote, or whether it has been unalterably fixed in the constitution. Its effect is to prohibit the legislature from removing a county seat without submitting the matter to a vote of the citizens interested. For the purpose cited it is consequently without significance.

The word "unless" which appears in the clause under consideration is supposed to have great force in conferring upon the phrase an affirmative meaning. Upon this point we are referred to the views expressed by Judge Folger in Manning, Bowman & Co. v. Keenan et al., 73 N. Y. 56. He says: "The word 'unless' has the force of 'except'—its primary meaning is 'unloosened from'—so what follows in the sentence after the word 'unless' is excepted or unloosened from what went before it. * * * Such a form of expression in a statute sometimes amounts to an affirmative enactment, and in fact *in proprio vigore* confers all that is excepted from a negative or restrictive provision. * * * Nor are instances lacking in enactments where it is manifest that by the expression of matter under the head of the word 'unless' it was meant to affirm the contrary of what was previously stated."

Conceding the soundness of these views, we observe that they were announced in the interpretation of the phraseology of a statute, not of a constitution. The purpose and effect of the same negative sentence might be wholly different in the two instruments. For example, in the absence of constitutional provisions the legislature would have unlimited jurisdiction on the subject of removal of county seats. Were it to enact in such case that no county seat should be removed unless a majority of the qualified electors vote therefor, there would be an affirmative implication that such a vote would authorize a removal. The practical effect of this negative phraseology would be equivalent to an affirmative enactment, for the reason that it would be the latest expression of the will of a body having jurisdiction of the subject.

The same provision, however, in a constitution would be a direction to the law-making power that it may not authorize by law the thing to be done upon a less vote than of a majority. If the statute, when passed, should make no requirement at all on the subject of the vote, then, doubtless, effect could be given to the affirmative implication in the constitutional provision, and a majority vote be held sufficient.

When the lowest limit only is fixed in the fundamental law, the legislature may act without restraint in the ascending scale, as we have before stated; and having fixed in the statute the vote which shall be required, it becomes the paramount law, and nothing is left for implication. This is but enforcing the rule announced by Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 188, that the framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.

It is no answer to this view of the subject to say: "If the legislature can say that a greater number than a majority shall be required to remove a county seat, they can say that every voter in the county shall

vote for the removal to effect the same, and thereby render nugatory the provision of the constitution as to a majority vote, and in effect prohibit the removal of a county seat."

An argument in favor of such a construction of the constitution as will nullify a statute is not aided by a suggestion that unless the construction contended for be adopted by the courts the legislature will have the power to pass laws prejudicial to the rights of the people.

It is not a legal inference that if unrestrained the chosen representatives of the people may commit either a foolish or a corrupt act. Legal presumptions are in favor of the integrity and wisdom of legislators, as well as the validity of their enactments. Said Mr. Justice Washington: "It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt:" Ogden v. Saunders, 12 Wheat. 270.

The remedy for bad or oppressive legislation, not obnoxious to constitutional restrictions, is said to be an appeal to the law-making power. If that should fail, the people in their sovereign capacity are supreme, and can correct the wrong. The courts can only enforce such limitations as the constitution imposes.

A certified copy of the proceedings of the constitutional convention relating to section 2, article 14, has been furnished us by counsel, accompanied by the proposition that "the record shows clearly that the constitutional convention declared its purpose of leaving the removal of county seats to a vote of the majority of the qualified electors, and not to a two-thirds vote."

In our judgment these proceedings only show that a diversity of opinion existed in the convention as to how far the legislative power should be restricted on the subject of the vote that should remove a county seat. There is nothing in the proceedings of the convention to point out the purpose of the provision made by it concerning this vote, beyond that conveyed by the meaning of the words employed therein. The plain, common-sense import of the language used indicates an intention to restrict or limit the power of the legislature in respect to the general law which it was required to pass on the subject. That a portion of the members were in favor of placing the limitation at a majority, and a portion at two thirds, does not indicate a purpose of withdrawing the subject from legislative action and discretion, save only to the extent of the limitation imposed.

There are instances where the proceedings of the convention which framed a constitution are said to furnish valuable aid in its interpretation. We do not regard this as one of them. The inquiry here is purely one of interpretation of language. The constitution derives its force, says Judge Cooley, from the people who ratified it, and their understanding of it must control. This is to be arrived at by construing the language used in the instrument according to the sense most obvious to the common understanding.

We hold that as to the objections raised against the act of February 11, 1881, that the act is valid. And it appearing from the record that two thirds of the electors of Custer county voting on the proposition did not vote to remove the county seat of said county from Rosita to Silver Cliff, the county seat was not removed.

The judgment of the district court is affirmed.

COFFMAN ET ALS. *v.* BROWN.

Filed January 18, 1884.

FINDING OF THE JURY WILL NOT BE DISTURBED when the evidence is conflicting.

A DEFENDANT IS BOUND BY AN ADMISSION IN HIS ANSWER as to the amount due from him to the plaintiff, and it is error for the court to order judgment to be entered upon a verdict for a less amount.

APPEAL from a judgment of the district court for San Juan county. The opinion states the facts.

Hudson & Slaymaker, *C. M. Frazier*, and *M. B. Carpenter*, for the appellants.

No appearance for the appellee.

By COURT. There is some conflict in the evidence as to the exact date when the partnership of appellants was formed. But the cause was tried to a jury, and we will not disturb their finding upon this question, which was submitted to and considered by them. The answer avers a tender of thirty-one dollars and forty cents, and admits an indebtedness to plaintiffs of that amount, yet the jury return a verdict for only twenty dollars and forty cents, and the court rendered judgment therefor. No question is made as to the sufficiency of the tender, and we think, under the verdict, plaintiffs ought not to recover their costs.

Although the evidence may have convinced the jury that plaintiffs' just demand did not exceed the sum named in their verdict, yet defendant was and is bound by the admission in his answer. Plaintiffs were in any event entitled under the pleadings to recover thirty-one dollars and forty cents, and the court should have rendered judgment for that amount.

The judgment will be reversed, and cause remanded with directions to the district court to render judgment for the sum above named.

The costs of the appeal will be equally divided between the parties; the balance of costs will be taxed against appellants.

Reversed, and judgment directed.

SIEBER ET ALS. *v.* FRINK ET ALS.

Filed January 18, 1884.

THE COURT MAY GRANT LEAVE TO FILE AN ANSWER after the time for answering has expired, where no default has been entered.

IN AN EQUITABLE ACTION THE COURT HAS POWER TO REFER THE SAME to a referee to take the testimony, and to decide the action upon the testimony so taken. In reviewing such evidence the appellate court may weigh the same with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses.

ENTRY OF JUDGMENT IN VACATION.—A judgment regularly rendered by a court in the transaction of its judicial business may be entered of record in vacation.

AN APPROPRIATION OF WATER IS NOT COMPLETE UNTIL THE ACTUAL DIVERSION or use of the water; but if the appropriator prosecutes his work with reasonable diligence his right of appropriation relates to the time when the first step was taken to secure it.

ABANDONMENT—EVIDENCE OF.—A failure to use water appropriated for a time is competent evidence on the question of abandonmment, and if such non-user continues for an unreasonable period, it may create a presumption of intention to abandon. Such presumption is not conclusive, but may be overcome by other satisfactory evidence.

CHANGE OF POINT OF DIVERSION—EFFECT OF.—An appropriator's rights of priority are not affected by a change of eighty feet in the point of diversion, when both points of

appropriation were upon the same stream, and no change was made in the quantity of water diverted, and no one was injured by the removal, and the use and the points of application of such use remained the same.

APPLICATION OF THE WATER TO SOME USEFUL INDUSTRY is essential to a valid appropriation. Such application must be made within a reasonable time to the business for which the appropriation was made. What constitutes such reasonable time is a question of fact, depending upon the circumstances of each case.

INCREASE IN THE AMOUNT OF WATER APPROPRIATED.—Where a prior appropriator of water subsequently enlarges his ditches, and diverts a larger amount of water than that originally appropriated, his right to the increased flow is taken subject to the rights of other appropriators which attached prior to the time of enlargement.

APPEAL from a judgment of the district court for Custer county. The opinion states the facts.

Blackburn & Dale, for the appellants.

A. J. Rising, for the appellees.

HELM, J. There was no error in allowing the answer to be filed. No default had been entered after the statutory period for answering expired, and it is doubtful if leave of court even was necessary, unless section 75 of the code may be construed as requiring such leave, for it is said that the office of a default is "to limit the time during which the defendant may file his answer," and that "if plaintiff fail to take a default before trial, it is a favor to the defendant:" Drake v. Davenick, 45 Cal. 463; Manville v. Parks, 1 West Coast Rep. 603.

Certainly when, as in this case, application is made, and leave granted upon terms by order of court, no default having been entered, there is no irregularity upon which we would reverse the judgment.

This is purely a chancery case; equitable questions only are presented, and equitable relief alone is demanded. The cause must be tried to the court, unless both parties consented to a trial by jury; the court, of course, possessing the right to submit certain issues of fact, had they existed, to a jury or referee: Sess. Laws, 1879, sec. 14, p. 122.

The court in this action submitted no issue to the referee, and the referee assumed no judicial function; he determined no question, and reported no finding; he only performed the ministerial duty of reducing the testimony to writing, and returning the same to the chancellor, who then heard the arguments of counsel and tried the case upon the pleadings and the evidence so reported.

We think that such cases may be tried upon proofs taken in this way, or upon oral testimony given in open court. We do not understand the chapter on references, or any other provision of the code, as operating to deprive the court, under the statute above cited, of the power, in cases like this, to direct upon its own motion the taking and reporting of evidence in the manner adopted herein—a power which was so fully conceded and so freely exercised before that instrument became a law. The case of Williams v. Benton, 24 Cal. 424, is not analogous. The reference there was to hear the evidence, and decide the issue; the opinion considers the compulsory power of the court to authorize a *finding* and *judgment* by the referee. Besides, when that opinion was written, the California practice acts contained no such provisions as section 14 above mentioned—a statute which has an important bearing upon this and several other questions connected with the distinction between procedure at law and in equity.

Counsel for plaintiffs in error express a desire to have this court review the case upon its merits, and "determine the rights of the parties so that

the proper decree may be made below;" and under the fourteenth and fifteenth assignments of error the argument and answer discuss but one proposition, viz., the validity of a judgment *entered* in vacation.

The question, therefore, which we shall consider under these assignments, is whether a judgment regularly rendered by a court in the transaction of its judicial business may be entered of record in vacation.

In Stearns v. Aguirre, 7 Cal. 443, cited, the clerk attempted to enter a judgment in vacation, when it was neither rendered by a court nor pronounced by law. Such a judgment is of course void; it is an attempt by a mere ministerial officer to perform judicial duties. The case is not in point upon the question above stated. The pronouncing of judgment is a judicial act; the entry of record thereof is a ministerial duty. The judgment is complete when properly declared, though the mechanical act of recording the same has not been performed.

In jury trials our code directs the clerk to discharge this duty within a specified time after verdict, but if he fails or neglects to do so within the statutory period, the judgment itself being pronounced in the verdict is none the less valid, and may still be recorded; the code does not require the entry to be made in term time, and in no event do the provisions limiting the time apply to trials by the court.

The practice of entering judgments in vacation prevailed at common law: Freeman on Judgments, 3d ed., sec. 38 et seq.; see also Code of Proc., sec. 144.

The remaining assignments of error question the sufficiency of the evidence to support the decree. Upon the principles of law governing the rights of the parties, counsel for both sides are in perfect harmony—a circumstance which is especially gratifying, as the court has no fault to find with the legal doctrines thus agreed upon. The case was tried in the district court mainly upon proofs taken and reported by a master or referee. It is therefore our duty to "sift and weigh all the evidence with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses:" Miller et al. v. Taylor et al., 6 Cal. 45.

The record contains over seven hundred and fifty folios of evidence, and we can not analyze the same in this opinion; we shall content ourselves with a statement of the material conclusions of fact to be drawn therefrom. Plaintiffs aver priority of right to the water in controversy through what is known as the Wilson and Brown ditch; defendants base their claim thereto upon alleged appropriations thereof by means of the Old or Becker and the Edward P. Smith ditches. A fourth, called the School Section ditch, is described in the testimony, and will command our attention. The Wilson and Brown ditch was constructed for the purpose of irrigating two tracts of land owned by Wilson and Brown respectively. Plaintiff Wheeler is the grantee of Wilson, and plaintiffs Sieber and Hudson held title under a conveyance from Brown. The priority of appropriation through the Becker ditch proper is practically conceded, though a suggestion of abandoment is made; it is probably the oldest connecting with Antelope creek.

We do not understand that plaintiffs complain of this appropriation of water; their contention is that defendants can not use this priority to sustain their right to water through the School Section ditch. We think plaintiffs are right in this respect. The head of the former is on Antelope creek; that of the latter is on Cottonwood, a tributary of

Antelope, both being above the point of confluence of the two streams; the latter was constructed in 1875, yet water was diverted from Antelope creek through the former as late as 1878; from the evidence and maps we conclude that the former extends in a westerly, and the latter in a northerly, direction; they meet and unite, and the water from both may be used in irrigating the same tract of land. But there are two separate and distinct divisions and appropriations of water, dating at different periods; and the rights acquired attach upon the respective dates of appropriation. There is some conflict of testimony as to the time of appropriation through the Wilson and Brown ditch; we are satisfied that the ditch was commenced as early as April or May, 1871, and that it was completed and water turned in by or before the first of August. The appropriation would, therefore, date from April or May of that year. We accept the rule adopted in California and Nevada in this connection. This rule is stated as follows: "Although the appropriation is not deemed complete until the actual diversion or use of the water, still, if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it:" Ophir M. Co. v. Carpenter, 4 Nev. 544; Kelly v. Natoma W. Co., 6 Cal. 109.

Water was not appropriated through the Smith ditch until July or August of 1871. If, therefore, there has been no abandonment of the right acquired by means of the Wilson and Brown ditch, the prior right of plaintiffs over the appropriations through the School Section and Smith ditches is established.

Upon the question of abandonment, the testimony is by no means clear. From 1871 to 1875, according to the proofs, each of the three ditches constructed in 1870 and 1871 was neglected, and probably used but little during one or more of the seasons; but we can not say that the evidence sufficiently establishes an intention to abandon either of them, or the right to water acquired thereby. A failure to use for a time is competent evidence on the question of abandonment; and if such non-user continued for an unreasonable period, it may fairly create a presumption of intention to abandon; but this presumption is not conclusive, and may be overcome by other satisfactory proofs. The removal in 1876 of the head of plaintiffs' ditch, and change of the point of diversion some eighty feet, does not affect their right of priority; both points of appropriation were upon the same stream; no change was made in the quantity of water diverted, and no one was injured by the removal; the use and the points of application to such use remained the same.

But it appears from the evidence of Wilson himself that prior to 1876 no part of the water appropriated through the Wilson and Brown ditch was used upon any portion of the Wilson tract. Of the quantity applied to the irrigation of the Brown ranch we are not satisfactorily advised. There is some proof that water "ran to waste" at the end of the ditch; and it may be that in 1871, and during the succeeding four years, but a part of the water diverted was actually applied to a beneficial use upon the Brown land. If this be the fact, plaintiffs are only entitled to priority for the quantity so used.

One of the essential elements of a valid appropriation of water is the application thereof to some useful industry. To acquire a right to water

from the diversion thereof, one must, within a reasonable time, employ the same in the business for which the appropriation is made.

What shall constitute such reasonable time is a question of fact depending upon the circumstances connected with each particular case. Plaintiffs Sieber and Hudson are entitled to a decree of priority, and an injunction protecting the same, for so much of the water appropriated through the Wilson and Brown ditch as was used previous to 1876 in irrigating portions of the Brown ranch, of which they are the purchasers. But to determine this quantity further proofs must be taken.

It appears that in the summer of 1876 the appropriation of water from the Cottonwood by the School Section ditch was enlarged. Such increase is subject to the right of plaintiff Wheeler, as well as Sieber and Hudson, acquired in the early spring of that year by the reconstruction of their ditch and diversion therethrough. But we have no definite means of determining this quantity from the record; further testimony upon this point is also essential.

The decree will be reversed and the cause remanded, with directions to the district court to take the necessary proof upon the two questions above mentioned, and enter a decree in accordance with the views herein expressed. The costs of the entire litigation will be equally divided between the plaintiffs and defendants.

Reversed and remanded.

SALISBURY *v.* ELLISON.

Filed January 25, 1884.

THE SURVIVING PARTNER OF AN INSOLVENT FIRM CAN NOT ASSIGN THE PARTNERSHIP assets for the benefit of preferred partnership creditors. If he does so, the validity of such assignment may be questioned in a legal action by a firm creditor without first resorting to an equitable action to cancel and set aside the same.

DEFENSE NOT PLEADED, WHEN MAY BE TAKEN ADVANTAGE OF.—After the plaintiff has made out a *prima facie* case and rests, the defendant can not offer evidence of a defense, legal or equitable, which was not presented by the pleadings. But when the evidence of the plaintiff in support of his case discloses a perfect defense, whether the same be equitable or legal, he will be deemed to have waived the defect arising from a want of averment thereof in the answer, and the defendant may have the benefit of such defense.

ERROR to the district court for Boulder county. The opinion states the facts.

Harmon & Ellis, for the plaintiff in error.

Platt, Rogers & Whiteley, for the defendant in error.

HELM, J. B. F. Pine, jun., being the surviving partner in the firm of B. F. Pine & Son, executed a written assignment of all the firm property to defendant in error; this assignment was for the benefit of the firm creditors, but gave preference to two of them. The firm being insolvent, Brinker, one of the creditors not so preferred, brought suit and recovered a judgment for the amount of his claim. In aid of such suit he caused plaintiff in error, as deputy sheriff, to levy a writ of attachment upon the property three days subsequent to the assignment thereof. Thereupon defendant in error, the said assignee, instituted his action of replevin for possession of the goods. This action was successful, and the present writ of error was sued out of this court to reverse the judgment rendered therein.

At the trial of the cause the written assignment aforesaid was admitted in evidence over defendant's objection. This action of the court is assigned for error, and the most important question presented rests upon this objection. Can the surviving partner of an insolvent firm assign the partnership effects for the benefit of preferred partnership creditors? If he can not do so, may the validity of such assignment be questioned in a legal action by a firm creditor? Or must an equitable action be first instituted to cancel and set aside the same?

The surviving partner is a trustee, the firm property being the trust estate; the partnership creditors, and the representatives of the deceased partner, are the beneficiaries, there being also a beneficial interest in favor of the trustee himself. The sole purpose of the trust is the closing up of the partnership business, and payment of the surplus, if any after the settlement of the debts, to the proper parties. In the performance of his duties the surviving partner is governed by the rules applying to ordinary trustees; his acts are scrutinized with the same care, and he is held to the same diligence and good faith as is required in the management of other trust estates: Gillett et al. v. Gaffney et al., 3 Col. 364. His right to make an equitable and just assignment of the partnership effects and credits for the equal benefit of all the creditors, is now recognized by a preponderance of authority. Such right is, we think, also recognized and regulated by section 68 of the general statutes. When the assignment before us was executed, however, this act had not become a law. Therefore our present investigation is not governed or in any manner affected thereby. But an assignment for the benefit of preferred creditors, the *firm being insolvent*, is declared invalid by courts of the highest dignity and worth.

In his position of trustee for *all* the firm creditors, the surviving partner is not permitted to sacrifice the interests of one by favoritism shown to another; if there be not sufficient partnership property to pay all the debts, equity and good conscience require that the trustee shall distribute the proceeds therefrom ratably among the creditors.

There are authorities which seem to hold that a surviving partner may prefer creditors in settling the firm obligations; but, so far as we have been able to discover, with a single exception, there was no question of insolvency in the cases upon which such declaration rests. The reason for the rule prohibiting preference among the creditors did not exist, and therefore such cases do not militate against the correctness of the rule where such reason appears.

If the firm assets are sufficient to pay all of the firm debts, so that each creditor will ultimately receive compensation in full, preference in the time or order of payment may not be inconsistent with the conditions of the trust. The exception referred to is the case of Egberts v. Wood, 3 Paige, 526, in which the chancellor suggests that the representative of the deceased partner has "no interest in the question as to what debts shall be paid first, in case the partnership effects are insufficient to pay the whole;" and therefore an assignment for the benefit of preferred creditors can not be impeached on the ground that such representative had no knowledge thereof. "The suit was brought by a firm creditor; the assignment was not sustained, but the reason given for declining it was that one of the *surviving partners* had no knowledge thereof and gave no consent thereto."

But counsel for defendant in error insists that the acts of the surviv-

ing partner in this respect can only be questioned in a court of equity; that his assignment for the benefit of preferred creditors can not be attacked in a legal forum. From the nature of the transactions and legal status of the parties interested, it is true that these questions more often arise in equitable actions. But such assignment, insolvency appearing otherwise, is held void as against a creditor injured thereby; no investigation is necessary to disclose this fact, for the instrument, the assignor being insolvent, bears on its face evidence of its own invalidity. Where the void assignment is offered and relied upon by the party to be benefited thereby, there would seem to be no good reason why objection thereto may not, under our practice, be made in a court of law.

In the action of ejectment, courts of law have long assumed the privilege of rejecting a void deed; and they have insisted upon a large concurrent jurisdiction with courts of equity in investigating questions of fraud for the purpose of determining such invalidity. A resort to equity is necessary to set aside or cancel such an instrument and remove the cloud upon title; but the defect appearing on its face, or being disclosed in a proper manner, courts of law simply treat the deed as a nullity and ignore its existence. We do not think that such an assignment as the one before us ought to receive any greater consideration or protection than a void deed to realty. And this is especially true under our present system of procedure.

Had plaintiff averred ownership of the property replevied by virtue of the assignment, defendant would have met the averment with an allegation of fraud upon creditors in the assignment; and the issue made upon this question would have been fully tried. There being only a general allegation of ownership in the complaint, it would be unjust to say that defendant might not object to the instrument upon which such ownership and right to possession entirely depend, where the matters appearing on the face of the instrument itself, together with the evidence already before the court, establish the fact that the claim of ownership is without foundation.

It must be borne in mind that the proof of plaintiff in making out his case, including evidence without objection on cross-examination, shows beyond question the *insolvency* of the partnership at the time of the assignment; also the facts that the assignment was made for the benefit of preferred creditors, and that Brinker was an unpreferred creditor to the extent of over three thousand dollars, and therefore plaintiff himself thus established a defense against his own action, which, if properly averred, would be decisive in a court of equity. It must also be remembered that under our practice an equitable defense is available in a legal action; and therefore defendant was entitled upon proper averment to prove the same as an affirmative defense in this case. He would not be permitted, after plaintiff makes out a *prima facie* case and rests, to offer evidence, either legal or equitable, which was not presented by the pleadings. But when the evidence of plaintiff in support of his case discloses a perfect defense, whether the same be equitable or legal, he will be deemed to have waived the defect arising from a want of averment thereof in the answer, and defendant may have the benefit of such defense. This is especially true where, as in the case before us, defendant may not, previous to the trial, have information which would enable him to plead the defense in his answer. Had the assignment been rejected by the court when offered in evidence, plaintiff could not have recovered;

having been received in connection with the other proofs, it established a defense and defeated his claim of right to possession of the property in controversy.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

STONE, J., concurred.

BECK, C. J., dissenting. The issues in this case were purely legal. The action was replevin, the complaint merely alleging ownership of the attached goods in the plaintiff Ellison. The answer denied such ownership, alleged ownership in B. F. Pine, the surviving partner of the firm of B. F. Pine & Son, and an indebtedness of the firm to the attaching creditor. The fact that the plaintiff acquired his title through an assignment for the benefit of creditors made by the surviving partner was not mentioned in the pleadings.

Prior to the recent statute (which, however, does not affect this case), it was only in equity the rule obtained that the surviving partner of an insolvent firm could not assign the firm assets with preferences to certain of the creditors. Aside from this equitable rule, the surviving partner could assign and convey the assets the same as his own property.

Holding the legal title and possession, he could invest a purchaser or assignee with good title. Of course, fraud may vitiate any contract, but the element of fraud in fact does not enter into this case. Neither does any matter of equitable defense, for the reason that no such defense was set up in the pleadings.

The assignment does not show on its face that the late firm of B. F. Pine & Son was insolvent. This appeared by extrinsic evidence elicited on the cross-examination of the surviving partner, who was a witness for the plaintiff. While an equitable defense may be interposed in a legal action, I am of opinion that to entitle a defendant to the benefit thereof, proper notice must be given that such a defense will be relied upon. Where this is not done, I do not think that a party who has failed to sustain the legal issues involved in a cause is entitled to equitable relief based on the testimony only.

For the above reasons I dissent from the opinion of the court.

ATKINSON ET AL. v. TABOR ET AL.

Filed February 8, 1884.

JUDGMENT, WHEN RELATES TO A FREEHOLD.—An appeal will not be dismissed on the ground that the judgment appealed from does not relate to a freehold, when it appears from the cross-bill filed by the appellants that the subject-matter of the litigation directly involved the title to several mines, and the findings on the issues presented by the cross-bill were against the appellants.

WAIVER OF APPEAL.—Matters may occur subsequent to the judgment which operate to waive the right of a party to have the judgment reviewed on appeal or writ of error. When such matters appear of record, the objection to the appeal may be raised by a motion to dismiss; but where they do not so appear, the objection must be raised by a plea in bar of the proceedings in error. The supreme court has jurisdiction to institute the necessary inquiry whether the matters alleged to constitute the waiver have in fact occurred.

A PARTY WHO HAS VOLUNTARILY TAKEN ADVANTAGE OF A JUDGMENT rendered at *nisi prius* can not afterwards prosecute proceedings to reverse it.

MOTION to dismiss an appeal from a judgment of the district court for Lake county. The opinion states the facts.

Markham, Patterson & Thomas and *Belford & Reed*, for the appellants.

L. C. Rockwell, for the appellees.

By the COURT. The appellees move to dismiss the appeal, and assign two principal grounds for the motion: one being that the appellants, since taking the appeal, have availed themselves of a large portion of the money deposited as the purchase money of the mines involved in the litigation, and have thus waived their right to have the judgment appealed from reviewed on appeal; the other ground of the motion is, that the judgment appealed from does not relate to a franchise or a freehold, and is not a judgment for money; for which reasons no appeal lies. The latter ground is not sustained, but directly contradicted, by the record. The subject-matter of the cross-bill relates to a freehold. It institutes a contest directly involving the title to several mines, alleging that the deed executed and deposited in escrow by the appellants was surreptitiously obtained by the appellees; that the conditions of the sale were not complied with; and that, for these reasons, the title did not pass. The cross-bill prays for affirmative relief, and that the deed be ordered to be delivered up to be canceled, and that appellants be decreed to be the owners of the real estate, free and clear of all claims of the plaintiffs. The referee found against the appellants on the issues presented by the cross-bill, and that they were not entitled to the relief prayed for. Consequently, the effect of the decree was to deny appellants' claim of title to the real estate, and to recognize their right to the purchase money deposited under the contract. Nevertheless, the judgment still relates to a freehold, and is reviewable upon appeal.

Upon the other ground assigned in support of the motion, that since taking their appeal the appellants have availed themselves of the benefit of the judgment and the contract by accepting and receiving a large portion of the purchase mohey so deposited, thereby waiving their right to have appellees' title declared null and void, as having been surreptitiously obtained, we observe that this point can not properly be raised by motion. Matters may occur subsequent to judgment which operate to waive the right of a party to have the judgment reviewed on appeal or upon writ of error. When such matters appear of record, the objection is properly raised by a motion to dismiss; but when they do not so appear, the objection must be raised by a plea in bar of the proceedings in error: Powell on Appellate Proceedings, p. 121, sec. 12 a, and authorities cited.

We entertain no doubt of the general proposition that it is inconsistent with the principles of justice and the rules of law to permit a party who has voluntarily taken advantage of a judgment rendered at *nisi prius* to afterwards prosecute proceedings to reverse it. Neither have we any doubt of the jurisdiction of this court where such conduct of a litigant before it is properly alleged, and the matter does not appear of record, to institute the necessary inquiry whether the matters alleged to constitute the waiver have in fact occurred.

To sustain the appellants' objection, and hold that we are without power to institute such inquiry, is equivalent to saying that the supreme court of this state is without power to determine a question pertaining to its own jurisdiction.

The motion to dismiss the appeal will be denied, without prejudice to the rights of the appellees to set up the same matters of waiver, by a plea in bar to the proceedings on appeal.

DE LAPPE v. SULLIVAN.

Filed February 8, 1884.

PROVISIONS OF THE STATUTE IN REFERENCE TO FURNISHING A BILL OF PARTICULARS are applicable to proceedings in the county court on appeal from a judgment of the justice's court.

DENIAL OF A MOTION FOR A MORE SPECIFIC BILL OF PARTICULARS, if erroneous, will not warrant a reversal of a judgment when the defeated party was not prejudiced thereby.

UNDER A CONTRACT OF EMPLOYMENT WHERE THE WORK IS TO BE DONE BY THE DAY OR MONTH, and nothing is said as to the time of payment for the services to be rendered, the wages of the employee are due and may be demanded at the close of each day or month, as the case may be. After such demand and non-payment, the employee may maintain attachment proceedings to recover his wages.

APPEAL from a judgment of the county court for Lake county. The opinion states the facts.

Templer & Hodges, for the appellant.

G. G. White and *T. C. Early*, for the appellee.

HELM, J. No objection is made here to the amount of the judgment rendered by the county court, nor to appellant's liability therefor; it is conceded that the labor was performed, and that appellee was justly entitled to the sum found due him. Defendant below demanded an itemized statement of the account sued on; in response thereto plaintiff furnished the following: "Dec. 5, 1882. Balance due for work to John Sullivan, $182.65." The court overruled defendant's motion, filed under the statute for a rule requiring a more specific bill of particulars or statement. The first assignment of error rests upon this ruling.

The suit is in the county court on appeal from a justice of the peace, and therefore there are no written pleadings; but, nevertheless, we think the statute applicable to the proceedings in the appellate court, and that defendant might properly invoke its aid by the motion filed. It is sufficient, however, for us to say that appellant is in no position to avail himself of an error, had one been committed in denying his motion. For as already stated, he is not complaining of injustice or injury in the amount of the judgment rendered; he is seeking no reversal on the ground that the sum recovered is excessive, or that he was in any way surprised or prejudiced by the evidence offered in proving the plaintiff's account.

A judgment will not be reversed for errors which could not have prejudiced the appellant. The ground averred in plaintiff's affidavit for attachment is, "that the debt was for work and labor performed, which should have been paid at the time the work and labor was performed." This averment was duly traversed and put in issue by affidavit in the usual form. But by stipulation of the parties, the trial of this issue was postponed till the final hearing; and it was then submitted to and determined by the court in connection with the principal case.

The proofs show that plaintiff was working for defendant by the day; that there was no stipulated time for payment of his wages, but that they were paid from time to time as plaintiff needed the money and made demand therefor; that either party might terminate the contract of employment, as defendant did, at any time; and that when discharged, plaintiff demanded the wages then due and unpaid.

Where by contract one is employed by another to work by the day or month, and nothing is said as to the time of payment for the services to

be rendered, his wages are due and may be demanded at the close of each day or month, as the case may be. We think such services are comprehended within the meaning of the statute relied on, and that after demand for the amount due the laborer may maintain his attachment proceedings. The court was justified in sustaining the attachment sued out in this case. This conclusion disposes of the remaining assignment of error.

The judgment will be affirmed.

Affirmed.

DE LAPPE *v.* SULLIVAN.

Filed February 8, 1884.

JUDGMENT AFFIRMED ON THE AUTHORITY OF DE LAPPE V. SULLIVAN, *ante*, 107.

APPEAL from a judgment of the county court for Lake county. The opinion states the facts.

Templer & Hodges, for the appellant.

G. G. White and *T. C. Early*, for the appellee.

By the COURT. The questions submitted for adjudication in this cause are identical with those considered in the case of De Lappe v. John Sullivan, *ante*, 107, which has just been decided. The evidence in no way changes or modifies the conclusions there arrived at. This appeal must therefore be determined in the same way.

The judgment of the county court will be affirmed.

Judgment affirmed.

WEISE ET AL. *v.* BARKER.

Filed February 8, 1884.

TENANTS IN COMMON WHO ARE JOINED AS PLAINTIFFS IN AN ACTION OF EJECTMENT are presumed to have consented to such joinder.

ONE TENANT IN COMMON MAY RECOVER POSSESSION OF THE WHOLE of common property, in an action of ejectment, as against an adverse possessor.

AMENDMENT—JOINDER OF CO-TENANTS.—A complaint in an action of ejectment, brought by a tenant in common to recover possession of his undivided share in certain mining claims, as against an adverse possessor holding under an entirely different source of title, may be amended by joining as plaintiffs the other tenants in common, and seeking the recovery of the entire property. Such an amendment does not change the nature of the original cause of action.

PRIOR LOCATION OF A MINING CLAIM IS NOT INVALIDATED BY A MISTAKE OF THE RECORDER in recording such location by a name somewhat different from that stated in the certificate of location.

A VALID LOCATION OF A MINING CLAIM CAN NOT BE MADE while the same is in the actual possession of other prior locators. The description of a mining claim, as the same appears in the complaint and on the record, held sufficient.

APPEAL from a judgment of the district court for Park county. The opinion states the facts.

George, *Maxwell*, and *Phelps*, for the appellants.

W. P. Wade, *George M. Dunn*, and *A. Danford*, for the appellees.

BECK, C. J. The principal errors assigned are, that the district court erred in allowing the amended complaint to be filed, and in making Ben-

bow and Hussey parties to the action. The action was originally instituted by Barker and Wade as plaintiffs, alleging that they were entitled to one undivided one half, or each to one undivided one fourth of the Tanner Boy lode, and that the defendants had wrongfully entered upon said claim and taken possession thereof, to the exclusion of the plaintiffs and their grantors, etc. Afterwards leave was granted the plaintiffs, after service of notice upon the defendants, to file an amended complaint in said cause making the said Benbow and Hussey parties plaintiffs. The amended complaint alleges, among other things, "that plaintiffs are, and were at the institution of this suit, owners and entitled to the possession of said claim in the following proportions, to wit, each to an undivided one fourth, and that they claim the right to occupy and possess said premises by right of pre-emption and by virtue of full compliance with the local laws and rules of miners in said mining district, the laws of the United States and of said state of Colorado, and by actual prior possession as a lode mining claim. Plaintiffs in error assume that Benbow and Hussey were made parties to the amended complaint without their consent.

We have searched the record in vain for evidence to sustain this assumption. The averments of the amended complaint are to the effect that Benbow and Hussey are tenants in common with the original plaintiffs, Barker and Wade, and that each of said four plaintiffs is the owner of an undivided one fourth of the property sued for. All were proper parties to the complaint, and the presumption obtains that all consented to become parties plaintiffs, as otherwise those not consenting would have been joined as defendants: C. C., secs. 11, 13.

The amended complaint having been filed by leave of the court after notice to the defendants, and the defendants, having suffered a default to be entered against them, are in no position to complain of the judgment. On behalf of the appellants, it is insisted that the amendment changed the subject-matter of the action. This view can not be sustained. True, the original complaint only claimed for the plaintiffs Barker and Wade an undivided half of the Tanner Boy lode; but as against the appellants, they were entitled to recover the entire lode, and the original complaint might have been amended to claim the whole. The defendants did not claim to be co-tenants of Barker and Wade, but were claiming the entire lode by a wholly different and adverse title.

The law is, that in ejectment one tenant in common may recover possession of the entire tract as against all persons but his co-tenants: Mahoney v. Van Winkle, 21 Cal. 583; Hart v. Robertson, Id. 348.

The amended complaint alleges that the plaintiffs are the owners and entitled to the possession of the lode. It further alleges that each plaintiff is the owner of an undivided one fourth of the lode. The stipulation of facts filed in the cause shows that all the plaintiffs derive title from the same source, that is, from the same act of location. It also shows that the defendants claim title by virtue of a location of the same lode, made long subsequent to the plaintiffs' location. Defendants were in no manner prejudiced by the filing of the amended complaint. The same title alleged in the original complaint was stated and relied upon for a recovery in the amended complaint. Defendants were not interested in this title, but claimed adversely to it. It was therefore wholly immaterial to them whether the action was brought in the names of the several co-owners against them, or in the names of a portion thereof.

But the point is made that plaintiffs' location was invalid because the name of the lode was by mistake recorded "Farmer Boy" instead of "Tanner Boy," as it was written in the location certificate. This was a mistake of the recorder, and can not avail the defendants in this case. The certificate itself appears to have complied with the statute: Gen. Laws, secs. 1813, 1814.

Plaintiffs were not responsible for the mistake of the recorder: Myers v. Spooner, 55 Cal. 258. Besides, the defendants were not misled by the alleged error. They have permitted judgment to go against them by default. Their default admits every issuable fact stated in the plaintiffs' complaint: Harlan v. Smith, 6 Id. 173; Hutchings v. Ebeler, 46 Id. 557. Among other issuable facts stated in the complaint is the following: "That heretofore, to wit, on or about the eleventh day of February, 1880, while plaintiffs and their grantors were in peaceable, open, notorious, and exclusive possession of said claim, working the same as aforesaid, defendants wrongfully and unlawfully entered upon said claim and took possession thereof, ousting plaintiffs and their grantors, and have ever since wrongfully held possession of said premises, to the exclusion of plaintiffs and their grantors."

The stipulation filed in the cause concedes that the lode was properly staked by the plaintiffs; that the mistake in the record was made by the recorder; and that the defendants staked and relocated said lode as abandoned property after the location by the plaintiffs. Upon the merits, then, the appellants have no standing in this case. The record shows actual possession in the appellees, which is *prima facie* evidence of title, and as we said in Lebanon M. Co. v. Con. Rep. M. Co., 6 Col. 380: "Entering upon premises in the actual possession of another for the purpose of performing the acts necessary to constitute location and possession, amount only to a trespass, and can not form the basis for the acquisition of title." Whether the location of Barker and his co-tenants be valid or not, their possession is sufficient to defeat a recovery by the appellants. We are further of opinion that the description of the lode set out in the amended complaint, as it appears in the record proper, transcript, folios 18–23, is sufficient to identify the claim sued for. The boundaries of the claim are given, and in addition the following: "The discovery tunnel is about one half mile below the old town of Timberline on the line of Buckskin creek, on the south side of said creek, and two hundred feet north-west from the discovery tunnel on the Ioda lode."

The judgment is affirmed.

DUSING *v.* NELSON.

Filed February 8, 1884.

A JUDGMENT TO BE FINAL MUST SHOW BY THE ENTRY ON THE RECORD, in intelligible language, a determination of the rights of the parties to the action, what relief has been granted, if any, or that the defendant has been dismissed without day. A judgment which does not conform to such requirements will be held to be interlocutory merely.

JUDGMENT AND FINDINGS IN FAVOR OF THE PLAINTIFF WILL BE PRESUMED TO BE SUPPORTED by the evidence when the same is not produced before the appellate court.

PURCHASE OF TRUST ESTATE BY EXECUTOR OF CESTUI QUE TRUST.—The maker of a promissory note, secured by a trust deed of land, which authorizes the trustee to sell such lands upon default in the payment of the note, can not object to a purchase at such sale by the executor of the beneficiary under the trust deed, when such purchase resulted greatly to his advantage.

ERROR to the county court of Jefferson county. The opinion states the facts.

Brown & Putnam, for the plaintiff in error.

A. H. De France, for the defendant in error.

BECK, C. J. This was an action of ejectment, brought by Nelson, the defendant in error, against Dusing, the plaintiff in error, to the March term, 1880, of the court below, to recover possession of a quarter-section of land. The last entry of record in said cause at the March term is in the following words: "And now, after the demurrer being overruled to defendant's additional answer, comes the said plaintiff and files his replication to said answer, whereupon the said defendant asks for judgment on said replication and the papers in this cause. And now the court, being fully advised in the premises, finds that there is not sufficient matter alleged in said replication on which to found an action. Whereupon it is considered ordered and adjudged by the court that the said defendant have and recover of and from the said plaintiff his costs and disbursements by him in this behalf laid out and expended, taxed at seven dollars and five cents, and that he have execution therefor."

No further steps were taken in said cause until the December term, 1880, of said court, when the plaintiff moved the court to vacate the judgment for costs entered at the March term, and for a rehearing of the defendant's motion for judgment upon the pleadings. This motion was resisted by the defendant's counsel, but the court sustained the motion, vacated the judgment for costs, and granted a rehearing of the application for judgment upon the pleadings, to which rulings of the court the defendant duly excepted. Afterwards, on the rehearing, the motion for judgment on the pleadings was overruled and the cause set down for trial before the court without a jury, by consent of parties. The finding and judgment were for the plaintiff.

The first error assigned questions the power of the court to vacate the judgment entered at the March term. Two terms of court had intervened after the entry of the so-called judgment before the coming of the December term at which the subsequent proceedings were had. If, therefore, the order entered at the March term was in fact a final judgment in the cause, the court had no power to set it aside, and to rehear and redetermine the issues after the lapse of two terms of court: Freeman on Judgments, secs. 90, 96.

The court below appears to have taken the view that the action taken at the March term did not constitute a final judgment, and was not a final disposition of the case. We are of opinion this view is correct. Pothier says: "A judgment to have the authority or even the name of *res judicata* must be a definite judgment of condemnation or dismissal:" Pothier Abr., pt. 4, c. 3, sec. 3.

If the order entered in a cause does not put an end to the action, but leaves something further to be done before the rights of the parties are determined, it is interlocutory and not final. To be final, it must end the particular suit in which it is entered.

It is said that a judgment "that the defendant go hence, and that he recover his costs," etc., though not formal, is a good final judgment, because no further action can be taken while it remains in force, but that a judgment for costs alone is not final: Freeman on Judgments, secs. 12, 16; see also Young v. Stonebraker et al., 33 Mo. 117; Adams v. Trigg, 35 Id. 190.

As we said in Alvord v. McGaughey, 5 Col. 244: "While a strict compliance with forms is not essential in the entry of judgment, yet to constitute a final judgment, the record must not only indicate that an adjudication took place, but the entry must have been intended as the entry of a judgment." This intention must be fairly deducible from the language employed in the entry. Thus tested, a final judgment will show, in intelligible language, a determination of the rights of the parties to the action, what relief has been granted, if any, or that the defendant has been dismissed without day. The supposed judgment in this case, not conforming with the above requirements, must be held to be interlocutory merely.

Looking now at the case as presented upon the merits, we find but little conflict in the facts as stated in the pleadings. The amended answer on one side, and the replication on the other side, assume to set out the facts concerning the origin and history of the plaintiff's title. And since the record shows that testimony was produced on the trial in support of the allegations of the complaint and replication (none of which has been preserved), and the finding and judgment having been for the plaintiff, the presumption obtains that the allegations of fact on the part of the plaintiff were duly proven.

Dusing, on the ninth of December, 1876, executed to one Oliver Graves, as trustee, a trust deed upon the land in controversy, to secure the payment of a promissory note for the sum of thirteen hundred dollars, given by Dusing to one A. C. Butler, payable in two years, with interest thereon at the rate of one and one half per centum per month. After maturity of the note, default having been made in the payment thereof, the premises having been duly advertised for sale, as required by the trust deed, they were, on the twenty-fourth day of November, 1879, offered at public sale by the trustee. There was then due upon the note about the sum of eighteen hundred dollars. The highest bid offered by an outsider was the sum of six hundred and twenty-five dollars. Thereupon the trustee bid, for the executors of the estate of said Butler, who was then deceased, by virtue of a power of attorney held by him for that purpose, the sum of fifteen hundred dollars; and that being the highest bid, the premises were struck off and sold to said executors for that sum. A few days afterwards, and before a deed was executed to the executors, in pursuance of said sale, Nelson, the plaintiff, purchased the premises from the executors, through the said Graves, for the sum of eighteen hundred dollars; and by direction of the executors this entire sum was indorsed upon Dusing's note, and a deed executed by said trustee directly to Nelson. In the execution of this deed, then, consists the whole irregularity upon which the defense is based.

That there is no equity in the defense is apparent from the fact that the defendant realized an additional credit upon his note of three hundred dollars over and above the amount bid at the sale, by reason of the plaintiff's purchase and of the transfer of the title to him. If the trustee had executed a deed to the executors in pursuance of the public sale to them, crediting their bid, fifteen hundred dollars, upon defendant's note, and the executors had then executed a deed to Nelson, retaining for the use of the Butler estate the additional three hundred dollars realized by the latter sale, there would exist nothing of the present defense, except the point that "the executors could not purchase at the trustee's sale, even if present."

As an unlimited proposition of law, this is not correct. That its observance would have operated greatly to the disadvantage of the defendant in the present case, and of the Butler estate as well, is manifest when it is remembered that the highest bid at the sale, aside from the bid of the executors, was the sum of six hundred and twenty-five dollars. By means of their purchase of the land, the executors secured for their estate payment in full of its demand against the defendant, and saved for the defendant the sum of one thousand one hundred and seventy-five dollars. The utmost good faith appears to have been exercised towards both debtor and creditor by the trustees referred to. Says Mr. Schouler, in his work upon Executors and Administrators, sec. 358: "The preponderance of American decisions tends rather to the conclusion that a purchase of assets by the executor or administrator, or his taking and accounting for the same at their appraised value, may often be really advantageous to the estate, and that such advantage is after all the main thing to be considered."

And again, in section 323, he says: "When it becomes necessary to save the estate from loss, it is right and even obligatory for the executor or administrator to purchase or take possession of land on the foreclosure of a mortgage belonging to the estate, and hold the title for the benefit of the estate."

The equities set up in the defendant's answer constitute no defense to the action. The irregularities complained of all resulted to his advantage. The trustee's deed vested the legal title in the plaintiff; therefore, the equitable defense failing, and there being no application for affirmative relief, judgment was properly given for the plaintiff.

Judgment affirmed.

PEOPLE ex rel. DEAN v. COMMISSIONERS OF GRAND COUNTY.

Filed February 8, 1884.

ADMISSIONS OF VOTERS—EVIDENCE OF.—In an action to determine the result of an election, the admissions of certain voters, made after the election, to the relator, touching their qualifications as electors, are not competent evidence.

COMPELLING THE ATTENDANCE OF WITNESSES.—Judgment will not be reversed for the refusal of the trial court to compel the attendance of witnesses who had been subpœnaed and had come to the place of trial, but who had afterwards refused to appear in court and testify unless their fees were first paid, especially where the affidavit used on the motion to compel such attendance failed to set forth what was expected to be proved, or even aver that their testimony would be necessary, pertinent, or in any way material in the case.

ELECTION TO DETERMINE THE REMOVAL OF COUNTY SEAT.—In the election to determine the removal of the county seat of Grand county from Hot Sulphur Springs to Grand Lake, the votes cast by the local voters at such latter place in favor of Grand Lake, west side, should be counted for Grand Lake.

FINDINGS OF THE LOWER COURT IN AN ACTION TO DETERMINE THE RESULT OF SUCH ELECTION reviewed, and held supported by the evidence.

APPLICATION for a writ of *mandamus*. The opinion states the facts.

L. B. France, for the relator.

R. S. Morrison, for the respondent.

STONE, J. This is an original proceeding, brought to this court by *mandamus*, for the purpose of testing the validity of the acts of the board of county commissioners of Grand county, in declaring the

county seat of that county removed from Hot Sulphur Springs to Grand Lake, as the result of an election held for that purpose in the fall of 1880, and in removing the public records, offices, and business to Grand Lake, as the lawful county seat. In the opinion rendered by this court, when the case was formerly before us, 6 Col. 202, we directed the issues of fact to be tried in the court below, and that the verdict of the jury, or the finding of the court therein, be returned to this court, showing: 1. What number of votes was cast by the qualified voters of Grand county, at the general election held in said county, on the second day of November, 1880, on the question of the removal of the county seat of said county; and, 2. Of the number of votes so cast, what number of legal votes was for Hot Sulphur Springs, and what number for Grand Lake, for county seat. In accordance with said order, the record before us presents the proceedings and evidence in the trial of said issue, and the court returns its finding as follows, to wit: "And now, on this eighteenth day of August, A. D. 1882, this cause heretofore at the present term of the court having been submitted to the court upon the evidence and arguments of counsel in said cause, and the court being fully advised in the premises, and a jury having been waived by the parties hereto, the court now finds that the number of votes cast by the qualified voters of Grand county, at the general election held in said county on the second day of November, A. D. 1880, on the question of the removal of the county seat of Grand county, was one hundred and sixty-four, and of the number of votes so cast, the number of legal votes cast for Hot Sulphur Springs for county seat was seventy-one (71), and the number of legal votes cast for Grand Lake for county seat was ninety-three (93). By the court, Chester C. Carpenter, Judge. [Seal.]"

Counsel for the relator, in his argument filed herein, claims that this finding is erroneous, for the reasons that, 1. Admitting that the election returns show *prima facie* that Grand Lake received one hundred and one votes; Grand Lake, west side, thirteen votes; and Hot Sulphur Springs, eighty-three votes, yet rejecting the thirteen votes cast for Grand Lake, west side, as having been cast for a separate point of location, and then rejecting the twenty votes cast at Teller precinct, and twenty-seven votes cast at Lulu precinct, amounting to forty-seven votes cast for Grand Lake as illegal on the ground of non-compliance with the registry law, and it would leave but fifty-four votes for Grand Lake as against eighty-three for Hot Sulphur Springs; 2. That the testimony shows that several votes cast at Grand Lake precinct for that place were illegal, and that more than twenty others might have been shown to be illegal had not the court refused as evidence certain admissions made to the relator Dean after the election, touching the qualifications of voters who are claimed to have made such admissions; and, 3. That the court erroneously refused to order process to compel the attendance of certain witnesses on behalf of the relator at the trial.

In respect to the registration in the two precincts named, we find from the testimony of the judges of election that there was no registration of voters in Teller precinct, the reason being that the county clerk, whose duty it was to furnish registration blanks for the purpose, failed to furnish any to this precinct, and the board of election judges waited for them up to the day of election without receiving them or making any otherwise.

As to Lulu precinct, the record shows that a registration was made

which seems to be in substantial compliance with the statute, and a certified copy of the registration list was put in evidence without objection, and the returns from that precinct were therefore entitled to be counted.

There was no error in the refusal of the testimony of the relator as to the alleged admissions of certain voters made after the election touching their qualifications. Such testimony was but the unsworn declarations of parties who were not present to contradict or explain such declarations; and sound rules of evidence, as well as reasons founded upon public policy, favor the exclusion of such evidence as hearsay, and a means of accomplishing fraud rather than justice: McCrary on Elections, secs. 270, 271, and cases cited.

As to the complaint that process was refused to compel the attendance of witnesses, it appears that certain witnesses who had been subpœnaed and who had come to the place of trial in obedience thereto, had afterwards refused to appear in court and testify unless their fees were first paid, and that upon affidavit of these facts, and motion for attachment, the court declined to award compulsory process to compel such witnesses to appear in court and testify in the case.

While the court in its discretion was undoubtedly authorized to compel such witnesses to appear in court and testify, yet for this court to reverse the finding of the court below, and send the case back upon that ground, is a different matter, and one we would not be warranted in doing, since the affidavit of the relator for the attachment prayed fails to set forth what is expected to be proved by such witnesses, or even to aver that the testimony of any one of them was necessary, pertinent, or in any way material in the case.

Coming to the count of the votes cast upon the question in controversy, it appears that counsel for respondents, acting under what was understood to be the rule laid down in McCrary on Elections, sections 62–174—that when the presumption that votes cast were legal is overcome by the fact that there was no registry, the burden of proof is upon the party claiming the benefit of the vote to prove that it was legal, and entitled to be registered and cast—made proof that nine votes cast at Teller precinct, where there was no registry, were legal, and were cast for Grand Lake for county seat.

It is then claimed on behalf of the respondent, that the legal number of votes to be counted for Grand Lake stands thus: Gaskill precinct, eight votes; Lulu precinct, twenty-seven votes; Grand Lake precinct, fifty-four votes; Hot Sulphur Springs precinct, four votes; Teller precinct, nine votes; making a total of one hundred and two votes for Grand Lake.

The total vote at Grand Lake precinct was sixty, fifty-four of which were cast for that point for the county seat, including the thirteen which were cast for the location at Grand Lake, west side. We do not think that these votes should be rejected for that reason, as claimed on behalf of the relator.

The question voted upon was the removal of the county seat from Hot Sulphur Springs to Grand Lake, and the designation by the local voters at Grand Lake of a particular point at the Lake as a preferred site ought not to be taken into account. Each individual voter might possibly have been interested in perferring a different spot as the exact site for the county buildings on the shore of the lake. It was a matter for the board of county commissioners to determine the exact site at the Lake, if a

majority of the legal voters of the county should vote in favor of the removal from the Springs to the Lake.

At Hot Sulphur Springs precinct fifty-nine votes were cast upon the question of removal, five of which were in favor of the removal to Grand Lake, and of these five votes four were proved to have been legal, leaving fifty-four in favor of the Springs, which added to twenty-five cast at Troublesome precinct, made seventy-nine in all cast against the removal in the whole county.

Taking the one hundred and two votes as before estimated as the total for Grand Lake and seventy-nine for the Springs, it gives Grand Lake a majority of twenty-three votes. If we reject the nine votes counted from Teller precinct in the above estimate, that is to say, if the entire vote at Teller is thrown out, leaving a total of ninety-three for Grand Lake, it still gives a majority of fourteen votes for Grand Lake.

It is claimed on behalf of the relator that the testimony shows that eight or ten of the votes cast at Grand Lake precinct in favor of that point were illegal, and that had the court permitted the introduction of the evidence of Dean as to the declarations of voters before referred to, it would have been shown that as many as twenty-nine altogether of the Grand Lake votes were not entitled to be counted. On the other hand, it is claimed by counsel for respondents that the evidence fairly shows that twenty-three certainly, and possibly twenty-nine, votes cast at Hot Sulphur Springs for that point were proved to be illegal, and the names of the persons who cast said votes are set out in the brief, together with the names of the witnesses by whose testimony each of such voters is claimed to have been proved illegal.

It is difficult to determine from the mass of testimony brought up by the record, and the uncertain and conflicting character of much of it, exactly how many votes on either side can be said to have been proved illegal, or not entitled to be counted; but viewed in every possible way fairly, we think the number on both sides is so nearly equal that the result of the *prima facie* count is not affected. The exact *data* or manner of estimating the number of legal votes by which the court below reached the finding returned here is not stated in the return of said finding, but however the result may be estimated fairly, we are satisfied that this finding is as nearly correct as the evidence presented by the certified copies of the registry lists, poll-books, and tally sheets of the election, together with the testimony of the witnesses heard upon the trial contained in the record and bill of exception, warrants, and should not be disturbed.

The act of 1876 requiring a two-thirds vote in favor of the removal of county seats, in order to effect such removal, did not affect the case before us here, inasmuch as the county of Grand is expressly excepted from the provisions of said act.

The finding of the court below is therefore approved, and the judgment of this court is that the peremptory writ of *mandamus* prayed in this action be denied.

Writ denied.

CARY v. MCINTYRE.

Filed February 8, 1884.

AN AGREEMENT FOR THE PURCHASE AND SALE OF A CERTAIN AMOUNT OF LUMBER, entered into as an accord of a previous agreement for the same purpose, which required such lumber to be of good quality, will be construed in accordance with the circumstances attending the making of the previous agreement, so as to require the lumber delivered to be of good quality.

A CONDITION OF SUCH ACCORD AGREEMENT MAY BE WAIVED by the party in whose favor such condition was made, to the extent, at least, of preventing the party waiving from rescinding the agreement and declaring it a nullity.

AN ACCORD AGREEMENT IS BINDING upon the party who signs the same, although it is not signed by the other party.

APPEAL from a judgment of the district court for Gunnison county. The opinion states the facts.

Mills Brothers, for the appellant.

Louis Boiset, for the appellee.

HELM, J. On the thirtieth day of October, 1880, Cary, who was defendant below, and McIntyre, who was plaintiff below, entered into a written contract, by the terms of which McIntyre was to furnish and deliver to Cary, at Gunnison city, two hundred thousand feet of good and merchantable lumber of such kinds as Cary wanted, and two hundred thousand shingles. He was also given the privilege of delivering three hundred thousand feet of lumber in addition, upon the same terms, if he should elect so to do; and was to "exercise all reasonable diligence in arriving at a speedy execution of the terms of the contract."

He also engaged not to manufacture any boards, lumber, or shingles for any other person until the contract was filled.

In consideration of the foregoing, Cary promised to receive and pay for each and every load upon delivery thereof according to the terms of the contract, twenty-eight dollars per thousand feet for the lumber and four dollars and ninety cents per thousand for the shingles. (In the latter part of April, 1881, Cary told McIntyre to hurry up and get out the lumber under the agreement.)

On the eighteenth of May following, nearly seven months after this contract was made, McIntyre had neither delivered nor offered to deliver any of the lumber or shingles mentioned therein; and Cary sent him the following letter:

"GUNNISON, Col., May 18, 1881.

"W. F. MCINTYRE, ESQ.

"*Dear Sir*—You having failed to comply with the terms and conditions of the contract made and entered into between yourself and myself on the thirteenth day of October last, I hereby notify you that I shall from this date treat said contract as broken, and the terms and conditions therein sought to be made binding upon me will be considered as of no effect. If you wish to enter into a new contract on such terms and conditions as we may hereafter agree upon, I would be pleased to talk with you. Yours, WALTER CARY, JUN."

A day or two after receiving this letter McIntyre encountered one Uppercu, who was acting as the agent of Cary, or rather of the firm of Buck & Cary, for whom the latter purchased the lumber. The conversation which followed resulted in the indorsement upon the back of a

copy of the original contract of the following, above the signatures of McIntyre and Uppercu, as appears therefrom:

"GUNNISON, GUNNISON CO., COLORADO.

"In and for the consideration that said Walter Cary, Jun., pay to me twenty-six dollars per thousand for one hundred and fifty thousand feet of lumber, the same to be delivered by him to me at the said town of Gunnison, within the next sixty days, payment of said lumber so delivered to be on demand, I hereby revoke and cancel the within agreement, and hold it null and void, reserving the right to sell lumber to other parties.

"May 25, 1881. W. F. McINTYRE."

"I hereby guarantee the payment of the above one hundred and fifty thousand feet of lumber at twenty-six dollars per thousand, in manner aforesaid. E. A. BUCK,

"By J. W. UPPERCU, Att'y in fact.

"GUNNISON, COLORADO, May 25, 1881."

Uppercu carried this to Cary, who returned it, and immediately expressed his satisfaction therewith, which fact Uppercu reported to McIntyre. Thereupon McIntyre began delivering lumber, and up to the twenty-fifth of July, Cary, by his agent Uppercu, had received and paid for one hundred and eight thousand feet, both acting under the stipulation last above set forth. After the twenty-fifth of July he refused to receive or pay for any more lumber. McIntyre brought suit upon the original contract and recovered a judgment for four hundred and ninety-two dollars. From this judgment Cary prosecuted the appeal.

We shall not consider who first violated the October contract; neither will we determine whether the May writing was a substitute therefor, as appellant claims, or an accord thereof, as contended by appellee. We may admit with counsel for appellee, that Cary's letter gave McIntyre a right of action, and also that the May agreement was simply an accord; we may further admit that it was a kind of accord which did not, unless satisfied, bar a right of action upon the original contract. In our judgment, the failure to render the accord a full satisfaction was the fault of McIntyre and not of Cary. McIntyre was bound to deliver the one hundred and fifty thousand feet of lumber within sixty days from May 25th. This was an important and material feature of the accord agreement. The evidence, without conflict or contradiction, shows that at the expiration of the time there remained forty-two thousand feet undelivered. Cary was not responsible for this failure to comply with the agreement, and was in a position to decline further proceeding thereunder. It is claimed that he was first in default by refusing to accept a few loads and parts of loads rejected in June. McIntyre's theory is, that since the May agreement did not expressly provide for good and merchantable lumber, or such lumber as Cary wanted, the latter was bound to accept anything tendered. He says in testifying: "I told Mr. Cary, you have to take just what I give you." But we submit this is neither a fair nor a legal interpretation of the contract. If it is, McIntyre might have delivered old and injured lumber, for there were no express words requiring it to be new or sound. He might have compelled Cary to take and pay for lumber which was worthless and unsalable at any price. This accord agreement must be construed in the light of the October contract, the business of Cary, and all other circumstances attending the making thereof.

Giving it a reasonable construction, we think the lumber was to be of good quality. Cary says he refused the loads or parts of loads because they were not merchantable; there is evidence tending to show that by the word "merchantable" he did not refer to the quality but the kind of lumber. He says that under the compromise agreement, McIntyre was to deliver the kind he wanted; and Cary further says: "He [McIntyre] told me if I did not want certain kinds to say so, and they would be taken down to his yard." The only denial of this last statement by McIntyre is in the language already quoted; but notwithstanding that expression, McIntyre retained the rejected lumber, and went on delivering under the contract; he seems to have thought no more about it till the institution of this suit some time afterwards. A condition of an accord agreement, like that of any other contract, may be waived by the parties thereto. Under the circumstances, if Cary was bound by the contract to receive the lumber rejected, there was a waiver of this obligation, to the extent at least of preventing McIntyre from rescinding the agreement and declaring it a nullity; he could only recover, if at all, for the loss occasioned by Cary's refusal to accept the rejected lumber: McIntyre v. Barnes, 4 Col. 289.

We do not agree with counsel for appellee that these are all questions of fact, and that they were properly submitted to and passed upon by the jury.

The fact that the May writing was not signed by Cary does not interfere with the mutuality or binding effect upon both parties of the accord agreement. There was no understanding that it should be signed or even reduced to writing before it took effect or was acted upon; there was ample consideration for it on both sides; Cary obtained a reduction in the purchase price per thousand feet, while McIntyre secured a guaranty for the payment of the price agreed upon, and acquired the privilege, denied in the October contract, of selling to other parties. Cary retained possession of the May proposition or agreement, and notified McIntyre by agent of his satisfaction therewith and acceptance thereof; he acted during the succeeding sixty days under the same, receiving the lumber as delivered and paying the twenty-six dollars per thousand as stipulated in the agreement. The form of the instrument and language used make it doubtful if there was any thought that Cary should sign it; it is more like a proposition which, when accepted and acted upon, became binding upon both parties, the writing simply being evidence of the terms of the contract between them.

Under the evidence, appellee was not in a position to maintain his action upon the October agreement.

The judgment must be reversed and the cause remanded.

Reversed and remanded.

DENVER & RIO GRANDE RAILWAY CO. *v.* OTIS ET AL.

Filed February 15, 1884.

CONDEMNATION OF LAND—JURISDICTION OF COUNTY COURT OVER.—When the award of the jury, in a proceeding for the condemnation of land, shows that the amount of compensation to be paid the owner exceeds the amount to which the jurisdiction of the county court is limited, the court must dismiss such proceedings at the cost of the petitioner.

ERROR to the county court for Chaffee county. The opinion states the facts.

L. K. Bass and *John M. Waldron*, for the plaintiff in error.

Markham, Patterson & Thomas, for the defendants in error.

STONE, J. This was a proceeding instituted by plaintiff in error in the county court of Chaffee county for the condemnation of certain lands of the defendants in error for right of way for the railway of the plaintiff company.

Several defects in the proceedings are alleged by plaintiff, which, if properly before us, might probably be considered grounds of error sufficient to reverse the case; but since these matters were presented by a bill of exceptions, which, for not having been prayed and allowed in due time, was on motion in this court stricken from the record, the matters thus brought up are not now before us for review.

There remains, therefore, for our consideration but one important ground of error, and that is a jurisdictional one. The commissioners appointed by the court to ascertain and report the value of the lands taken for the said right of way returned into court as such ascertainment and finding, that the value of the lands so taken was one thousand five hundred dollars; that the damage to the residue of the lands of defendants not taken was two thousand five hundred dollars, and that the benefits to the land not taken were nothing, and hence the amount of the award altogether was the sum of four thousand dollars. Upon this award a rule was entered by the court for the right of way upon payment of the said sum awarded.

Counsel for defendants, conceiving the amount of this award to be the only question properly before the court, have devoted their argument and brief filed herein solely to the support of the jurisdiction of the court below in entering judgment upon the award; but we consider it unnecessary to discuss the question here, inasmuch as we have recently passed upon the precise question in the case of the Denver, Western & Pacific R. R. Co. v. Church, 1 West Coast Rep. 611, decided at the present term. In that case we held that the jurisdiction of the county courts as to amount being limited to the sum of two thousand dollars, such courts were without jurisdiction to proceed further in such case where the amount of the award was in excess of two thousand dollars.

The judgment is reversed and the cause remanded, with directions to the court below to dismiss the proceedings. However, for the reasons given in the opinion in the case of the D., W. & P. R. R. v. Church, *supra*, the plaintiff in error will be adjudged to pay the costs.

Reversed.

HUGHES v. CUMMINGS ET AL.

Filed February 15, 1884.

REHEARING DENIED IN HUGHES v. CUMMINGS, 1 West Coast Rep. 608.

PETITION for a rehearing. The facts are stated in the former opinion reported in 1 West Coast Rep. 608.

W. T. Hughes and *C. C. Post*, for the plaintiff in error.

R. S. Morrison, for the defendants in error.

HELM, J. We have examined carefully the exhaustive argument of counsel upon this application, but neither the reasons assigned nor the authorities cited warrant us in changing our views. An effort was made to impeach the correctness of the record of a court of general jurisdiction in a collateral proceeding. This court has held that unless the defect complained of appears on the face of the record itself, the judgment of such a court is exempt from attack, save in a direct proceeding. The adoption of any other rule would render all judgments insecure, and result in the most disastrous consequences. The district court had no jurisdiction to try the issue made by replication; therefore no error was committed in sustaining defendants' demurrer thereto.

Rehearing denied.

BEAN, County Clerk etc., v. PEOPLE, etc.

Filed February 15, 1884.

EXAMINATION OF RECORDS—DUTY OF COUNTY CLERK.—Section 667 of the general statutes, providing that the county clerk shall keep his office "open during the usual business hours, * * * and that all books and papers required to be in his office shall be open for the examination of any person," gives no right to a private individual to examine and abstract the entire records of a county for the sole purpose of securing future private emolument from the sale of abstracts thus obtained, and imposes no duty upon the clerk to allow such acts to be done.

ERROR to the district court for Gunnison county. The opinion states the facts.

George Simmons and *S. P. Rose*, for the plaintiff in error.

Mills Brothers and *Louis Boiset*, for the defendants in error.

HELM, J. The principal question presented by the record in this case is one of statutory construction purely. Section 667 of the general statutes provides that the county clerk shall keep his office "open during the usual business hours, Sundays and legal holidays excepted," and that "all books and papers required to be in his office shall be open for the examination of any person."

The cardinal rule of statutory construction is to discover and declare the intent of the law-makers. Counsel for defendants in error contend that the section above mentioned needs and will admit of no construction; that the words "any person," used therein, include each and every individual who may choose to demand an inspection of the county records. But we are not prepared to accept this conclusion. We feel confident that an examination of the statute is proper with the view of determining whether or not the legislature intended to grant the privilege

here claimed. Relators in this case assert the right, under the law, to examine and abstract the *entire records* of Gunnison county, for the sole purpose of securing future private emolument from the sale of abstracts thus obtained. They do not seek information concerning a tract of land in which they themselves, or parties whom they represent, have or expect to have an interest. Their business is permanent; to carry it on successfully they must not only by themselves or agents occupy the clerk's office for weeks, perhaps months, in abstracting the instruments now recorded, but they must also be there daily thereafter abstracting the conveyances filed from day to day. Their interruption and annoyance of the clerk are not temporary; they are continuing and permanent.

It matters not that relators require no aid from him; for he is charged by statute with the *safe keeping* and *preservation* of the records, and is responsible for their truthfulness and freedom from mutilation. A single stroke of the pen, the erasure or addition of a single word, may change the character of a conveyance, or destroy the most valuable property right. The clerk is unfaithful to his trust if he allow one of the record books to remain for an instant in the hands of a stranger, out of his sight. If he performs his whole duty, he must watch, or employ an assistant to watch, each and every person who examines or abstracts a single title record.

Did the legislature contemplate a business such as that of relators, and intend to impose upon the clerk these duties and responsibilities in connection therewith? Did they intend to say to him, "You must give relators, *gratis*, a part of your time and attention on each and every week-day during your term of office"? If one person or partnership may subject him to this inconvenience, labor, and annoyance, others may do the same; the abstract business is lawful, and in populous counties usually quite a number of individuals or firms engage therein. The clerk's entire time might be monopolized in this way, and yet he is allowed no compensation therefor.

Our laws require the county commissioners to provide, at the expense of the county, an office for the recorder, to light and heat the same, and to furnish tables, chairs, and all necessary appliances for the convenience and use of the recorder and persons transacting therein the business contemplated by statute. Did the legislature intend to furnish, at public expense, office and desk room, together with tables and chairs, for the *permanent* use and convenience of persons engaged in a purely private speculative enterprise?

It is urged that this business is a great public convenience and security. That parties interested may more readily and perhaps cheaply procure desired information and abstracts; and that in case of loss thereof by theft or fire, any portion of the records may be duplicated from the abstract office. It is answered that the clerk is required to furnish abstracts and information to those demanding the same at a compensation fixed by legislative enactment; and that it is the duty of the commissioners to provide safes and vaults sufficient to protect the records from loss and injury by fire or burglary; and it may also be added, that the possession of complete abstracts by dishonest and evil-minded persons might increase the danger to the public records, by offering an inducement for their destruction.

We think that the business of relators should be treated as any other

legitimate private enterprise. There is no law to prevent the clerk's aiding them if he choses so to do, either *gratis* or for a stipulated compensation, provided he does not neglect his official duties. But the courts should not by *mandamus* compel him to do this against his will.

We are of opinion that the statute in question was not designed to allow individuals who wish to abstract the *entire records* for future profit in their private business the privilege of using continuously the public property and of monopolizing, from day to day for months and years, a portion of the time and attention of a public officer against his will and without recompense. In support of the foregoing reasons and conclusions, see Buck et al. v. Collins, 5 Ga. 391; Webber et al. v. Townley, 43 Mich. 534. Entertaining these views upon the merits of this case, we need not inquire into the regularity of the proceedings before the district judge.

The judgment will be reversed and the cause remanded, with directions to dismiss the petition.

Reversed and remanded.

SUPREME COURT OF IDAHO.

PEOPLE *v.* MOONEY.

Filed September 13, 1882.

INSTRUCTIONS.—If the record of a case on appeal to this court contains no evidence, and an instruction given to the jury be correct under any possible state of the evidence, such instruction must be sustained.

MURDER, WHAT IS.—Under the statutes of this territory, the killing of a human being in the commission of an unlawful act, which in its consequences naturally tends to destroy life, or is committed in the prosecution of a felonious intent, is murder.

MURDER IN THE FIRST DEGREE.—Under the statute all murder committed in the perpetration or attempt to perpetrate robbery is murder of the first degree.

APPEAL from the district court of the third judicial district, Oneida county. The opinion states the facts.

W. A. Crawford, district attorney, for the people.

H. M. Bennett, for the appellant.

PRICKETT, J. At the November term of the district court of the third judicial district, held in and for the county of Oneida, A. D. 1881, the defendant was indicted for the crime of murder; and upon a trial was convicted of murder in the first degree, and thereupon a judgment of death was pronounced against him. From that judgment the defendant has appealed to this court, and the case has been submitted upon briefs, without oral argument.

There is no evidence or bill of exceptions in the record, nor is there any assignment of errors on file; we are therefore left to an examination of the record, viz., the indictment, the instructions of the district court to the jury, and the judgment; and if there be no error apparent upon their face, the judgment must be affirmed.

The indictment seems, upon inspection, to be perfect, and no objection is urged to the judgment; but from the tenor of the appellant's brief we conclude that he objects to the following instruction given by the court to the jury, to wit: "If the jury believe from the evidence, beyond a reasonable doubt, that this defendant killed Joel Hinkley, and that such killing was perpetrated while the defendant, either by himself or with another person, was attempting to commit a robbery, then they may find the defendant guilty of murder in the first degree."

There being no evidence in the record, upon the familiar principle that he who alleges error must show it, if the instruction was correct under any possible state of the evidence it must be sustained.

The statutes of this territory, section 21 of the act concerning crimes and punishments, provides that "involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner; provided that when such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy life, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder."

Section 17 of the same act provides that all murder which shall be committed in the perpetration or attempt to perpetrate robbery shall be deemed murder of the first degree.

Thus it will be seen that section 21 makes the unintentional killing of a human being committed in the prosecution of a felonious intent murder, and section 17 makes it murder in the first degree if the intent was to commit the felony of robbery, and some others therein enumerated.

Under the statute, then, the instruction was proper—indeed, the court might have instructed the jury, under the circumstances stated, not only that they might find the defendant guilty of murder in the first degree, but that such was their duty.

It is competent for the legislature to prescribe what felonious homicides shall be deemed murder, and to define the degrees. It is the policy of the law to hold persons engaged in felonies, or attempts to commit felonies, responsible for all the consequences of their felonious acts, whether such consequences were definitely intended or not. The intent to commit a felony standing in the place of the malice in ordinary cases of murder, it follows that the instruction given being correct in law, those asked by the defendant's counsel, upon the view that the killing, in order to constitute murder, must have been intentional, were incorrect, and were properly refused.

There being no error either in the giving or refusal to give instructions, the judgment of the court below must be affirmed, and it is accordingly hereby affirmed.

The cause is remanded to the district court with directions to fix anew the time for executing its judgment.

MORGAN, C. J., and BUCK, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,086.

MATZEN *v.* SHAEFFER.

Department Two. Filed February 25, 1884

EQUITABLE ASSIGNMENT OF MORTGAGE.—Where, in pursuance of an agreement between a mortgagor and mortgagee, a third party pays off the mortgage debt and takes a conveyance of the mortgaged premises, such transaction will be construed as being an equitable assignment of the mortgage so as to entitle the grantee to priority and protection as against a judgment creditor of the mortgagor whose rights accrued subsequent to the execution of the mortgage, although at the time of such conveyance the mortgagee satisfied the mortgage on the record.

WHEN THERE IS NO VALID HOMESTEAD IN EXISTENCE, an order of the court setting the same aside to an insolvent is a nullity.

APPEAL from a judgment of the superior court for Butte county, entered in favor of the defendant. The opinion states the facts.

J. H. McKune, for the appellant.

Long, Lott, and *Belcher*, for the respondent.

SHARPSTEIN, J. It appears by the findings that it was arranged between the mortgagee, mortgagor, and appellant, that she should pay the sum of three thousand five hundred dollars for the satisfaction of the mortgage, and a conveyance to her of the mortgaged premises by the mortgagor. This entire sum was handed to the mortgagee, who retained the amount due on the mortgage, and gave the residue to the mortgagor. Whereupon the mortgagor executed a conveyance of the premises to appellant, and the mortgagee entered satisfaction of the judgment which he had previously obtained in an action to foreclose the mortgage.

Previous to this the premises had been sold to the respondent, under an execution issued upon a judgment recovered against appellant's grantor after the execution of the mortgage. But the time for redeeming the premises from said execution sale had not expired at the time of appellant's purchase. Since then respondent has received a deed from the sheriff who sold the deed to him under said execution.

This presents a case in which the interests of the appellant required that the lien of the mortgage which she paid off should be kept alive. Her interests can only be fully protected by regarding the transaction in which she paid off the mortgage as an assignment of it to her, and the lien as being kept alive for her security and benefit. "In general, when any person having a subsequent interest in the premises, and who is therefore entitled to redeem, for the purpose of protecting such interest, and who is not the principal debtor, primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection:" 3 Pomeroy's Eq. Jur., sec. 1212. And this equitable result follows, "even though a receipt was given speaking of the mortgage debt as being fully paid, *and sometimes even though the mortgage itself was actually discharged and satisfied of record:*" Id., sec. 1211.

If the respondent had purchased the premises while the satisfaction of

the judgment of foreclosure remained of record, he doubtless would be protected. But the findings show that he purchased the premises, and received a certificate thereof, before any action to foreclose the mortgage had been commenced, and that he was made a party defendant, and served with summons in said action. And if it be held that the appellant became the equitable assignee of the mortgage, and as such was entitled to have the lien created by it kept alive for her protection, notwithstanding the satisfaction and discharge of it of record, the respondent will be in no worse position than he would if the judgment of foreclosure had been *actually* assigned to appellant when she paid it off. The fact of the entry of satisfaction of the judgment could not have influenced him when he purchased the premises, because the action in which said judgment was entered had not then been commenced. He purchased the premises subject to the mortgage, and the rights which he thereby acquired could not be affected by an assignment of the mortgage, either in fact or by operation of law. We think this is one of the cases in which the satisfaction of a mortgage of record does not of itself prevent a court of equity from holding that the payment of it operated as an assignment of it to the person making the payment.

There is nothing to indicate that appellant, when she paid off the mortgage, intended to purchase it, or to have it kept alive for her benefit. It does not appear that anything was said on that subject. She paid it off, and the mortgagee without her request satisfied it of record. But the payment was made for her benefit, or for that of respondent. If the payment under the circumstances operated as an equitable assignment of the mortgage to her, she gets the benefit of it; otherwise, the respondent. Now it is quite clear that she intended the payment of the mortgage should inure to her own and not to his benefit. She had in view her own and not his interest. And it is only by regarding the transaction as an assignment of the mortgage to her that her interests can be protected and maintained, and a court of equity will presume that it was intended she should reap the benefit of her investment. Equity regards that as done which ought to be done, and looks to the intent rather than to the form.

There is no equitable ground on which the respondent could object to the mortgage lien being kept alive for the protection of appellant's interest, and the mortgage having been satisfied of record when it should have been assigned to appellant, it was not error to vacate the satisfaction. And as the premises were regularly sold under said decree of foreclosure, and purchased at the sale by the appellant, who after the time for redemption had expired received a deed, we do not doubt that her title to the premises is superior to that of the respondent, and that she is entitled to the relief prayed in her complaint.

The declaration of homestead filed by Kelley was not such as the law requires in order to constitute a homestead; and there being no valid homestead in existence when the court in the insolvency proceeding made an order setting one apart for Kelley, such order was a nullity.

Judgment reversed, with directions to the court below to enter a judgment in favor of the plaintiff as prayed in her complaint.

THORNTON and MYRICK, JJ., concurred.

No. 9,087.

PERSONS *v.* SHAEFFER ET ALS.

Department Two. Filed February 25, 1884.

THE PAYMENT OF A JUDGMENT MAY OPERATE AS AN EQUITABLE ASSIGNMENT of the same to the party making the payment, although the judgment is satisfied of record. Equity, however, will not keep such judgment alive to the prejudice of subsequent *bona fide* purchasers of the premises on which it was a lien, who purchased the same when it appeared of record that the lien had been discharged, and who had no knowledge of any equities existing in favor of the person who discharged the judgment.

APPEAL from a judgment of the superior court for Butte county, entered in favor of the plaintiff. The opinion states the facts.

J. H. McKune, for the appellant.

Gale & Jones, for the respondent.

SHARPSTEIN, J. When the defendant executed the mortgages which this action was brought to foreclose, the judgment which Wilcoxson had obtained in an action to foreclose a prior mortgage was satisfied and discharged of record, and the court finds that the mortgagees of the subsequent mortgages had no notice or knowledge of any equities then existing in favor of Catherine Matzen, who paid the sum due on the Wilcoxson judgment. In Matzen v. Shaeffer, No. 9,086, *ante*, p. 126, we held that as between the parties to that action the payment of the Wilcoxson judgment by Matzen operated as an equitable assignment of it to her, and that the lien was kept alive for her protection and benefit, notwithstanding it had been satisfied and discharged of record. The reasons for so holding are stated in the opinion filed in that case, and it is unnecessary to repeat them. But at the time of the execution of the mortgages in this case, it appeared by the record that the Wilcoxson judgment had been satisfied and discharged, and it can not be held that the mortgagees took subject to the lien of that judgment. Matzen on paying it had neglected to have it assigned to her, and had suffered it to be and remain satisfied of record until after Shaeffer had executed these mortgages upon the premises.

This presents a case in which either Matzen or these mortgagees must suffer from her neglect to act promptly, as she might have done in the matter of obtaining an *actual* assignment of the Wilcoxson judgment, or, failing in that, having the satisfaction of record vacated. She must suffer the consequences of her own neglect. The parties who took the mortgages under such circumstances must be protected. Equity as well as law requires that they should be. Her equities at the time were latent. She might or might not avail herself of them. The lien of the Wilcoxson judgment had been discharged. Equity might under some circumstances keep the lien alive, notwithstanding such discharge. But it certainly would not keep it alive to the prejudice of a party who had purchased the premises when it appeared of record that the lien had been discharged, and who did not have any knowledge of the equities on which alone it could have been kept alive after being discharged.

Judgment affirmed.

THORNTON and MYRICK, JJ., concurred.

No. 9,011.

SHAEFFER *v.* MATZEN ET AL.

Department Two. Filed February 25, 1884.

JUDGMENT IN AN ACTION OF EJECTMENT SHOULD BE FOR THE PLAINTIFF when the defendant has no claim to the demanded premises beyond what his naked possession gave him, and at the time of the commencement of the action the plaintiff had the legal title and was entitled to the possession.

APPEAL from a judgment of the superior court for Butte county, entered in favor of the plaintiff. This was an action of ejectment. At the trial a nonsuit was granted to the defendant Matzen. The further facts appear in the opinion.

J. H. McKune, for the appellant.

Long, *Lott*, and *Belcher*, for the respondent.

By the COURT. The defendant Stillinger does not appear to have had any claim to the demanded premises beyond what his naked possession gave him; and at the time of the commencement of this action the plaintiff had the legal title, and was entitled to the possession of said premises. This is sufficiently apparent, although somewhat obscured by the finding of a great number of irrelevant facts.

Judgment affirmed.

No. 8,454.

ESTATE OF LORD, Deceased.

Department Two. Filed February 26, 1884.

A HOMESTEAD FOR THE USE OF THE SURVIVING WIFE OF A DECEDENT can not be set apart under section 1465 of the code of civil procedure, so as to include a part of the separate estate of the decedent when there is common property.

A FINDING THAT CERTAIN PARCELS OF LAND OF A DECEDENT, which his widow prays may be set apart to her as a homestead, could not be divided, will not be sustained when the allegations of the petition for the homestead show the contrary.

APPEAL from an order of the superior court for Solano county, settling an account. The opinion states the facts.

Sawyer & Ball, for the appellant.

Fox & Ross, for the respondent.

MYRICK, J. The deceased died intestate, leaving a widow him surviving, who became administratrix. His mother (the appellant) is his only other heir. The widow filed a petition that a homestead be set apart to her, none having been selected, designated, or recorded in the life-time of the intestate. She petitioned the court to set apart three parcels of land, viz.: 1. Containing one hundred and fifteen and ninety-eight one-hundredths acres, being farm land; 2. Containing twenty acres, being farm land; and, 3. Containing one thousand and fifty-five acres, being swamp land. Her petition set forth that the said lands were mortgaged for five thousand dollars, on which some interest had accrued; that the two first-described tracts were community property, and had a dwelling-house and other improvements thereon; that the third-described piece of land was the separate estate of the intestate; that the entire property was not worth to exceed five thousand dollars above the mortgage; and

that it had been appraised in the inventory of the estate at nine thousand five hundred and seventy-one dollars.

The petition prayed that the two first parcels be set aside as a homestead, or in any case a partition could not be made that the whole be sold, and out of the proceeds a homestead be set aside. Appraisers were appointed by the court, who reported the value of said lands, being three several tracts as stated in the petition, at nine thousand five hundred and seventy-one dollars; that the first-described tract had a dwelling-house with other improvements; that the two parcels, firstly and secondly described, are common property, and the piece thirdly described is separate property of decedent; that the premises could not be divided without material injury, and that the whole is incumbered with a mortgage for five thousand dollars and some interest. Thereupon the widow filed another petition, setting forth the matters contained in her first petition, the fact of the appraisal, and that the property could not be divided without material injury, and prayed for a sale of the property, and that out of the proceeds she be allowed five thousand dollars in lieu of a homestead.

The court fixed a day for the hearing of the petition, and after hearing evidence, found the facts as above, among others, that the two first-described parcels were community property, and the other separate property of the deceased, and ordered the property to be sold in one parcel subject to the mortgage, and that out of the proceeds, five thousand dollars, if so much should result, be set apart and designated as a homestead for the said widow, and that she retain the same for that purpose as her own property. A sale was made for five thousand four hundred and forty-four dollars and twenty cents, cash, subject to the mortgage; and the sale was confirmed and a conveyance made. The administratrix filed her account, in which she charged herself with four hundred and forty-four dollars and twenty cents of the proceeds of said sale, and omitted to charge herself with the five thousand dollars. The appellant contested the settlement of the account; and her objections being overruled, this appeal was prosecuted.

We have given the above full statement of facts in order to more clearly state the law applicable thereto. The statute is clear that if a homestead has been declared in the life-time of the deceased, and if it be appraised at more than five thousand dollars, and can not be divided, the whole may be sold, and five thousand dollars of the proceeds be set apart in lieu of the homestead claim. Evidently, the widow supposed the same course could be taken when no homestead had been declared, upon her petition for what is called a probate homestead; and the court below seems to have agreed with her. It is not necessary, in this case, to decide that question, and we omit to do so.

The proceedings in this case, from and after the report of the appraisers, were irregular, and we very much doubt if any title passed to the purchasers. Referring to section 1465, code of civil procedure, we find the direction, if no homestead has been selected, designated and recorded, the court must select, designate, and set apart, and cause to be recorded, a homestead, for the use of the surviving husband or wife or children (as the case may be) out of the common property, or, if there be no common property, then out of the real estate (separate property) belonging to the decedent. The selection must be made from the common property, if there be any; it can be made from the separate prop-

erty only in case there be no common property. The statute in this regard is clear and explicit, and admits of no question. The petition of the widow stated that the two first-described parcels of land were common property, and that the third was the separate property of the decedent, and this is shown in all the subsequent proceedings. It appeared, then, on the face of the petition, and by the subsequent proceedings, that the court had no jurisdiction to set apart a homestead out of, or to include within a homestead, a third parcel. If the court could not set apart the third parcel, it certainly could not sell it for homestead purposes. This is clear to a demonstration. The sale was not made to pay debts; its object is distinctly stated.

Again: the petition states that the real estate consists of three parcels, giving the acreage of each, the two first being farming lands, and having on one of them the dwelling-house and improvements, and the third being swamp land, and the appraisers so report, and the court so finds; yet the court finds and adjudges that these separate parcels could not be divided. Were it not for the allegation of the petition and the statement in the findings, we might be bound by the findings of the court that they could not be divided; but with the allegation of the petitions and the facts as found, we can not see how the conclusion at which the court arrived could have been supported by the evidence. It seems to us that the only bond between the three parcels is the mortgage over all, which is not a controlling element in making a homestead selection.

A proper course for the court below to have taken would have been to proceed on the first petition to set apart a homestead out of or embracing the common property, which would have been subject to the mortgage; and the widow would then have been in condition to ask a sale of the balance of the property and the application of the proceeds to the payment of the mortgage, under section 1475, code of civil procedure, or in case of foreclosure, to ask that the mortgaged property not set apart be first sold, and the proceeds applied, leaving the homestead liable for the balance only.

We suggest (and this is a suggestion merely) that, as the estate is still in process of administration, the court below may save the rights of the parties, including the purchasers, by setting all proceedings subsequent to the first petition, and let the money paid by the purchasers be returned, and then proceed to set aside a homestead according to law.

The proceedings in this case were taken under section 1465, code of civil procedure, as amended in 1880. This section received a legislative construction in harmony with the views we have above expressed, by the amendment of section 1468, approved February 19, 1881, wherein it is provided, that where separate property is set apart, it is set apart for a limited period only, the title vesting in the heirs subject to the order setting apart.

The order is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.

SHARPSTEIN and THORNTON, JJ., concurred.

No. 9,252.

KELLEY *v.* FITZELL.

Department Two. Filed February 26, 1884.

A FINDING WILL NOT BE DISTURBED WHEN THE EVIDENCE IS CONFLICTING.

REFUSAL OF THE COURT TO ALLOW A WITNESS TO TESTIFY TO CERTAIN DECLARATIONS and conversations made by and between the parties to the action, although erroneous, will not warrant a reversal when the defeated party was not prejudiced thereby.

APPEAL from a judgment of the superior court for Lassen county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

C. G. Kelley, for the appellant.

C. McClaskey, for the respondent.

SHARPSTEIN, J. The plaintiff gave to the defendant an agreement in writing, of which the following is a copy:

"I hereby agree that H. G. Fitzell may take a fourth or fifth interest in the ditch right he has this day conveyed to me, by being at his proportion of the expense on said ditch, down to and through his lands.

"June 28, 1880. G. F. KELLEY."

On behalf of plaintiff, it is contended that this was simply a proposition which respondent never accepted. But the evidence on this point is conflicting. That introduced by respondent tended to prove that he did accept it, and aided in the construction of the ditch. Under these circumstances, we can not disturb the finding of the court below on that question.

On the trial the wife of plaintiff was called by him as a witness and asked to state a conversation between her husband and defendant—to state all of the conversation. Defendant's counsel objected to her stating what plaintiff said, as not the best evidence. The court sustained the objection, and plaintiff excepted. The court then told the witness to state only what respondent said to plaintiff, whereupon the witness said: "I heard the defendant [Mr. Fitzell] tell Mr. Kelley [plaintiff] that he would not take any interest in the ditch; that he had not got the money to pay out on it; but that he would work on the ditch for Mr. Kelley [plaintiff], and take his pay in water; that was about the middle of October, 1880." While we do not doubt that the court erred in sustaining the above-mentioned objection, we can not see how the plaintiff could be prejudiced by it. His witness testified to a declaration or avowal of defendant that he would not take any interest in the ditch, and that was all plaintiff was trying to prove. Nothing which the plaintiff could have said at the time would add any force or weight to this evidence. The declaration or avowal of defendant, as testified to, was clear and explicit. It could not be made more so by anything which the plaintiff could have said.

Judgment and order affirmed.

MYRICK and THORNTON, JJ., concurred.

No. 10,909.

PEOPLE v. JORDAN.

Department One. Filed February 26, 1884.

AN APPEAL BY THE PEOPLE FROM A JUDGMENT OR ORDER SUSTAINING A DEMURRER to an indictment will be dismissed where there is a prior appeal by the people from the same judgment or order.

APPEAL from a judgment of the superior court of San Francisco, entered in favor of the defendant, sustaining a demurrer to an indictment charging him with obtaining money under false pretenses. The further facts appear in the opinion.

Attorney general, for the appellant.

Darwin & Murphy, for the respondent.

By the COURT. This is an appeal by the people from a judgment or order in favor of defendant, on a demurrer to the indictment: Pen. C., sec. 1238. The notice of appeal was served and filed on the tenth day of November, 1883. If the judgment or order was appealable, the people had perfected an appeal from the same on the twenty-sixth day of October, 1883.

The appeal No. 10,909 must therefore be dismissed.

Appeal dismissed.

No. 9,059.

BROWN, Adm'r etc., v. MULLIN.

Department Two. Filed February 26, 1884.

SUBSEQUENT APPROPRIATION OF THE WATERS OF A RAVINE, which had been prior appropriated, only extends to the water suffered to go to waste by the prior appropriator.

A FINDING THAT THE PLAINTIFF WAS ENTITLED TO WATERS of a certain ravine held unsupported by the evidence.

APPEAL from a judgment of the superior court for Yuba county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. This is an action of trespass, to recover damages for the diversion of the waters of China ravine, in Yuba county, California, plaintiff alleging that he had a right to the waters of China ravine, and that defendant constructed a dam across the said ravine at a point above the head of plaintiff's ditch, and by means of defendant's dam and ditch took the waters from said ravine. The defendant denied that plaintiff owned the water right of China ravine, and alleged that it belonged to the defendant. The plaintiff first claimed a right to take and first took water from the ravine in 1873. The defendant appropriated the water in 1864, and used it almost continuously until this suit was brought, his right never being questioned during all that time; but at all times he allowed the water, or a surplus of water, when he had no sale for it, to flow down to the head of plaintiff's ditch. The further facts appear in the opinion.

Cross & Simonds, for the appellant.

Belcher & Belcher, for the respondent.

THORNTON, J. Whether China ravine had flowing in it, for more than eight years prior to the trial of this cause, a stream of natural water, is in our opinion immaterial, inasmuch as the defendant had, ever since 1865, appropriated the waters of the ravine, and had partly used it for irrigation and partly sold it to be used, up to the time of the appropriation claimed to have been made by O'Connor, the intestate of plaintiff. This last appropriation did not take place earlier than 1873, and did not extend beyond the water which then flowed back into the ravine from the irrigation by defendant, or was suffered at that time to escape and flow in the ravine by defendant. In other words, it only extended to the water suffered to go to waste by defendant, as above stated. It is not claimed that this water ever exceeded forty inches—sometimes during the season it was less than five inches. The court found that the defendant was not the owner or entitled to the use of any natural water flowing down China ravine since 1878, when the quantity thereof was less than forty inches, measured under a six-inch pressure, when the same was used or wanted by plaintiff; and that plaintiff was the owner of said forty inches.

The evidence did not sustain the finding. The right of plaintiff does not exceed what is indicated above. For this reason the order denying the new trial is reversed and the cause remanded.

SHARPSTEIN and MYRICK, JJ., concurred.

No. 6,907.

EMERIC *v.* ALVARADO ET AL.

In Bank. Filed February 27, 1884.

DIRECTION MADE AS TO COSTS ON APPEAL.

THE facts of this case are stated in the opinion reported in 1 West Coast Rep. 708.

By the COURT. In this cause the court overlooked the question of costs on the appeals. As to this point, it is ordered that the costs of the appeals taken in this cause be treated as costs in the cause, and be adjusted as such on the final hearing and judgment herein.

No. 9,129.

MARTIN v. JACOBS.

Department One. Filed February 28, 1884.

TRESPASS BY CATTLE.—Under the act of March 20, 1878, one who willfully enters with cattle and horses upon land belonging to and in the possession of another, and depastures them thereon, is liable for the damage suffered by the latter.

APPEAL from a judgment of the superior court for Yolo county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

C. P. Sprague, for the appellant.

W. B. Treadwell, for the respondent.

ROSS, J. The statute under which this action was brought, act of March 20, 1878, Stat. 1877–8, p. 360, makes the defendant liable for the acts charged in the complaint and proved and found against him in the court below; that is to say, the willful entry by the defendant, with cattle and horses, upon land belonging to and in the possession of the plaintiff, and depasturing the same to plaintiff's damage. The first section of the act reads: "If any horse, mare, mule, jack, jenny, hog, sheep, goat, or herd of neat-cattle, or any number of such animals, shall break into or enter upon any private lands, whether inclosed or not, the owner of or person keeping, harboring, or controlling such animals shall be liable to the owner or possessor of such lands for the amount of all damage caused by such trespass; or, when the trespass is continuing in its nature, for all damage caused by such continuing trespass, such damages to be recovered in a civil action brought for that purpose." In addition to the remedy given by the section just quoted, subsequent sections of the act provide for a lien upon the trespassing animals under certain circumstances, and where such lien is asserted, for notice to the owner of the stock. But those provisions do not apply to the present case. The evidence is sufficient to sustain the findings.

Judgment and order affirmed.

MCKINSTRY and MCKEE, JJ., concurred.

No. 8,649.

GILMAN v. CURTIS.

Department One. Filed February 28, 1884.

ASSIGNMENT OF POLICY OF INSURANCE.—The assignment of a policy of life insurance as collateral security for advances made to a third person vests the legal title to the policy in the assignee. The interest of the owner of the policy only extends to what remains of it after such advances have been paid. Until such advances have been paid, the owner of the policy, although he is under no obligation to repay the same, is not entitled to have it surrendered to him, or to receive the amount due thereon.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

Hanlon and *Tyler*, for the appellant.

Sieberst and *Sharp*, for the respondent.

Ross, J. To this suit Gilbert Curtis and the Ætna Life Insurance Company were originally made defendants. The controversy grows out of a policy of insurance issued by the company upon the life of one A. W. Tucker. The complaint charges that the policy was issued upon the life of Tucker and delivered to one Esther Cordelia Curtis, who, it is alleged, paid the premiums thereon. It is not alleged to whom the policy was made payable. There are, however, allegations and findings to the effect that Esther Cordelia Curtis assigned the policy to the plaintiff, who subsequently caused the same to be assigned to the defendant Gilbert Curtis, as security for certain advances to be made by him for and on account of the said Esther Cordelia Curtis.

The findings are, that the advances so made, for the security of which Gilbert Curtis received the policy, amounted to four thousand and seventy-one dollars and twenty-one cents. There is nothing in the case to show that the plaintiff became personally responsible for those advances. The prayer of the complaint is for a decree to the effect that the plaintiff is the owner of the policy, and entitled to collect and receive from the insurance company the money for which it was issued—the insured having deceased; that the interest of the defendant Gilbert Curtis therein be determined; that he be required to assign and deliver to the plaintiff the policy, and he failing to do so, that the clerk of the court execute such assignment; and that both defendants be restrained from disposing of the policy, or the moneys mentioned therein, to others than the plaintiff. There was also a prayer for general relief. The record discloses no service of process on or appearance by the Ætna Life Insurance Company; but the judgment entered in the cause recites that the action was "dismissed as against the Ætna Life Insurance Company and the intervenor herein." The sole parties to the suit are, therefore, the plaintiff and the defendant Gilbert Curtis.

The following is the decree entered in the court below:

"Now, therefore, by reason of said verdict and findings, it is ordered that judgment be entered herein in favor of the plaintiff, and against the said Gilbert Curtis, as of the date of said verdict, to wit, on the ninth day of May, 1881.

"It is therefore further ordered, adjudged, and decreed that the plaintiff is the owner of the policy of insurance, number 81,308, issued by the Ætna Life Insurance Company upon the life of A. W. Tucker, deceased, which said policy of insurance was issued upon the life of said A. W. Tucker for the sum of ten thousand dollars, and which was duly assigned, transferred, and set over to the plaintiff as alleged in plaintiff's complaint.

"That while the plaintiff was the owner of said policy of insurance, she assigned and caused the same to be transferred to the defendant Gilbert L. Curtis in trust, to secure future advances to be made by the defendant Gilbert L. Curtis to pay Judge Swift and the Sacramento Bank certain liens and claims that they had, or claimed to have, upon said policy of insurance.

"And the jury having found, by their verdict, that the defendant Gilbert L. Curtis had, at the date of their said verdict, advanced the sum of four thousand and seventy-one dollars and twenty-one cents, which amount they found to be due him for money so advanced as aforesaid, the said defendant Gilbert L. Curtis is therefore entitled to receive said amount so found to be due, less the cost of suit; and that the said policy of insurance is subject to said trust and payment of said sum of four

thousand and seventy-one dollars and twenty-one cents, which amount is to be paid to the defendant Gilbert L. Curtis when said policy shall be paid by the Ætna Life Insurance Company.

"And the plaintiff, upon the payment of the said sum, is entitled to have and receive from the said Gilbert L. Curtis a surrender and reconveyance of said policy, and that the said plaintiff is entitled to receive from the Ætna Life Insurance Company the whole amount due upon said policy. And the plaintiff is entitled to have and recover from the said Gilbert L. Curtis her costs in this action, levied at the sum of five hundred and nineteen dollars and thirty-two cents."

The decree as entered is, we think, obnoxious to some of the objections urged by counsel for appellant. As the jury found, and the court approved and adopted the finding, that the plaintiff assigned the policy to the defendant, to be held by him as collateral security for certain advances to be and which were made by him, the legal title to the policy passed by the assignment to the defendant. The court should not, therefore, have adjudged the plaintiff the owner of the policy, and entitled to receive from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy is in what remains of it after the advances, for the security of which it was assigned have been satisfied. To that excess plaintiff is equitably entitled. But since the defendant was by the assignment invested, not only with a lien upon the policy, but with the legal title thereto as security for his advances, it is clear that he can not be made to surrender it to the plaintiff until the advances made by him are repaid; and since there is no personal obligation on the plaintiff to repay the advances, and the policy does not appear to have been paid, we do not see what other decree can properly be entered on the findings than one declaring the interests of the respective parties in and to the policy, and the moneys growing out of it, and directing the defendant to seek the enforcement of its payment, and in the event of its payment that defendant, after deducting the amount of the advances for the security of which the policy was assigned, pay the remainder to the plaintiff. The plaintiff is also entitled to costs of this suit.

Cause remanded, with directions to the court below to modify the judgment so as to accord with the views above expressed.

McKINSTRY and McKEE, JJ., concurred.

No. 7,584.

BLACK ET AL. v. MERRILL.

Department One. Filed February 28, 1884.

IN AN EQUITABLE ACTION TO REOPEN A SETTLEMENT AND SALE MADE BETWEEN PARTNERS, and for an accounting of the partnership affairs, on the ground of fraud alleged to have been practiced by the defendant, the court can not, without setting aside such sale and making an accounting, render judgment for the plaintiff for a specific amount, on the ground that the defendant was guilty of a breach of warranty or of deceit.

APPEAL from a judgment of the superior court of Alameda county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

George E. Whitney, for the appellant.

Cobb and *Langan*, for the respondents.

Ross, J. It is thoroughly and well settled that the relief awarded a plaintiff must be consistent with the case made by his complaint. The complaint in the present instance is a bill in equity to reopen a settlement and sale between partners, and to obtain an accounting of the partnership affairs, on the ground of fraud alleged to have been practiced by the defendant. On the trial in the court below, no accounting of the affairs of the partnership between plaintiffs and defendant was taken, but certain evidence was introduced, from which the court found these facts: That in April, 1877, plaintiffs and defendant entered into a copartnership, for the purpose of manufacturing and vending brick in Alameda county, of this state; that defendant became the managing partner of the firm in Oakland, where the principal place of vending the brick was carried on, plaintiffs having more immediate charge of manufacturing the brick; that books of account were kept at Oakland by the son of defendant, purporting to contain all of the business transactions of the firm in Oakland, to which books plaintiff Black had access at all times, and which books were examined from time to time from December, 1877, to the time next hereinafter mentioned, by an expert appointed by Black and paid by the firm; that on the thirtieth day of October, 1878, there stood upon said books, among other things, accounts against certain persons, aggregating eight hundred and thirty-one dollars and fifty-two cents; that on said thirtieth day of October, defendant sold his interest in the firm and its assets to the plaintiff Black for the sum of nine thousand one hundred and twenty-seven dollars and one cent, plaintiff Merrill consenting thereto, and agreeing with Black, as a part of the consideration of the sale, and of the retirement of the defendant from the firm, to assume and pay the debts due from the firm as the same appeared upon the books; that Black paid defendant the sum of nine thousand one hundred and twenty-seven dollars and one cent, defendant retired from the firm, and plaintiffs afterwards paid its debts; that the aforesaid purchase of defendant's interest was made "upon the faith and belief that said books of account exhibited the true state and condition of the business transacted by him in behalf of the firm, and especially a true statement of the balance due from the various debtors of said firm, and a true statement of the various persons indebted to said firm;" that the accounts referred to as aggregating eight hundred and thirty-one dollars and fifty-two cents had, previously to the aforesaid sale, been paid by the persons against whom they stood, and the money received by the defendant, and by him appropriated to his own use; and for this sum the court below gave the plaintiffs judgment, with costs.

The difficulty in the way of affirming the judgment is that it is not warranted by the complaint. That, as was stated at the outset, is a bill in equity to reopen a settlement and sale made between partners, and to obtain an accounting of the partnership affairs, on the ground of fraud alleged to have been practiced by the defendant. The court did not set aside the sale and take an accounting, but in rendering its judgment evidently proceeded upon the theory either of a warranty on the part of the defendant of the accounts referred to as aggregating eight hundred and thirty-one dollars and fifty-one cents, or else considered that the action might be treated as one for deceit. But it was not for a breach of a warranty or for damages for deceit that plaintiffs sued. A party can not allege one cause of action and recover upon another.

Judgment and order reversed, and cause remanded for a new trial.

McKEE and McKINSTRY, JJ., concurred.

No. 8,123.

McCoy v. Byrd et als.

Department One. Filed February 28, 1884.

The Affidavit of an Applicant for the Purchase of State Lands must set out the facts required by the statute to be stated therein. An affidavit which fails to state whether there are or are not settlers on the land which is sought to be purchased is insufficient.

Matters Which the Statute Requires to be Stated in Such Affidavit can not be held immaterial.

Appeal from a judgment of the superior court for Tulare county, entered in favor of the defendants. This action was brought upon an alleged contest originating in the state land office, touching the rights of the parties to purchase a certain tract of swamp and overflowed land in Tulare county. It appears from the complaint, that from the first of January, 1873, until the first of January, 1874, the defendant Byrd was the duly elected, qualified, and acting county treasurer of Tulare county; that on the third day of January, 1873, he made and filed in the office of the county surveyor of Tulare county his affidavit and application to purchase the land in question as swamp and overflowed land; that thereafter the county surveyor made a survey of the land for Byrd, under and in pursuance of his (Byrd's) said affidavit and application; that after the land was surveyed by the county surveyor, Byrd's affidavit and application, together with the survey, were forwarded to and filed in the office of the surveyor general, and thereupon the application and survey were approved by the surveyor general, and on the eighth day of April, 1873, the register issued to Byrd a certificate of purchase for the land, which said certificate was in the form prescribed by law. On the thirteenth day of November, 1875, one M. Hart, who is made a party defendant in this case, filed in the office of the surveyor general an application to purchase the land. On the fourth day of August, 1881, the plaintiff procured the county surveyor of Tulare county to survey the land, and on the tenth day of August, 1881, he made an affidavit and application to purchase the land, and on the thirteenth day of August, 1881, his affidavit and application, with a certificate of the survey, were filed in the office of the surveyor general. The surveyor general refused to approve the application of plaintiff to purchase the land, for the reason that a certificate of purchase for said land had been issued to defendant Byrd. Thereupon plaintiff filed in the office of the register a protest to the issuance of any further evidence of title to said defendant Byrd, on the ground that Byrd was the county treasurer of Tulare county when he applied to purchase the land, and at the time the certificate of purchase was issued to him. The defendant Byrd filed a demurrer to the complaint, which was sustained. Plaintiff declined to amend, and final judgment was entered in Byrd's favor, for costs, from which plaintiff prosecutes this appeal. The further facts appear in the opinion.

W. H. H. Hart, *McNamara*, and *Atwell*, for the appellant.

Brown & Daggett, *Edwards*, and *Dubruiz*, for the respondent.

Ross, J. It is well settled that an applicant seeking to purchase land from the state must set out in his affidavit the facts required by the statute to be stated therein: Botsford v. Howell, 52 Cal. 158; Hildebrand v. Stewart, 41 Id. 387; Woods v. Sawtelle, 46 Id. 389. The stat-

ute under which the plaintiff's application is made, political code, sec. 3443, requires the affiant to state, among other things, "that he knows the land applied for and the exterior bounds thereof, and knows of his own knowledge that there are no settlers thereon; or, if there are, that the land has been segregated more than six months by authority of the United States." From the affidavit of the plaintiff it does not appear whether there are or are not settlers on the land which he seeks to purchase. The courts can not hold immaterial matters which the statute declares must be stated.

Judgment affirmed.

McKINSTRY and McKEE, JJ., concurred.

No. 9,151.

MONTGOMERY *v.* MERRILL ET AL.

Department One. Filed February 28, 1884.

ORDER SETTLING A RECEIVER'S ACCOUNT WILL BE AFFIRMED when no error appears.

OBJECTIONS AND EXCEPTIONS TO THE ALLOWANCE OF A VERIFIED ACCOUNT of a receiver appointed in an action for the foreclosure of a mortgage need not be verified.

APPEAL from an order of the superior court for Colusa county settling the verified account of a receiver appointed in an action for the foreclosure of a mortgage. After such account had been presented for settlement, the defendant filed written objections and exceptions to certain items thereof. Such objections and exceptions were not verified. On the hearing the receiver objected to the court's considering them on the ground that they were unverified. The objection was overruled, testimony heard, and certain items of the account reduced. The receiver appealed.

Albery and *Hurlburt*, for the appellant.

John T. Harrington, for the respondent.

By the COURT. This is an appeal by the receiver from the order of the court below settling his accounts. We have examined the rulings as to the items of the account to which our attention is called, and find no error in them. It would serve no useful purpose to go over the items in detail.

Order affirmed.

No. 9,112.

PEOPLE ex rel. HARRIS *v.* BLAKE ET AL.

In Bank. Filed February 28, 1884.

DEDICATION OF STREET—FINDINGS.—In an action to obtain a decree adjudging certain premises to be a public street, a finding that on a certain day such premises were dedicated by the owners as a public street is sufficient, without finding who such owners were, when it appears that neither the defendants nor their grantors have or had any interest in the premises or any title thereto.

A FINDING THAT THE DEFENDANTS have and had no right or title to the land in controversy reviewed, and held supported by the evidence.

APPEAL from a judgment of the superior court for Alameda county,

entered in favor of the plaintiff, and from an order denying the defendants a new trial. This was an action to obtain a decree adjudging certain premises in the city of Oakland to be a public street, that the defendants be directed to remove certain buildings and obstructions therefrom, and be enjoined from erecting any building or obstructions thereon. The further facts appear in the opinion, and in the opinion rendered on a former appeal, reported in 60 Cal. 497.

Tuttle & Tuttle, and *Jarboe & Harrison*, for the appellant.

George E. Whitney, for the respondent.

MYRICK, J. The court below found that the land in controversy constitutes a portion of a public street, which had been wrongfully and unlawfully obstructed by the defendants, and that the defendants had and have no right or title thereto. In arriving at the conclusion that the land was a portion of a street, the court found that the same had been dedicated as a public street, by the owners, and had been, with the permission of the owners, used by the public as a public street and highway from the beginning of the year 1853 to the end of the year 1859. The defendants object to the sufficiency of the findings, in that the court did not find who were the owners who thus made the dedication. If the defendants or their grantors have and had no interest in the premises, and no title thereto, it is an immaterial fact to them who were the owners.

The finding that the defendants had and have no right or title to the land is sustained by evidence, viz.: the evidence of surveyors tending to show that the quantity of land specified in the subdivisions of tract D, as per map of the subdivisions, is contained in the tract, placing the southern line of the tract eighty feet north of the northern tier of blocks as delineated on the Kellersberger map; there is evidence tending to show that from the fence built along the southern line of subdivision No. 9 to the northern line of the so-called Fourteenth street, the distance is found as delineated on the map of tract D; there is evidence tending to show that the persons who caused the Kellersberger map and survey to be made caused a street of the width of eighty feet to be laid out, surveyed, and staked, over and upon the premises in controversy; there is evidence tending to show that the northern tier of blocks, as delineated on the Kellersberger map, does not reach within eighty feet of the southern line of tract D, and if that be true, the partition deed between the original owners did not include the premises, and they were not included in the deed from J. K. Irving to Goggin of subdivision No. 1 of tract D, and therefore not included in any deed conveying or purporting to convey the title of the original owners. The Kellersberger map delineates blocks and streets from the water front to the north line of the northern tier of blocks, giving the distance as three thousand eight hundred and fifteen feet; the partition map gives the westerly line of the space marked thereon "Oakland" as sixty-three chains—*i. e.*, four thousand one hundred and fifty-eight feet; this westerly line is considerably less than the distance, as shown on the map, from the water front to the northerly line of the space marked "Oakland"—thus showing (at least sufficiently certain to sustain the finding) that the Kellersberger map did not embrace all the land between the water front and the tract D as partitioned to J. K. Irving.

In this view of the case the other matters assigned as error become im-

material. This case was here on a former appeal, at which time a new trial was granted: 60 Cal. 497. In the consideration of that appeal, it was assumed that the north line of the blocks as delineated on the Kellersberger map corresponded with the south line of tract D; the discrepancy now apparent was not considered. This is mentioned to explain what would otherwise appear to be an inconsistency between the facts appearing on that appeal and on this. In the partition map, "Oakland" is delineated as lying immediately south of tract D; and probably this fact led to the supposition that "Oakland" of the partition map corresponded with the Kellersberger map.

The judgment and order are affirmed.

THORNTON and SHARPSTEIN, JJ., concurred.

MORRISON, C. J., concurred in the judgment.

No. 9,175.

OHLEYER, Assignee, etc., *v.* BUNCE.

Department Two. Filed February 28, 1884.

FINDINGS—SUFFICIENCY OF.—In an action to set aside a sale on the ground of fraud, where the court finds enough to avoid the sale, it is unnecessary to find more, although everything alleged in regard to such transfer is not found on.

JURISDICTION IN A PROCEEDING OF INVOLUNTARY INSOLVENCY is acquired by the service of a copy of the petition of the creditors and the order of the court on the debtor. In such case no notice to creditors is required to be published.

IN SUCH PROCEEDING, WHEN IT DOES NOT APPEAR FROM THE RECORD whether or not the debts of the petitioning creditors were created after the act of 1880 took effect, the appellate court will presume that they were, in support of a finding that the order appointing an assignee was duly made and given.

APPEAL from a judgment of the superior court for Sutter county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. This was an action by the assignee of one Marcuse, an involuntary insolvent, to recover a stock of goods or its value, the sale and transfer of which by the insolvent to the defendant was alleged to be fraudulent and void, as having been made with intent to prefer the defendant, as a creditor of the insolvent, within the provisions of section 55 of the insolvent act of 1880. The further facts appear in the opinion.

J. H. Craddock and *I. S. Belcher*, for the appellant.

Stabler & Bayne, for the respondent.

SHARPSTEIN, J. The court found, among other things, that at the date of said transfer said Marcuse was insolvent, and in contemplation of insolvency, and to prevent his property from being distributed ratably among his creditors, he made said sale and transfer of said goods, wares, and merchandise; that said sale and transfer were not made in the usual and ordinary course of business of said Marcuse, and for that reason—there being no evidence sufficient to overcome the legal presumption raised by that fact—the defendant had reasonable cause to believe that said Marcuse was insolvent, and that said sale and transfer were made with a view to prevent the said property from being ratably distributed among the creditors of said Marcuse.

The court did not find everything alleged in regard to said transfer,

but it found enough to avoid the sale, and it was unnecessary to find more. The finding that the court in which the insolvency proceeding was pending "by an order duly made and given," appointed the plaintiff herein assignee of the estate of said insolvent, is attacked on the ground that there was not such proof as the law requires of the publication of the order appointing a meeting of creditors. In cases of *voluntary* insolvency it is provided that on receiving and filing the petition, schedule, and inventory, the court shall make an order declaring the petitioner insolvent, and appoint a time and place for a meeting of the creditors to prove their debts, and choose one or more assignees, and shall designate a newspaper or newspapers in which publication of said order shall be made, and that a copy of said order shall immediately be published by the clerk in the newspaper or newspapers designated as often as the newspaper is printed before the meeting of the creditors.

But in cases of *involuntary* insolvency, the court, on the filing of the creditors' petition, is required to issue an order requiring the debtor to show cause, at a time and place to be fixed by the court, why he should not be adjudged an insolvent debtor; and a copy of the petition and order to show cause must be served on the debtor. No provision is made for the service of any notice on the creditors, who are the plaintiffs in such cases. But the court is required to appoint a day for their meeting to elect an assignee. In a case of *voluntary* insolvency the proceeding as to creditors is one *in invitum;* but in case of *involuntary* insolvency, the reverse is true. The proceeding is then one *in invitum* as to the debtor, and the code provides how and in what manner he shall be served with notice, but makes no provision for the service of any notice on the creditors who are the moving parties, or the plaintiffs in the proceeding. In a case of *voluntary* insolvency the court does not acquire jurisdiction to appoint an assignee until after the order mentioned in section 6 has been made, and a copy of it published as provided in section 7. In a case of *involuntary* insolvency, jurisdiction is acquired by receiving the petition mentioned in section 8, making the order specified in section 9, and serving both the petition and order in the manner provided in section 10.

In this case the defendant objects that the creditors were not duly notified of a proceeding instituted by themselves, and therefore that the court did not acquire jurisdiction to appoint an assignee of his estate. We think jurisdiction was acquired in this case by the service of a copy of the petition of the creditors and order of the court on the debtor, and that the law did not require the publication of notice to creditors, as appellant contends. It does not appear that the debts of the petitioning creditors were created after the act of 1880 took effect, nor does it appear that they were not. We are informed by the transcript that "the creditors' petition in involuntary insolvency" was introduced in evidence by the plaintiff; contents not stated. It may have shown that the debts were created after the act of 1880 went into effect. If it did not, the appellant should have incorporated it in the record, in order to overcome the finding that the order appointing plaintiff assignee *was duly made and given.*

Judgment and order affirmed.

THORNTON and MYRICK, JJ., concurred.

No. 9,229.

HAUSMEISTER *v.* PORTER.

Department One. Filed February 28, 1884.

JUDGMENT REVERSED on the authority of Meyer v. Porter, 1 West Coast Rep. 874.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the defendant. This case was formerly decided and reported in 1 West Coast Rep. 877. An order was subsquently made vacating the judgment, after which the following opinion was filed.

Rosenbaum & Sheeline, and *S. C. Denson*, for the appellants.

W. A. Anderson, city attorney, and *McKune & George*, for the respondent.

By the COURT. On the authority of Meyer v. Porter, 1 West Coast Rep. 874, judgment reversed and cause remanded, with direction to the court below to overrule the demurrer and permit defendant to answer.

No. 8,915.

DE CELIS ET AL. *v.* PORTER ET AL.

Department Two. Filed February 28, 1884.

SUPREME COURT CAN NOT INFER ONE FACT FROM OTHER FACTS FOUND. The only inferences which it can draw from the findings are inferences of law.

JUDGMENT IN DE CELIS V. PORTER, 1 WEST COAST REP. 575, MODIFIED as to the date from which interest should be allowed.

APPEAL from a judgment of the superior court for Los Angeles county. The facts are stated in the prior report of this case in 1 West Coast Rep. 575.

Glassell, Smith & Patton, for the appellants.

T. H. Howard, and *Graves & Chapman*, for the respondents.

By the COURT. The petition for a modification of the judgment calls attention to the fact that the interest should be charged on the credit allowed on the mortgage, five thousand two hundred and fifty-five dollars and thirty cents, with interest from the fourteenth of June, 1876, instead of from the seventh day of June, 1879. If it had been found as a fact by the court below, that the credit on the mortgage was allowed as of the fourteenth of June, 1876, we should unhesitatingly order the modification. But it is not so found. Of what date such credit was allowed is a fact which this court can not find, but which should have been found by the court below. It may be that the credit was allowed as of the fourteenth of June, 1876, but this can only be arrived at in this court by an inference of one fact from others found, which we can not make. The only inferences which we can draw from the findings are inferences of law. We are not allowed to draw inferences of fact from the facts found. If this court were to infer a fact from other facts, it would be usurping the province of the trial court, which alone can find the facts in issue. This is the rule with regard to special verdicts, and we are of opinion that the same rule applies to findings of fact. There is no finding that the credit referred to was allowed of an earlier date than that mentioned in

the opinion in the cause, and in directing a judgment on the findings we must adhere to the facts as found.

But the contract of the fourteenth of June, 1876, of which the mortgage sued on forms a part, which, it is held, was revived by the promise of Porter at the conference in relation to the judgment which was entered in this court in 1879, does bind Porter to pay interest on three fourths of this credit, at the rate of ten per cent. per annum; and the judgment should be modified so as to allow interest at the rate last named, as against Porter, from the seventh day of June, 1879. But Maclay has made no promise to pay interest at that rate. Maclay is only bound to pay the legal rate. And if Maclay should be called on to pay anything on the deficiency judgment, the interest, as against him, should be computed only at the rate of seven per cent. This applies not only to the computation to determine the amount of the deficiency, as against Maclay, but interest on the deficiency so determined, as against him, should be computed at the same rate.

The judgment is modified in this regard, and the court below, in entering judgment, will regard these directions, in addition to those given in the opinion filed on the twenty-ninth day of January, 1884.

No. 8,494.

SWEETSER ET ALS., Ex'rs, etc., v. DOBBINS.

Department Two. Filed February 28, 1884.

FINDINGS OF A JURY ON SPECIAL ISSUES SUBMITTED TO THEM, in an action for the reformation of a deed for an alleged mistake, are merely advisory to the court. If, in such action, the court files findings as to all the facts in issue, in which, after reciting that a jury had been impaneled to try special issues, and had rendered a verdict, it is stated, "Now, from said verdict and the testimony adduced in said cause, after due consideration, the court finds the following facts," a judgment entered upon such findings will not be reversed for an erroneous instruction to the jury as to the character of the evidence necessary to warrant the relief asked.

THE COURT MAY CAUTION A WITNESS NOT TO GIVE EVIDENCE OF FACTS based on knowledge derived from his client, or by hearsay from others; and may strike out such evidence already given.

THE REJECTION OF IMMATERIAL EVIDENCE is not error.

CROSS-EXAMINATION MAY INCLUDE THE ORIGINAL COMPLAINT, although an amended complaint has been filed.

ERROR IN OVERRULING AN OBJECTION TO A QUESTION ASKED A WITNESS can not be taken advantage of when the answer was favorable to the appellant.

A MORTGAGE EXECUTED BY THE DEFENDANT MAY BE INTRODUCED IN EVIDENCE in an action to reform a subsequent deed, when the two instruments form parts of the same transaction.

IN SUCH ACTION THE SCRIVENER MAY TESTIFY AS TO THE DATA FURNISHED HIM for drafting such mortgage, and that he had compared the same with the *data*.

THE COURT HAS DISCRETION TO REFUSE A FURTHER EXAMINATION of the same witness on a point on which he has already been examined.

ERRONEOUS FINDING OF THE COURT ON AN IMMATERIAL ISSUE will not warrant a reversal.

APPEAL from a judgment of the superior court for Solano county, entered in favor of the defendant, and from an order denying the plaintiffs a new trial. The opinion states the facts.

George A. Lamont and *George A. Nourse*, for the appellants.

J. McKenna, Wendell & Kelley, and *A. J. Dobbins*, for the respondent.

MYRICK, J. The complaint in this case was filed to obtain a decree reforming a deed executed by defendant to plaintiffs' testator, so as to include a tract of land not included therein, and that said tract be conveyed to them in their representative capacity. The plaintiffs alleged that by the agreement of their testator and the defendant the tract was agreed to be embraced in the deed, and was omitted therefrom by the mistake and inadvertence of the scrivener. The defendant denied such agreement and mistake, and alleged that the deed contained all the land which he had agreed to convey. Special issues were submitted to a jury; and the verdict was, in effect, in favor of defendant. The court filed findings as to all the facts in issue, in which, after reciting the fact that a jury had been impaneled to try special issues and had rendered a verdict, it is stated: "Now, from said verdict and the testimony adduced in said cause, after due consideration, the court finds the following facts," etc. On this appeal points are presented by the plaintiffs, viz.:

1. The court instructed the jury that as to the first issue presented to them (which was merely as to whether the land of defendant was divided into seven or eight parcels), the rule was that a preponderance of evidence should govern them; but as to the other issues (which related to the alleged agreement and mistake), a different rule obtains from that in ordinary civil actions; that to establish a mistake in the execution of a written instrument, the evidence as to the mistake must be clear and convincing; that the evidence must be more than mere preponderance—it must be clear and convincing.

The plaintiffs allege this instruction to be error; that subdivision 5, section 2061, code of civil procedure, furnishes the rule in *all* civil cases, that "when the evidence is contradictory the decision must be made according to the preponderance of evidence;" that the instruction gave one rule to one class of civil cases, viz., an action to reform an instrument, and another rule to other civil cases.

It was decided by this court in Bates v. Gage, 49 Cal. 126, that the findings of a jury on special issues are merely advisory to the court, and if adopted by it are the findings of the court; in Wingate v. Ferris, 50 Id. 105, it was held that if a general verdict be rendered by the jury, the court can set aside the verdict (without motion for new trial), and find the facts and render judgment on the testimony already taken; and in Brandt v. Wheaton, 52 Id. 430, it was held that in case of general verdict, the court must, notwithstanding the verdict, find the facts.

If it be a correct principle that a general verdict may be disregarded by the court, and a decision be rendered by it on the testimony already given, and if a verdict on special issues is merely advisory, to be adopted by the court or not, as it is convinced, how far was it error for the court to instruct the jury as it did, conceding, for the purpose of this case, that the statute above quoted furnishes the rule for *all* civil cases?

The court found all the facts: it found that the agreement alleged in the complaint was not made; it found that the agreement alleged in the answer was made; it found that no parcel of land was omitted, through mistake or inadvertence, to be mentioned or described in the deed; it found that the deed included all the land intended to be conveyed, and correctly expressed the intention of the parties to the same. As above stated, the court said, as preliminary to the facts: "Now, from said verdict and the testimony adduced in said cause, after due consideration,

the court finds," etc. What answer of the jury did the court rely upon and adopt as the basis of its findings? and what finding was based on the determination of the court from the testimony? This does not appear. It does not appear that the court adopted any portion of the verdict, as distinguished from exercising its own judgment. It is true, the court said, "from said verdict;" but it also said, from "the testimony adduced in said cause, after due consideration, the court finds."

The court had authority to rely on its own opinion in regard to the weight of evidence; and in doing so, it is to be presumed that it was governed by proper and legal rules. According to the section of the code above referred to, the jury is to be instructed by the court, "on all proper occasions," that when the evidence is contradictory the decision must be made according to the preponderance of evidence. This evidently refers to all cases where the decision of the jury is final as to the facts. In cases at law, the decision of the jury is final, unless set aside; but in equity cases it is merely advisory, and may be adopted or not, as the court shall be convinced. If this case had been tried by the court without a jury, there is no doubt that the court would have been governed by the rule that the law presumes the deed to speak the intention of the parties, and to overcome such presumption, the plaintiff would have been required to show, by proof clear and convincing, that it did not so speak; it must, therefore, necessarily follow, in cases where a verdict is but advisory, that the same rule should govern a jury. It can not be that the legislature intended one rule regarding the weight of evidence to apply to a court and another rule to a jury in arriving at a decision in the same case. The court was not bound to enforce upon the jury a rule which it was not bound in law or in conscience to apply to its own action.

2. It was not error for the court to caution the witness Lamont not to give evidence of facts based on knowledge derived from Pierce (plaintiffs' testator), or by hearsay from others; nor to strike out the evidence based thereon already given.

3. The witness Lamont was asked whether or not he would have attached certain property if he had not supposed it was mortgaged, and an objection to the question was sustained. Conceding it to be possible for a person to tell what he would or would not have done regarding a transaction now passed, we do not see that it could have affected the verdict. The matter for consideration was, What did he do? not, What would he have done?

4. We see no error in permitting the cross-examination of the witness Lamont to include the original complaint.

5. A witness (Rush) was examined as to a conversation had by him with the defendant. He had not a distinct recollection of what the defendant said; and on cross-examination, was asked as to the impression left on his mind from what was said. If the court erred in overruling the objection, the error did appellant no harm, because the answer was favorable to him.

6. The mortgage first executed by the defendant was a portion of the transactions between the parties culminating in the deed in question, and it was admissible in evidence.

7. It was not error to admit Coghlan's testimony as to the *data* had for drafting the mortgage made February 1, 1876; nor,

8. To allow Coghlan to testify he had no doubt that he had compared the instrument with the *data* from which it was drawn.

9. The witness Lamont, called for plaintiffs, had testified as to conversations had by him (on behalf of Pierce) with the defendant, and negotiations between them, and had given his version of those conversations and negotiations. He testified that defendant's only proposition was, "I will give you a deed to the ranch, and you give up all my papers." The defendant, on his own behalf, testified as to an additional offer made by him during those conversations and negotiations. Lamont was called, in rebuttal, to deny such offer, and an objection thereto was sustained. The witness having already testified as to the conversations, and having stated what was defendant's only proposition, thus saying there was no other, it was doubtless in the discretion of the court to permit or refuse a further examination relating thereto.

10. As to the tenth point, we can not see that the jury was misled or confused by the nature of the instructions.

11. The appellants complain that the judge of the court below assumed that he was conclusively bound by the verdict of the jury. It does not appear that the judge came to a different conclusion, from the testimony, than that arrived at by the jury. The judge says: "In this case there is a contradiction of witnesses—as decided a conflict as I have ever seen." But he does not say that he would have decided other than as the jury did; therefore no error is manifest. In ruling on plaintiffs' motion to set aside the verdict, and for judgment, the court said: "I do not see any circumstance in this case by which I feel that I am warranted in setting aside the verdict;" thus, in effect, expressing his view of the evidence.

12. The court found that defendant was not in embarrassed circumstances, pecuniarily. Objection is made that this finding is not sustained by the evidence. Granting that it is not sustained, yet, as a fact to be found, it was an immaterial matter. Proof of his pecuniary circumstances may have had some bearing on the case as evidence, but it was not an ultimate fact. The ultimate facts were whether or not the parties had agreed that the omitted tract should be included in the deed, and whether the omission was by mistake.

Judgment and order affirmed.

SHARPSTEIN and THORNTON, JJ., concurred.

No. 8,875.

STOCKTON BUILDING AND LOAN ASSOCIATION *v.* CHALMERS ET AL.

In Bank. Filed February 28, 1884.

PROBATE PROCEEDINGS AS NOTICE OF TITLE.—Proceedings in the probate court to have certain premises set apart to a widow and children as a homestead are not notice sufficient to put a subsequent *bona fide* purchaser from the person holding the legal title upon inquiry as to the equities of such children.

APPEAL from a judgment of the superior court for El Dorado county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts. The opinion of department two may be found in 12 Pac. C. L. J. 101.

Irwin & Carpenter, for the appellant.

G. G. Blanchard and *W. L. Dudley*, for the respondent.

MYRICK, J. This is an action to foreclose a mortgage executed by one Robert Chalmers in his life-time. His executor and executrix and a junior mortgagee were made defendants. Joseph and Martin Alhoff are intervenors, and the court having rendered judgment against them, and directed a sale of the mortgaged premises, they have appealed. The intervention is based upon the following facts:

In 1855, one M. Alhoff went into the occupation of a small tract of unsurveyed government land, and thence resided thereon, with his family, until his death. He extended his possessions so as to embrace some twenty-two or twenty-three acres, planted a vineyard, built a house, wine-cellar, and distillery. He was qualified to pre-empt, but took no steps in that direction other than to occupy the land. He died in 1867, leaving him surviving a widow (Louisa M.) and two sons (the intervenors). In that year (1867) the place was set apart by the probate court to the widow and two sons as a homestead, and they continued to reside on the premises until July, 1869, when the said Louisa M. intermarried with Robert Chalmers, and she removed, with her sons, to the house of said Chalmers on the other side of the road dividing the Chalmers place from the Alhoff place. In May, 1869, said Chalmers had been appointed guardian of the persons and estates of the two boys, and received letters, but he filed no inventory or report.

The United States survey of the land was completed July 31, 1871. In 1871 or 1872, Robert Chalmers filed a pre-emption claim, which embraced his residence on the east side of the road, as well as the east nine and thirteen one-hundredths acres of the Alhoff place, and in August, 1873, he received a United States patent for the same. On the twenty-seventh of September, 1874, said Chalmers deeded to Louisa M. and the two boys the westerly thirteen and nineteen one-hundredths acres of the Alhoff place, retaining the title to the easterly nine and thirteen one-hundredths acres, on which were located the dwelling, barn, and a portion of the wine-cellar. On the same day he executed the mortgage in suit, which embraced the easterly nine and thirteen one-hundredths acres and his own residence, with other property, but did not embrace the westerly thirteen and nineteen one-hundredths acres. In January, 1879, said Chalmers moved to the Alhoff house, and resided there until his death, in 1881. In March, 1879, said Robert Chalmers executed the second mortgage to his son, the defendant, Hugh Chalmers. The intervenors attained majority, respectively, Joseph on the seventeenth of September, 1878, and Martin on the twenty-first of November, 1879.

The intervenors claim that by virtue of the homestead proceedings in the Alhoff estate they became tenants in common with their mother in the ownership of the premises; that when Chalmers acquired the title from the United States government, he acquired it for them, and thence held in trust for them; and that the possession by their father and the setting apart by the probate court imparted to the plaintiff sufficient notice to put it upon inquiry, and that it is not an incumbrancer in good faith without notice. We do not think the homestead proceedings in any manner affect the mortgage. Those proceedings operated only upon whatever right the intestate had at the time of his death.

The court found that neither the plaintiff nor those through or from whom it acquired the note and mortgage had any knowledge of the

alleged right or title of the intervenors, prior to the commencement of this action. There is evidence sufficient to sustain this finding.

The judgment and order are affirmed.

MORRISON, C. J., and SHARPSTEIN, THORNTON, MCKINSTRY, and ROSS, JJ., concurred.

No. 8,853.

CHALMERS *v.* CHALMERS.

In Bank. Filed February 28, 1884.

JUDGMENT AFFIRMED on the authority of Stockton Building and Loan Association v. Chalmers, *ante*, 148.

APPEAL from a judgment of the superior court for El Dorado county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Irwin & Carpenter, for the appellant.

G. G. Blanchard and *W. L. Dudley*, for the respondent.

By the COURT. This action is similar to that of Stockton Building and Loan Association v. Chalmers, No. 8,875, opinion this day filed, except that this is to foreclose the junior mortgage. The court found that the plaintiff had no knowledge of the alleged rights of the intervenors until the complaint in intervention was filed; and there is evidence sufficient to justify the finding.

Judgment and order affirmed.

NOTES.

THE supreme court of the United States, in the important case of the Spring Valley Water Works v. Antone Schottler et al., constituting the board of supervisors of the city and county of San Francisco, in error to the supreme court of California, has recently rendered a decision affirming the judgment of the lower court.

The plaintiff in error was incorporated under the general law for the incorporation of water companies, passed April 22, 1858. The provisions of this act required that "the rates to be charged for water shall be determined by a board of commissioners, to be selected as follows: Two by such city and county, or city or town authorities, and two by the water company; and in case that four can not agree to the valuation, then, in that case, the four shall choose a fifth person, and he shall become a member of said board; if the four commissioners can not agree upon a fifth, then the sheriff of the county shall appoint such fifth person. The decision of a majority of said board shall determine the rates to be charged for water for one year, and until new rates shall be established. The board of supervisors, or the proper city or town authorities, may prescribe such other proper rules relating to the delivery of water, not inconsistent with this act and the laws and constitution of this state."

At the time of the incorporation of the plaintiff in error the constitution of California provided, that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed."

In 1878, the board of supervisors of San Francisco and the plaintiff in error appointed the commissioners provided for by the act of 1858. Soon after their appointment, one of the commissioners appointed by such supervisors died, and the vacancy thus created has never been filled. In 1879, California adopted a new constitution, article 14 of which declared the uses of all water now or hereafter to be appropriated to be public uses, and provided that the rates to be collected by any corporation, for water supplied to any city and county, or city or town, or the inhabitants thereof, shall be annually fixed by the board of supervisors, or other governing body of such place. Under this provision of the constitution and the legislation based thereon, the defendant in error claimed the right and power to fix the rates to be charged by the company for water, and refused to appoint a member to fill the vacancy in the board of commissioners occasioned by the death of the former incumbent. This suit was begun in the supreme court of the state for a writ of *mandamus*, requiring the board of supervisors to take action in the matter and fill the vacancy. The court, on final hearing, refused the writ and dismissed the petition.

In affirming this action of the California court, the supreme court held, Waite, C. J., delivering the opinion, that the state, under its reserved power, had authority to substitute for such commission another, selected without the co-operation of the company; and that such commission might be the municipal officers of the place to be supplied with water. In discussing this latter question the court said:

"It is said, however, that appointing municipal officers to fix prices between the seller and the buyers is in effect appointing the buyers themselves, since the buyers elect the officers, and that this is a violation of the principle that no man shall be a judge in his own case. But the officers here selected are the governing board of the municipality,

and they are to act in their official capacity as such a board when performing the duty which has been imposed upon them. Their general duty is, within the limit of their powers, to administer the local government, and in so doing to provide that all shall so conduct themselves, and so use their own property, as not unnecessarily to injure others. They are elected by the people for that purpose, and whatever is within the just scope of the purpose may properly be intrusted to them at the discretion of the legislature. That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn v. Illinois, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law. What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all. By the constitution, and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and the company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination. It is not to be presumed that they will act otherwise than according to this rule."

Mr. Justice Field dissented from the conclusions reached by the majority of the court, and from the reasons assigned for them. In his opinion, water collected in reservoirs as it falls in rain, as the water of the plaintiff in error is collected, is private property, and can not be appropriated to public use without compensation to the owner; and such compensation must be fixed by an impartial tribunal, and not by the consumers of the water or their agents.

WEST COAST REPORTER.

WHOLE No. 11. MARCH 13, 1884. VOL. II. No. 3.

RIPARIAN RIGHTS THE WEST COAST DOCTRINE.

Continued.

IT seems proper, in this connection, to consider very briefly the liabilities of ditch owners, miners, appropriators, and other parties using waters as before described, for injuries caused or occasioned by such use to adjoining proprietors and occupants. These injuries may be of various kinds, resulting from negligence, unskillfulness, design, intentional trespass, from the methods in which the use of the water is ordinarily conducted, and the like. I shall examine these different species or types of injury separately.

First, where the injury is not intentional, nor resulting from the ordinary and constant mode of using the water, but is caused by the breaking or overflow of ditches, reservoirs, dams, and other structures, lawfully erected for the purpose of appropriating the water to legitimate uses. The doctrine is settled by the English courts, that whenever a party lawfully constructs a reservoir, embankment, dam, or other artificial structure on his own land, for the purpose of catching, impounding, or retaining water, he thereby becomes an *insurer* of the safety of his adjoining or neighboring proprietors and occupants against all possible injury occasioned by his structure. He is absolutely liable to a neighboring proprietor or occupant for all injury done to the latter through a bursting or overflow of his reservoir or other structure, entirely irrespective of any negligence or want of skill in its erection or management, and even though the accident was caused by an unusual storm, flood, or other so-called "act of God." These English decisions have not been followed in all our American states. The doctrine which they establish has been rejected by the courts of California, and pronounced entirely inapplicable to the mining and water interests of the Pacific communities. It has been settled, by a series of well-considered decisions, that ditch owners and proprietors of similar works are only bound to use that amount of

care, skill, and diligence in the erection, maintenance, and use of their reservoirs, ditches, canals, flumes, and the like, which an ordinarily prudent man uses in the management of his own affairs of the same kind and under the same circumstances. I will refer to a few of the leading cases in which this test of liability was judicially settled. In one of the earliest of these cases the action was brought to recover damages caused by the bursting of defendant's dam, whereby the plaintiff's land was overflowed and injured. The right to recover was based upon an allegation that the dam was constructed in a careless and insufficient manner. Held, that such a claim presented a good cause of action; and if the dam was thus constructed, and the bad construction was the proximate cause of the bursting and overflow, the defendant was liable. But the court at the trial had charged the jury as follows: "If the jury believed that the dam was improperly constructed, *or that the defendant could have constructed it in a better or more substantial manner, so as to prevent its breaking,* then the defendant was liable." This charge was held to be erroneous. It presented the defendant's duty and liability in too broad a manner. The question is not what the defendant *could* possibly have done, but what discreet and prudent men should do, or *ordinarily* do, in such cases where their own interests are to be affected.[1]

Wolf v. St. Louis etc. Co.[2] was a similar action to recover damages for the overflowing of plaintiff's land through the negligent construction and use of defendant's flume. On the trial the court charged that defendant was bound, in the construction and management of its dam and flume, to use all the care which a *very* prudent owner would use under the like circumstances. This instruction was pronounced error; that the owner of a flume, ditch, reservoir, etc., is bound to use that care and caution, in the construction and management of his water-works, to prevent injury to others, which *ordinarily prudent* men use in like instances in their own affairs; and that the question of negligence in such cases must largely depend upon all the surrounding circumstances. In a similar action to recover damages from the overflowing of plaintiff's land by the breaking of defendant's dam, the defendant was held liable for negligence in building and using the dam, whereby the water overflowed the lands of the plaintiff. The court added the further most important rule governing this class of cases, that the doctrine of contributory negligence on the part of the plaintiff could not apply to an injury caused by such negligence of the defendant; that a want

[1] Hoffman v. Tuolumne etc. Co., 10 Cal. 413. [2] 10 Id. 541.

of reasonable care on the plaintiff's part could not be set up as a defense to such an action.[3] While the English doctrine is extreme in one direction, it may well be doubted, I think, whether this rule does not go too far in the other extreme, and impose an insufficient liability upon the owners of water-works. Since these structures are necessarily dangerous to neighboring proprietors, and since the injury caused by their accidental bursting or overflow is necessarily great, it would seem just that their owners should be required to use all reasonably *possible* means in their construction and management to prevent accidental injuries thereby. I would venture to suggest that the rule as laid down by the trial court in the case of Hoffman v. Tuolumne etc. Co., above quoted, would be more reasonable and just to *all* the parties interested, than the one finally adopted by the court. These dams, reservoirs, and other structures, in their essentially dangerous nature, have some analogy, at least, to railways, and the same test of liability might, under their respective circumstances, be appropriately applied to each.

It was also held by the supreme court of Nevada, that a dam erected on a stream, in a manner in no wise injurious or prejudicial at the time of its erection to a mill above, but which, by reason of circumstances that could not have been anticipated, happening subsequently, and operating in connection with it, causes the water to flow back upon the mill, is not such an obstruction as to authorize its abatement, or to justify a recovery of damages against the person building it.[4]

Secondly, where the injuries are intentional trespasses. In these instances the proprietors of the water-works are, of course, liable without regard to any question of negligence or lack of skill. The law does not permit one person, under color of a right to appropriate, divert, or use the water of a public stream, to trespass upon the lands or invade the existing rights of another party. Thus it is expressly held that the statutes of congress of 1866 and 1870 merely confirm such rights of water on the public lands as were accorded to the owners of mining and other claims by the state customs, laws, and decisions prior to their enactment. These statutes do not grant any rights *not* recognized by such local customs and laws; they do not authorize A., while engaged in constructing a ditch for water, to exca-

[3] Frale v. Sears etc. Co., 12 Cal. 555; as laying down the same general test of liability, see also Todd v. Cochell, 17 Id. 97; Tenney v. Miners' Ditch Co., 7 Id. 335; Campbell v. Bear River etc. Co., 35 Id. 679; Richardson v. Kier, 34 Id. 63, 74; S. C., 37 Id. 263.

[4] Proctor v. Jennings, 6 Nev. 83.

vate it across the mining claim of B., which was located previously to the location of the ditch.[5] In another case a ditch conducted water from a stream over the adjacent country, crossing other small natural watercourses, the beds of which were dammed up by the embankment of the ditch, and by the fall of rain the waters of the streams became so swollen as to render it necessary to cut the embankment of the ditch in order to preserve it from injury; and the owners of the ditch cut the embankment at a point where there was no natural watercourse, so that the waters were turned onto the cultivated land of the plaintiff, causing damage. Held, that the injury thereby sustained was not an act of God, but resulted from the voluntary act of the ditch owners, and they were liable to the plaintiff for the damage. A. may not, in order to save his own property, destroy the property of B., however urgent the necessity.[6]

Thirdly, where the injury is not an intentional trespass, nor merely the result of negligence, but is the natural or necessary consequence of the mode in which the water-works are constructed, or in which they are ordinarily operated. In some of the instances placed in this group, the wrong may approach very nearly to an intentional trespass, while in others it may involve negligence; but on the whole, these cases constitute a separate and distinct class. The forms of such injuries are various. One form consists in the discharge of the water, after its use, directly upon the lands of another person, or its discharge in such a place and manner that it naturally and necessarily flows down upon the lands of a neighboring proprietor. In the important case of Richardson v. Kier,[7] the defendant Kier owned a ditch passing over and across Richardson's land. In regard to the general duty of the ditch owner under these circumstances, the court said: "He [the ditch owner] is bound so to use his ditch as not to injure the plaintiff's land, irrespective of the question as to which has the older right or title. He is bound to keep it in good repair, so that the water will not overflow or break through its banks, and destroy or damage the lands of other parties; and if through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the ditch, and injure the land of others, either by washing away the soil or by covering the soil with sand, the law holds him responsible." In regard to the discharge of the water after use upon the land of an adjacent owner, the court further held: "When Kier discharged his water from his ditch above

[5] Titcomb v. Kirk, 51 Cal. 288; and see also Henshaw v. Clark, 14 Id. 461; Boggs v. Merced M. Co., 14 Id. 282, 379.

[6] Turner v. Tuolumne etc. Co., 25 Cal. 398.

[7] 34 Cal. 63, 74.

Richardson's land, in such a place that it naturally would and did flow over and upon and injure R.'s land, K. is liable for the injury so done. It is no excuse that he may have sold the water to miners, by whom it was used before it reached R.'s land and did the injury. If the miners thus contributed to the injury, and are joint tort-feasors with K., this is no defense to a suit against him." The same liability has been imposed upon the owners of water-works under like circumstances, and for similar injuries in other cases.[8]

Another form of the injury, for which the courts have given the remedy of compensatory damages or of injunction, consists in such a use and discharge of the water that it naturally and necessarily flows down upon the lands of adjoining proprietors, charged with mud, sand, gravel, and other mining *débris;* which material, being thus carried and deposited upon such adjacent lands, injures or even destroys them for all beneficial uses.[9] In Nixon v. Bear River etc. Co., an injunction was granted restraining the defendant from allowing the water, mud, sediment, or sand collecting in its ditch or reservoir, from flowing down into the plaintiff's garden and ruining his crops. The court said: "The instructions refused by the court at the trial are founded upon the theory that in mineral districts of this state the rights of miners and persons owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition, thus annihilating the doctrine of priority in all cases where the contest is between a miner or a ditch owner and one who claims the exercise of any other kind of right, or the ownership of any other kind of interest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it." In Levaroni v. Miller an injunction was granted under very similar circumstances, although the fact appeared or was found that the injury was not done by defendants maliciously or unnecessarily, but in the ordinary conduct of their business. In another type of the same injury the mud, sand, gravel, and other *débris* are discharged by the ordinary mode of use into a stream, and are carried down by the natural flow of the current and deposited upon the lands of proprietors adjoining the stream in its lower portions, perhaps many miles below the point of discharge.[10]

[8] See Richardson v. Kier, 37 Cal. 263; Blaisdell v. Stephens, 14 Nev. 17; Henshaw v. Clark, 14 Cal. 461; Grigsby v. Clear Lake W. Co., 40 Id. 396.

[9] Logan v. Driscoll, 19 Cal. 623; Nixon v. Bear River etc. Co., 24 Id. 367; Levaroni v. Miller, 34 Id. 231.

[10] Robinson v. Black Diamond etc. Co., 50 Cal. 461; 57 Id. 412; Woodruff v. North Bloomfield etc. Co., 8 Saw. 628; S. C., 1 West Coast Rep. 183.

4. *Amount of water which the appropriator is entitled to use; or, the extent of his appropriation.*

The amount of water which an appropriator is entitled to use—commonly designated as the *extent* of his appropriation—is a question of fact to be determined by a jury. The right of the prior appropriator in this respect is limited to the amount or extent of his actual appropriation, as against subsequent appropriators and claimants; and he can not, after *their* subsequent rights have attached, by changing the place or nature of his use, or by enlarging his works, or otherwise, extend his claim or increase the amount of water diverted or used, to the prejudice of such subsequent parties.[11] The extent of the appropriation and amount of water thereby taken may be determined by the special purpose for which the appropriation was made; and in such a case the appropriator is entitled to so much water only as is necessary for that purpose; a change of the purpose which would increase the amount of water diverted would not be permitted as against subsequent claimants.[12] Thus, in the case of Nevada W. Co. v. Powell, cited below, it was held that where the plaintiff had appropriated a portion of the water of a stream, and had made a dam and ditch amply sufficient for his purpose, and had thereby acquired the right to use such portion only of the water, and in such manner only, he can not encroach upon the rights of subsequent appropriators by extending his use beyond the first appropriation. By the plaintiff's erections and use for several years, other persons had a right to suppose that he had thereby defined and determined his own rights as to amount of water, and to act accordingly by appropriating the surplus to their own uses. On the other hand, if a prior appropriation has been made of a certain amount or quantity of the water, independently of any *particular* use or purpose, the appropriator may afterwards, as against subsequent claimants, change either the place or the nature of his use, provided such change does not increase the amount of water diverted and used.[13] *J. N. P.*

(TO BE CONTINUED.)

[11] Nevada W. Co. v. Powell, 34 Cal. 109; Ortman v. Dixon, 13 Id. 33; Higgins v. Barker, 42 Id. 233; Davis v. Gale, 32 Id. 26; Lobdell v. Simpson, 2 Nev. 274; Barnes v. Sabron, 10 Id. 217; Atchison v. Peterson, 20 Wall. 514.

[12] Nevada W. Co. v. Powell, 34 Cal. 109; McKinney v. Smith, 21 Id. 374; Barnes v. Sabron, 10 Nev. 217.

[13] Davis v. Gale, 32 Cal. 26; Kidd v. Laird, 15 Id. 161; Woolman v. Garringer, 1 Mont. 535.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

CARDWELL v. AMERICAN RIVER BRIDGE COMPANY.

Decided March 3, 1884.

INTERNAL NAVIGABLE WATERS—POWER OF CONGRESS OVER.—Congress has power, under its authority to regulate commerce and establish post-roads, to control for those purposes the internal navigable waters of the various states. As soon as congress legislates in regard to any such navigable waters, its power becomes exclusive, and the states can not afterward authorize any material obstruction to their navigation; but till congress acts, the legislature of any state has the power to authorize the obstruction of any navigable waters within its borders, by the erection of bridges, dams, or other structures, for the convenience and advantage of commercial intercourse.

THE ACT OF CONGRESS ADMITTING CALIFORNIA INTO THE UNION, which provides that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor, it would seem, should be regarded as a valid regulation by congress of the navigable waters of California, which would withdraw them from the operation of state legislation authorizing the construction of a bridge over a navigable stream, such as the American river, that would utterly destroy its navigability.

THE CASE OF ESCANABA CO. v. CHICAGO, 107 U. S. 679, COMMENTED ON, and the points supposed to distinguish it from that case pointed out.

DEMURRER to bill. The bill alleges that the American river is navigable in fact for steamboats and barges for thirty miles from its mouth to Folsom; that complainant is the owner of several thousand acres of land bordering for a long distance on the river below Folsom; that he raises on said lands several thousand tons of grain yearly; that he is the owner of a steamboat and other vessels, by which he could and would ship his grain down the river but for the obstruction interposed by the bridge in question; that there are large deposits of cobble-stones in the bed and on the borders of the river on his land, which have a large market value in San Francisco for paving and other purposes, which, but for the said obstructions, he could ship by his vessels and sell at a large profit, whereas the expense of sending them by rail and other means open to him is such that he is unable to dispose of them at all, or so as to make it profitable; that in pursuance of the authority of an act of the legislature of California, the defendant has erected a low bridge without any draw in it, or other means of passing the bridge, by means of which the navigation of the river by complainant's steam and other boats is wholly obstructed, to his damage many thousand dollars every year. He asks a decree, either compelling defendant to remove the bridge, or else place a suitable draw in it, so as to permit the passage of steamers and other vessels capable of navigating the river.

Scrivener & McKune, for the complainant.

H. O. & W. H. Beatty and *J. B. Haggin*, for the defendant.

By the Court, SAWYER, Circuit Judge. This case is clearly within the rule as laid down in the Wallamet Bridge Case, 7 Saw. 127. If that case can be sustained in the broad terms of the rule stated, then the demurrer in this case should be overruled. Since that decision was rendered the supreme court of the United States has decided the case of Escanaba Co. v. Chicago, 107 U. S. 679, which defendant insists overrules the principle announced in the Wallamet Bridge Case; that under the clause of the act admitting Oregon into the Union, the state has no

power to authorize the construction of bridges over the navigable waters of the state which shall materially obstruct their navigation. It must be admitted, I think, that there is language in the opinion that favors that view; and I am by no means certain that the court did not intend to go as far as its broadest language indicates. It is sought to distinguish this case from the Chicago Bridge Case. If it can be distinguished, it must be on the following grounds: In the Blackbird Creek Case, arising in Delaware, the Schuylkill Bridge Case, in Pennsylvania, and all others since decided, following the decisions in those cases, it was held that congress, under its authority to regulate commerce and establish post-roads, had power to control, for those purposes, the internal navigable waters of the various states; that as soon as congress legislates in regard to any such navigable waters, its power becomes exclusive, and the states can not afterward authorize any material obstruction to their navigation; but till congress acts, the legislature of any state has the power to authorize the obstruction of any navigable waters within its borders, by the erection of bridges, dams, or other structures, for the convenience and advantage of commercial intercourse. It was held, with respect to the navigable waters of Delaware and Pennsylvania, that congress had never acted, and, consequently, the legislation of these states authorizing the obstructions complained of was valid.

The question, therefore, is, has congress acted with reference to the navigable waters of California, by legislating upon the subject, in such sense that its control has superseded the power of the state legislature and become exclusive? If so, then the case is distinguishable from any of the cases, other than the Wheeling Bridge Case, before decided by the supreme court. If congress has so acted, that legislation is found in the act admitting California into the Union, which act provides, "that *all* the navigable waters within the state *shall be common highways*, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor:" 9 Stat. 452, 453. How can the American river be a "common highway," or how can it be "free" to "the citizens of the United States," or "the inhabitants of the state," with a low bridge across it, without a draw, and so constructed as to preclude all navigation by steamers or vessels? To be a common highway, or to be free to all to use as such, involves a capacity to be *practically used as a highway*, and such capacity is wanting where there is an impassable barrier or obstruction. This provision is a law of congress, and it is valid, not as a compact between the United States and the state of California, but as a law of congress, passed by virtue of the constitutional power of congress to regulate commerce among the states and with foreign nations, and to establish post-roads: Pollard's Lessee v. Hagan, 3 How. 224, 225, 229, 230; Wheeling Bridge Case, 13 Id. 566; Mining Debris Case, 1 West Coast Rep. 212. What does this provision of the statute mean? Can there be any reason to suppose that congress intended anything else than to make or continue the navigable waters of the state, by virtue of its power to regulate commerce, practical free highways, and to take away the power of the state to destroy or wholly obstruct their navigability? Had nothing been said upon the subject in the act of admission, but subsequently, after the admission of California into the Union "on an equal footing with the original states in all respects whatever," congress had passed a separate, independent act, with no other provision in it, providing "that all the navigable waters within the state

of California shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor," would anybody suppose that congress, by the passage of such an act, under the circumstances indicated, could have any other purpose than to take control of the navigable waters of the state for the purpose of preventing any interference with, or obstruction to, their navigability, or "so far as might be necessary to insure their free navigation"? Or would it be seriously doubted, that congress had acted upon the subject-matter within the meaning of the terms of the decisions in the Blackbird Creek and Schuylkill Bridge cases mentioned? If such would be the construction in an independent act passed subsequently to the admission of the state, it must be the construction of the same language as found in the act of admission. If such is not the purpose of this provision, it would be difficult, I think, to determine what the purpose is. Following the direct decision upon this point in the Wheeling Bridge Case, 13 How. 565, I had no difficulty in concurring with the district judge in the ruling that a similar provision in the act admitting Oregon into the Union constituted legislative action by congress upon the subject-matter, of such a character as to withdraw it from the jurisdiction of state legislation.

In the Chicago Bridge Case, *supra*, the court still recognizes the power of the national government to control the navigable waters of the several states. It says: "The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States, which *are navigable in fact, so far as it may be necessary to insure free navigation*, where by themselves, or their connection with other waters, they form a continuous channel for commerce among the states or with foreign countries:" 107 U. S. 682. The question, then, is, whether the provision quoted from the act of admission is legislation by which congress takes control of the navigable waters of the state, "so far as it may be necessary to insure their free navigation;" and whether there can be a "common highway," or "free navigation," where the passage of steamers or other vessels is absolutely obstructed by impassable barriers thrown across the channels of waters otherwise navigable, in fact. In the case of the state of Illinois, neither the act authorizing the inhabitants to form a state government, 3 Stat. 428, nor the resolution admitting the state into the Union, Id. 526, contains the provision, or any provision of a character similar to that found in the acts admitting California and Oregon into the Union. Both the act and the resolution relating to Illinois are silent upon the subject, and I am not aware that there is any subsequent legislation on the subject affecting the *status* of Illinois. In the Chicago Bridge Case, the supreme court seems to regard the provision of the ordinance of 1787 as inoperative after the admission of Illinois as a state. Says the court: "Whatever limitation upon its powers as a government, whilst in a territorial condition, whether from the ordinance of 1787, or the legislation of congress, *it ceased to have any operative force*, except as voluntarily adopted by her after she became a state of the Union. On her admission she became entitled to and possessed all the rights and dominion and sovereignty which belonged to the original states. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original states in all respects whatever:' 3 Stat. 536. Equality of constitutional right and

SHARON *v.* HILL.

Decided March 3, 1884.

FRAUDULENT MARRIAGE CONTRACT—EQUITABLE JURISDICTION TO CANCEL.—Equity has jurisdiction to declare null and void and to cancel an instrument which is claimed to be a marriage contract, executed in conformity with section 75 of the civil code of California, when the same is a forgery, or was obtained by fraud.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

BILL in equity to cancel a written instrument. The opinion states the facts.

W. H. L. Barnes, for the complainant.

Tyler & Tyler, for the defendant.

By the Court, SAWYER, Circuit Judge (delivering an *oral* decision). This is a suit in equity to declare null and void, and to cancel an instrument which is claimed to be a contract of marriage between William Sharon, complainant, and Sarah Althea Hill, defendant. The point of the demurrer interposed, is, that the bill does not present a case for equitable relief. We have examined the question fully, and we are satisfied, upon the principles established by the various authorities cited by complainant's counsel, that it is a proper case for equitable jurisdiction. The bill presents a case of forgery and fraud. The contract purports to have been drawn and executed in pursuance of the provisions of section 75 of the civil code of California. The code of California makes a marriage contract purely a civil contract for all legal purposes, like any other civil contract.

This supposed contract is alleged to be a forgery, and to be fraudulent. It purports to be in writing, and to be signed by the parties; and the defendant claims, by virtue of it, to be the wife of complainant, and to have an interest in his property, which is alleged to be of the value of several millions of dollars. There is no adequate remedy at law for complainant, against the claim set up under the alleged contract, and no means, at law, to annul it, at the suit of complainant. The defendant can choose her own time for enforcing her claim under the alleged contract, even after the death of the other party. Fraud has always been one of the principal heads of equity jurisdiction.

The instrument in question is alleged to be a forgery, and a fraud. If it is a forgery, it is of course a fraud, also. The only parties who appear to have any personal knowledge of the facts, so far as indicated—who, personally, know anything about this transaction—are the two parties to the alleged fraudulent contract. One is alleged to be many years older than the other, the complainant being alleged to be sixty, and defendant, twenty-seven years old. The elder, in the ordinary course of nature, is more liable to die, and the contract, in such an event, would be in control of defendant, without any testimony to defeat the fraud, if fraud there be. The right to several millions of property might be, in after years, affected and controlled by reason of the alleged fraud. A great wrong and injustice may be thus perpetrated in consequence of it, unless a court of equity can take hold of, and cancel it. There is no way by an action at law, that we are aware of, to meet the conditions, or, effectually, dispose of this instrument. We are satisfied from the authority we shall cite, and numerous other authorities to the same effect, that this

is a proper case for equitable relief, if the allegations in the bill be true, and, for the purposes of the demurrer, their truth is admitted.

We think this case is within the rule that is often laid down on this subject. Story, in his work on equity jurisprudence, section 700, after speaking of various instruments, that may be used for fraudulent, or improper, purposes, and which may be canceled by a court of equity on the ground of fraud, says: "If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes, and it may be litigated at a distance of time when the proper evidence to repel the claim may be lost or obscured; or when the other party may be disabled from contesting its validity with as much ability and force as he can contest it at the present time."

Story says further, in section 701: "The whole doctrine of courts of equity on this subject is referable to the general jurisdiction which it exercises in favor of a party *quia timet*. It is not confined to cases where the instrument having been executed is void upon grounds of law and equity; but it is applied, even in cases of forged instruments which may be decreed to be given up without any prior trial at law, on the point of forgery."

If this instrument is not void upon its face, then, its validity depends upon testimony *aliunde*, and testimony which rests wholly *in parol*, which is liable at any time to be wholly lost, or placed beyond the reach of the parties injured by the fraud. In case of the death of complainant, the contract, and the means of enforcing it, honest, or otherwise, would be wholly in the control of the alleged forger, and fraudulent claimant. She would be mistress of the situation, and the heirs of a large estate might be wholly at her mercy.

There is a charge of forgery and fraud; and we think the instrument, if a forgery, and fraud, ought to be canceled. If there is no remedy in equity for such a wrong, as is charged, then the law is, indeed, impotent, to protect the community against frauds of the most far-reaching, and astounding character. If there is no precedent for a case upon the exact state of facts disclosed by the bill, it must be because no instance exactly like it has ever before arisen. The principle, however, is established, and the occasion has arisen for making a precedent, if none ever existed before.

The demurrer is therefore overruled, with leave to answer on or before the next rule day, on payment of the usual costs.

DISTRICT COURT, DISTRICT OF OREGON.

WEST PORTLAND HOMESTEAD ASSOCIATION *v.* LOWNSDALE, Assignee, etc.

Filed February 21, 1884.

CONVEYANCE—CONSIDERATION FOR.—A conveyance under seal is *prima facie* evidence of a sufficient consideration, and a mere stranger to the land can not question it.

CASE IN JUDGMENT.—G. and C. were tenants in common of a tract of land which was surveyed and platted as Carter's addition to Portland, and then partitioned between tenants in common by mutual conveyances, the one to C. containing a small park for the purpose of equalizing the partition, described therein as block 67, and afterwards changed by said survey so as to materially diminish said park; and at the same time G. surveyed a tract of land adjoining the tract held in common into lots and blocks and together with his co-tenants platted the two tracts as one Carter's addition, and duly acknowledged and recorded the same, with a block numbered 67 in the G. tract, and the small park aforesaid, not numbered. *Held*, That the conveyance to C. of the park as block 67 did not affect the block 67 afterwards laid off in the G. tract, and that the assignee in bankruptcy of C. had no right, interest, or equity therein, and should be enjoined at the suit of G.'s grantee from selling the same as the property of C. and thereby casting a cloud on such grantee's title thereto.

SUIT to enjoin a sale of real property. The opinion states the facts.

C. P. Heald, for the plaintiff.

George H. Durham and *George H. Williams*, for the defendant.

DEADY, J. This case was before this court on a plea of the statute of limitations (section 5057, revised statutes) to the original bill, filed on March 27, 1883, when the former was held good: 17 Fed. Rep. 205; and also on a demurrer to an amended bill, filed July 24, 1883, which was overruled: Id. 614. The case has since been heard on such amended bill, the answer thereto, and the replication, exhibits, and testimony, and the only question arising thereon, is this: Was the present block 67 in Carter's addition to Portland conveyed to Charles M. Carter on September 6, 1871, by the partition deed to him of L. F. and Elizabeth Grover and others of that date? If it was, this suit can not be maintained even if it was included in said deed by mistake, because the right to relief therefrom is barred by section 5057 of the revised statutes. But if it was not, then it is equally clear that the defendant, as the assignee in bankruptcy of said Carter, has no right or interest in the property, and may be restrained from selling it as such, and thereby casting a cloud on the title of the plaintiff thereto.

This is a question of fact, and without discussing the evidence in detail, it is sufficient to say that it is clear and convincing that this block 67 was not in existence—had not been laid off—when this deed was executed, and was not affected by it. Neither did the parties to this conveyance contemplate or understand that the title to this block was in any way involved in the partition of which it forms a part. For although the description in the conveyance—block 67 in Carter's addition to Portland—so far indicates this block as the property intended as to make a *prima facie* case of identity, yet the plaintiff is entitled to show, and has shown beyond a doubt, that this is a mere coincidence, and that whatever property was intended to be conveyed by the description of block 67 in Carter's addition, it was not and could not be this block 67.

Whenever, for any cause outside of a deed, there arises a doubt in the application of the descriptive part thereof, evidence *dehors* the writ-

ing may be resorted to for the purpose of identifying the subject of the instrument and the understanding or intent in this respect of the parties thereto. And it matters not that it may not appear what property was intended to be conveyed by the description of block 67 in this deed, so long as it does not appear that it is the block in dispute.

But there is very little room for doubt or controversy on the subject. When the parties had selected the blocks in the common tract as laid out, up to and including 65 in the first survey, it was found that Mr. J. S. Smith and Charles M. Carter had less in value, according to the agreed prices, than the other two; and so, to equalize the partition, Smith took a small park and numbered it 66, while Carter took another one lying between Summit and East drives, and marked it 67; and the deeds to them were made out accordingly. The plat of this survey was photographed before this partition, and the original was burned in the great fire of 1872. The photographic copy is here, but without the numbers 66 and 67 on it.

Soon after this survey and partition of the common tract, the ground, which was uneven and steep, and covered with timber and brush, was burned over, and showed such irregularities of conformation as induced the parties to change the survey in some respects, whereby the park allotted and conveyed to Carter as block 67 was materially reduced in size, and on this account and from its situation, regarded as almost worthless.

In platting the subsequent survey of the Grover tract, the second survey of the common tract was included therein, and the whole acknowledged and recorded by all the parties thereto on November 4, 1871, as the plat of Carter's addition. In numbering the blocks on the Grover tract, the draftsman, who was the same person in both cases, commenced at 66, the highest number on the original draft of the plat of the common tract being 65. Before the acknowledgment, however, attention was called to the fact that Smith had been allotted a park in that tract and received a conveyance of it from his co-tenants as block 66, and thereupon the block of that number on the Grover tract was numbered 66½, but the park allotted and conveyed to Carter as block 67 does not appear to have attracted the same attention, and the plat was acknowledged and recorded, with only the one block numbered 67 on it—the one in the Grover tract. The probability is, that being comparatively worthless it was overlooked. It was never listed for taxation; and Mr. Carter testifies that he owned the block adjoining it, and he preferred and so regarded it as public ground or street.

The theory of the defendant is, that although this park in the common tract was allotted and conveyed to Carter as block 67, yet when upon the resurvey this was nearly obliterated, that the parties—and particularly Grover and Carter—came to an understanding that there should be a block 67 laid off in the Grover part of the new Carter's addition, which should stand for and represent the block of that number and description in his deed of September 6. But the parties to the transaction—Grover, Smith, and Carter—all testify positively that there never was any such agreement or understanding, or even any intention that Carter should have block 67 in the Grover tract on any account or for any reason; and there is nothing in the case but surmise and conjecture to the contrary.

About this time Carter wrote his name on the recorded plat of Carter's addition across all the blocks claimed by him therein, and this block 67

is not among them. If he then understood that it was his, why did he omit to mark it? The omission to do so, under the circumstances, is a deliberate admission that it was not his. He never listed it for taxation or paid any taxes on it. Lists of the property on which he paid taxes for several years after 1871, indorsed on the tax receipts, including sundry blocks in Carter's addition, are produced in court, and this block does not appear in any of them. Carter was one of the corporators of the plaintiff, his name appearing signed to the articles on July 27, 1875, and as such, he took the conveyance of this block from the grantors of the plaintiff. This was another deliberate admission that the property was not his, but that of the grantors of the plaintiff.

And all these admissions were made long prior to the bankruptcy and the rise of this controversy, and could not, so far as appears, have been made collectively or for any ulterior purpose whatever. And if this surmise or conjecture is even admitted to be a fact, it is not apparent how this verbal understanding between Grover and Carter could have the effect to convey any land of the former to the latter, let alone that of his wife's. Nor was there any reason in right or justice for such an understanding or agreement between the parties. If the partition of the common tract was thought to have resulted unequally as to Carter, by reason of the contraction of the park allotted to him as block 67, Mr. Grover was under no more obligation to make up the deficiency than his two cotenants, who had received an equal share with himself. The assumption that he would voluntarily undertake to make this deficiency good, and apparently more than good, out of his own or his wife's property, is unreasonable and incredible.

Nor is there any ground on which the plaintiff and its grantors are estopped to assert their title to this block, as against Carter's assignee in bankruptcy. In the first place, there is no reason to believe that any of Carter's creditors ever gave him credit on the strength of the ownership of this block. In those days it was an unoccupied, out-of-the-way piece of property, and of comparatively small value—a mere drop in the bucket compared with the value of his estate and the volume of his financial transactions. He never was in possession of it, never laid any claim to it, nor exercised any acts of ownership over it.

There was no intention to deceive any one by means of the transaction, which occurred seven years before the bankruptcy, nor did it involve any such gross culpable negligence on the part of the plaintiff's grantors as the law considers equivalent to such intention; and more than all this, if any creditor ever was led to believe, from the record of the deed of September 6th to him, that the bankrupt ever owned a block numbered 67, in a Carter's addition to Portland, he would also see that it did not purport to be such a block according to the recorded plat of said addition, and he might also see from the record thereof that such plat was made and acknowledged quite two months after the date of such deed, and thereby he would be informed, or have good reason to believe, that such block must be No. 67 on some other and prior but unrecorded plat of some other attempted Carter's addition.

It is also claimed by counsel for the defendant that the plaintiff is not a purchaser for a valuable consideration, and therefore can not maintain this suit. But how that can be material in this controversy between the plaintiff, who appears to have the legal title, and a stranger to the property, who does not appear to have any right, interest, or even equity in

the premises, is not apparent. But the claim is not even sustained by the evidence. The conveyance from Grover and wife to the plaintiff, on August 11, 1875, purports to have been made in "consideration of the sum of thirty thousand dollars to them paid." The conveyance is under seal, and is *prima facie* evidence of the truth of this recital, or at least that it was executed for a valuable consideration: C. C. P., sec. 743. And there is not a particle of evidence in the case to the contrary.

The most that can be said is, that it may be surmised from the evidence and the nature of the transaction, that the formation of the plaintiff, and the conveyance of this property to it, was merely a means of putting it on the market, and that the only consideration which the grantors actually received from the conveyance was in the stock of the corporation. But admitting this to be a fact, the conveyance was, nevertheless, made upon a valuable consideration—the stock of the corporation standing for the property and having an equal value with it.

The plaintiff is clearly entitled to the relief, and there must be a decree for an injunction restraining the defendant, as prayed in the amended bill, and for the costs; and it is so ordered.

SUPREME COURT OF IDAHO.

GRETE *v.* KNOTT.

Filed September 14, 1881.

PRACTICE—JUDGMENT ROLL.—Papers in a case which properly form no part of the judgment roll, and which would on motion have been stricken from it, may be considered on appeal as a part of the record by stipulation of parties.

FACTS STATED IN THE RECITALS OF A JUDGMENT of a court of general jurisdiction are presumed to have been proven by competent evidence, but such evidence properly forms no part of the judgment roll.

APPEAL from a judgment of the second judicial district court for Owyhee county, entered in favor of the plaintiff. The opinion states the facts.

Edward Nugent, for the appellant.

Richard Z. Johnson, for the respondent.

BUCK, J. The plaintiff filed his complaint in this action on the third day of October, 1879. Summons was issued on the same day, but personal service was never effected. An attempt at service was made by publication.

On the twenty-seventh day of April, 1880, the following stipulation was entered of record in the case and filed:

"In the district court of the second judicial district, in and for Idaho territory, Owyhee county. John Grete v. William B. Knott. It is stipulated by and between the parties hereto, that in the item of the complaint containing the account of Timothy Warren against the defendant be enlarged to the amount of six hundred and seventy-seven dollars, on account of a failure of certain credits allowed in the complaint, and that the whole judgment be enlarged to embrace said sum.

"April 27, 1880. WILLIAM B. KNOTT."

On the same day judgment was entered in compliance with the prayer of the complaint and the stipulation on file, for four thousand two hundred and ninety-one dollars and eighty-nine cents, and costs and disbursements. The said stipulation was the only appearance of the defendant in the case. The case comes to this court on an appeal from the judgment, and the record consists of the judgment roll alone.

The appeal seeks to reverse the judgment on the following grounds: 1. Because the record shows that the defendant was a non-resident, and does not show sufficient service of the summons to give the court jurisdiction of the person of defendant; 2. That there was no waiver of service of the summons; 3. That the paper appearing in the transcript marked "stipulation for judgment" was not an appearance on the part of the defendant; 4. That the record does not show that said stipulation was signed by defendant, and that proof of such signature should appear in the judgment roll.

In the argument of the case the attention of the respective attorneys was given chiefly to two points: 1. Whether the service of the summons as shown by the record was sufficient to give the court jurisdiction; 2. Whether the paper indorsed "stipulation" was sufficient to sustain the judgment.

The first point is a question of great importance, involving the validity of service of summons by publication, much discussed in later decisions in federal and state courts. . The judgment of the court, however, is based in this case on the stipulation for judgment, and it is not therefore necessary to consider the first point.

The paper marked "stipulation for judgment," properly forms no part of the judgment roll, and under former decisions of the court would have been stricken out on motion had such a motion been made. But as it is made a part of the transcript, and no objection being made to it, and the attorneys of the respective parties having given prominence to it in the argument, the court is of the opinion that it should be considered as a part of the record by consent of parties.

This paper is entitled and filed as other papers in the action. Appellant claims that it has reference to but one specified item in the complaint, but in direct terms it refers to the whole judgment. In terms it stipulates that that item be enlarged to six hundred dollars, and that the whole judgment be enlarged to include that amount. The whole judgment, by reasonable construction, is the judgment asked for in the complaint. The court is of the opinion that this writing, in terms, consents, at least, that the judgment entered according to the prayer of the complaint be enlarged by six hundred dollars. If advantage was taken by defendant in entering judgment too soon or contrary to the terms of the stipulation, the defendant might have had it corrected in the court below, under section 68 of the code of civil procedure.

The judgment recites that it was entered according to the prayer of the complaint and the stipulation on file. Even without reference to the terms of the stipulation, from the terms of the judgment we presume that the truth of the recitals was established by competent evidence to the satisfaction of the court, but the evidence should form no part of the judgment roll.

The judgment is affirmed.

MORGAN, C. J., and PRICKETT, J., concurred.

PEOPLE, etc., v. AH TOO.

Filed February 14, 1884.

PRACTICE—INSTRUCTIONS.—In charging a jury, the court should give only such instructions as are pertinent to the evidence. A refusal, therefore, to instruct the jury as to the weight to be given to circumstantial evidence is not error, when there was no such evidence in the case.

APPEAL from a judgment of the second judicial district court for Ada county, convicting the defendant of murder. The opinion states the facts.

G. W. Adams, *E. J. Curtis*, and *Fremont Wood*, for the appellant.

T. D. Cahalan, for the respondent.

BUCK, J. Ah Too was indicted, tried, convicted, and sentenced at the November term of the district court, 1882, in Ada county, on an indictment for murder in the killing of Ah You. This appeal is taken from the judgment and from the order of the court overruling a motion for a new trial. The errors assigned in the bill of exceptions, and insisted upon in the argument on appeal are: 1. The refusal of the court to give a certain instruction at the request of the defendant; and, 2. The order of the court overruling the motion for a new trial.

The instruction asked by defendant, and refused by the court, is as follows: "If the evidence introduced by the prosecution to establish the guilt of the defendant be regarded by the jury as circumstantial, and the circumstances by themselves doubtful, the jury must examine and inquire very closely into the adequacy of the motive of the defendant for committing the offense as charged."

The exception to the refusal of the court to give this instruction seems based, by a reference in appellant's brief, upon a principle in 3 Graham and Waterman on New Trials, 710, where it is stated, "To refuse such instructions as properly arise in the case is error." This proposition is conceded to be good law, and it suggests the question, Did the instruction asked for properly arise in the case?

While "there is no evidence admissible in a court that does not depend more or less on circumstances for credit," Wharton's Cr. Ev., 8th ed., sec. 10, yet it can hardly be claimed that an instruction, as to the character and weight of circumstantial evidence should be given in all cases. The court can not be called upon to charge the jury upon abstract propositions: 3 Graham and Waterman on New Trials, 795. An abstract proposition may be correct in principle, and yet so irrelevant to the facts as to have no practical bearing upon the issues tried. To give a jury such an instruction would perplex rather than aid them in finding a verdict.

In the case at bar there seems to have been an entire absence of circumstantial evidence. The shooting occurred in the day-time, in the midst of several witnesses, and the defendant admitted that the fatal shot came from his revolver, but alleged that the shooting was wholly accidental. The entire evidence was by eye-witnesses, except the dying declaration of deceased, and those declarations criminating defendant depended entirely upon the credibility of the witness to whom they were said to have been made. We find no element of circumstantial evidence therein. The ruling of the court in refusing this instruction might be sustained on other grounds, but with a view to correcting the practice of

asking rambling and irrelevant instructions the court sustains the ruling of the court below, upon the ground that the instruction asked for was properly refused because not pertinent to the evidence in the case.

Upon the second branch of the case, to wit, that the verdict is contrary to the evidence, the court is of the opinion that the objection to the verdict is well taken. In coming to this decision, we do not disregard or ignore the principle insisted upon by respondent, to wit: "Where the evidence is conflicting, the verdict will not be set aside." Upon an inspection of the evidence, we are of the opinion that the case at bar does not come within the rule. As a result of the conclusion of the court will probably be a new trial in the court below, a discussion of the evidence here would be out of place.

The judgment of the court below is reversed, a new trial ordered, and the case is remanded to the district court of Ada county, second judicial district, Idaho territory, for further proceedings.

MORGAN, C. J., and PRICKETT, J., concurred.

GRAY, Sheriff, etc., *v.* CEDERHOLM ET ALS.

Filed February 14, 1884.

JUDGMENT IN PROBATE COURT—WHAT IS.—Entries in the docket of the probate court that complaint was filed, summons issued and served, demurrer to complaint filed, and the entry of fees for overruling demurrer and entering default, with various entries of fees, do not constitute a judgment for either party.

AN APPEAL FROM SUCH A JUDGMENT TO THE DISTRICT COURT should be dismissed.

APPEAL from a judgment of the second judicial district court for Alturas county, entered in favor of the plaintiff. The opinion states the facts.

Kingsbury & McGowan, for the appellants.

Angell & Sullivan, for the respondents.

MORGAN, C. J. This cause was commenced in the probate court of Alturas county by filing a complaint on the twenty-seventh day of November, A. D. 1882. The next day summons was issued and made returnable December 3, 1882, and was so returned, served on defendants. On the return day the defendants, by their attorneys, Messrs. Kingsbury & McGowan, appeared specially in said cause and filed their motion to set aside and quash proceedings, for reasons stated therein. This motion was overruled by the probate court. Thereupon a demurrer to plaintiff's complaint was filed by defendants. It does not appear from the transcript of the docket that the said demurrer was either sustained or overruled, the only reference thereto being found in the fee bill, as follows, to wit:

To filing demurrer by defendant.....	$0 25
Overruling demurrer, entering default for want of answer	50

Then follow various entries in the record of fees for swearing witnesses, after which the following entries were made:

Plaintiff introduced in evidence judgment roll of district court in suit of Charles Nelson v. W. E. Milner.

Bond for release of attachment property.....	$0 25

Two executions offered in evidence. Defendants' counsel object to the

introduction of this documentary evidence as being irrelevant and immaterial. Objection overruled. Excepted to by defendants' counsel.

To entering final judgment	$1 00
Certified copy for roll	1 50
Docketing judgment	50
Making judgment roll	50
Filing judgment roll	25
	$14 00
Sheriff's fees	5 00
Damages	310 00
	$329 00

There is nothing else in the record indicating any judgment by the probate court, either on the demurrer or on the evidence in this cause. From this supposed judgment the defendants give notice of an appeal to the district court of Alturas county, on the seventh day of December, 1882, and file an undertaking on the ninth day of December following. On the fifteenth day of January following, the papers were placed on file in the district court. On the eighth day of August, 1883, the district court in and for said Alturas county, upon motion of plaintiffs herein, dismissed said appeal. To said judgment dismissing the appeal the defendants excepted, and on the third day of October following took an appeal to this court.

The only substantial assignment of error in defendants' bill of exceptions is that the court erred in dismissing the appeal from the probate court. It is evident that the first question to be considered is, Was there any judgment by the probate court in this cause? If there was no judgment, then there could be no appeal, and an attempted appeal should be at once dismissed. Section 350, civil code, says: "A judgment is the final determination of the rights of the parties in an action or proceeding." Is there a determination of the rights of either party in this record? The entry of "damages, three hundred and ten dollars," is claimed to be a judgment. It has none of the elements of a judgment. It is nowhere stated that it is adjudged, ordered, decreed, or considered that the plaintiff should have or recover of defendants, nor that defendants should have or recover of plaintiff, the sum of three hundred and ten dollars, or any other sum. There is no word or words used which indicates an adjudication by the probate judge for or against either party. In this there is no indication whether judgment is given for plaintiff or for defendants, and one can only infer from the fact that the probate judge has charged a fee for "entering default for want of answer," that no answer was filed, and therefore that possibly it was the intention to enter judgment for plaintiff. There is no judgment entered either sustaining or overruling demurrer. No default of defendants entered, and no judgment for either plaintiff or defendants. No execution is authorized for either party, and the pretended judgment does not indicate which party is entitled to execution: Wright v. Fletcher, 12 Vt. 431.

The following entries: "We, the jury, find in favor of the plaintiff, and assess his damages at four thousand four hundred and ninety-three dollars [and the record showed the entry], whereupon the court entered judgment on the verdict," were held to be no judgment: Faulk v. Kellums, 54 Ill. 189.

In Barrett v. Garrigan, 16 Iowa, 47, referred to by counsel for appellant, the transcript showed proceedings up to and including the trial, after which was written: "Judgment for plaintiff against the defendant for ——, October 24, 1856. Damages, eighty-four dollars; justice's fees, eighty cents; constable, twenty-five cents; two witnesses, twenty-five cents."

This was held to be a good judgment. This indicates for whom and against whom judgment was given, time, and amount—a very different judgment from the one at bar.

It appears that an attempt was made in the probate court to enter up a formal judgment on the twenty-sixth day of July, A. D. 1883, *nunc pro tunc*. Section 603, civil code, requires when trial is by the court (probate or justice's) judgment must be entered at the close of the trial. Judgment was not so entered. An appeal was taken to the district court on the seventh day of December, 1882. After an appeal is taken to the district court and perfected, the probate judge lost all jurisdiction in the cause, and could do nothing in reference thereto, except by order of the district court. Any action, therefore, taken by the probate court after said appeal was not legally taken, and could not change the condition of the record in the district court.

There being no judgment in the probate court, there could be no appeal, and the appeal was properly dismissed.

This conclusion having completely disposed of the cause, it is not thought proper to enter into the discussion of matters which do not and can not affect the judgment of the court.

Judgment affirmed.

PRICKETT and BUCK, JJ., concurred.

GENERAL CUSTER MINING COMPANY *v.* VAN CAMP.

Filed February 14, 1884.

THE RIGHT TO APPEAL IS STATUTORY and unknown to the common law; it can not be extended to cases not within the statute.

THE BOARD OF COUNTY COMMISSIONERS AND THE BOARD OF EQUALIZATION, although composed of the same persons, are separate and distinct bodies, with different duties and powers.

THE RIGHT OF APPEAL GIVEN BY STATUTE FROM ORDERS OF THE BOARD OF COMMISSIONERS does not imply the right of appeal from orders of the board of equalization.

ERROR to the district court for Custer county. The opinion states the facts.

James H. Hawley, *M. Kirkpatrick*, and *E. P. Johnson*, for plaintiff in error.

Thomas J. Galbraith and *Huston & Gray*, for defendant in error.

PRICKETT, J. The assessor of Custer county in this territory, for the year 1881, assessed the mill and appurtenances of the plaintiff in error at seventy thousand dollars, and bullion on hand at one hundred and seventy thousand dollars. Upon the complaint of the manager of the company, the board of equalization of the county reduced such assessment to thirty-five thousand dollars on the mill and its appurtenances, and to twenty-five thousand dollars upon the bullion. From the order of the board reducing the assessment, James H. Van Camp, a private

citizen of the county, appealed to the district court of the third judicial district for Custer county. A motion was made in the district court to dismiss the appeal, on the ground that no appeal is allowed by law from an order of the board of equalization, and that Van Camp was not, in any event, a proper party to take such appeal. The motion to dismiss was overruled; the cause was tried *de novo*, and the court rendered judgment, restoring the assessment on the bullion to the original sum of one hundred and seventy thousand dollars, and fixing the assessment of the mill and appurtenances at thirty-five thousand dollars, as fixed by the board.

The questions submitted to this court are the same as were raised in the district court on the motion to dismiss the appeal. Will an appeal lie from an order of the board equalizing assessments? Is it a legal and proper remedy? In order to answer these questions, we must look to the statutes, for the right to appeal is purely statutory, unknown to the common law, and it can not be extended by courts to cases not within the statute.

The defendant in error, to sustain the right of appeal, relies upon section 25 of the act creating the board of county commissioners and defining their duties and powers: Rev. Laws, p. 529. It provides that "appeals may be taken from orders of the board of county commissioners, as follows: 1. From any order, by any person aggrieved thereby; 2. From an order allowing an account or demand against the county, by any elector or tax-payer of the county on the ground of improper or excessive allowance; 3. From an order prejudicially affecting the public interest, by either the district attorney or the probate judge of the county, on behalf of the county."

Section 19 of the same act defines the duties and powers of the board of commissioners; and the twelfth subdivision of that section provides that they shall "act as a board of canvassers and equalization, and do and perform all other acts required of them by the organic act and laws of Idaho territory not in conflict with this act." Under this last-mentioned provision it is claimed that the board, while equalizing assessments under the revenue law, are discharging duties and exercising powers imposed and conferred upon them as county commissioners. In this connection, it is proper to notice that the general meetings of the board of commissioners are required to be held in January, April, July, and October of each year, at all of which meetings "they shall transact any business which may be required of them by law."

Section 22 of the revenue law of this territory, revised laws, page 487, provides that "the commissioners of the county shall constitute a board of equalization, of which the clerk of the board of commissioners shall be clerk," and that "the board of equalization shall meet on the third Monday in August in each year, and shall continue in session from time to time until the business of equalization presented to them is disposed of," etc. The provisions and requirements of this section of the revenue law are full and complete, and nothing is added to or subtracted from them by the repetition contained in subdivision 12 of section 19 of the county commissioners' law empowering the commissioners "to act as a board of equalization."

It seems quite clear that the board of county commissioners and the board of equalization are two separate and distinct bodies, created by different acts of the legislature; that by section 22 of the revenue law

persons holding the office of county commissioners, by election or appointment, are invested with another distinct office, having a different name. The revenue act, complete in itself, provides what duties the board of equalization shall perform. It requires them to meet and discharge those duties at a time not fixed by law for a meeting of the board of commissioners. It provides them with a clerk, and designates him as the clerk of the board of equalization; and although the two boards are composed of the same persons, they are as completely different in respect to organization, powers, and duties, as if composed of different individuals. There being two separate boards, the right of appeal given by statute from orders of the board of commissioners does not imply the same right from the orders and decisions of the board of equalization. We conclude, therefore, that the district court erred in entertaining the appeal, and in denying the motion to dismiss it.

It becomes unnecessary to consider whether Van Camp was a proper party to appeal from an order of the board of commissioners, under any circumstances, as the question already disposed of is decisive of the case.

Judgment reversed and the cause remanded, with directions to the district court to dismiss the appeal.

BUCK, J., concurred.

MORGAN, C. J., did not sit at the hearing.

PEOPLE, etc., *v.* STAPLETON.

Filed February 16, 1884.

BURGLARY—WHAT IS.—In section 59, crimes and punishments, revised laws, page 332, wherein it is provided that "every person who shall, in the night-time, * * * break and enter any dwelling-house or tent, with intent to commit murder, robbery, mayhem, larceny, or other felony," the term "larceny" applies alike to grand and petit larcenies. In an indictment for burglary drawn upon that statute it is not necessary to allege the value of the property intended to have been stolen.

AN OBJECTION TO AN INDICTMENT, "THAT IT DOES NOT SUBSTANTIALLY CONFORM to sections 233 and 234 of the criminal practice act," can not be taken advantage of upon a motion in arrest of judgment under section 426. Such objection, if made at all, must be taken by demurrer under section 285, as limited by section 293.

APPEAL from a judgment of the second judicial district court for Ada county, convicting the defendant of burglary. The opinion states the facts.

G. W. Adams, for the appellant.

T. D. Cahalan, for the respondent.

BUCK, J. The defendant, W. S. Stapleton, was tried, convicted, and sentenced at the November term of the district court in Ada county on an indictment for burglary. When called upon to plead, he entered the plea of not guilty, and made no objection to the form or substance of the indictment by demurrer or otherwise. Upon the rendition of the verdict, the defendant moved an arrest of judgment: 1. On the ground that the indictment does not substantially conform to section 234 of the criminal practice act, in that "it does not give the legal appellation of the offense attempted to be charged, and is not certain as to the offense attempted to be set forth;" 2. That the facts stated in said indictment do not constitute

a public offense, in this, that it does not appear upon the face of said indictment that defendant attempted to commit a felony, there being no allegation therein that the value of the goods and property intended to have been stolen by defendant were of the value of sixty dollars, or of any value.

The assignment of error sets out error in the refusal of the court to grant an arrest of judgment, and in addition thereto the refusal to give the following instructions at the request of the defendant: "1. In order to find the defendant guilty as charged in the indictment, the jury are instructed that the evidence must prove, beyond a reasonable doubt, that the defendant, with a felonious intent, did attempt to forcibly break and enter the alleged dwelling-house in the night, with the further felonious and concurrent intent of committing a felony therein by then and there stealing and carrying away the goods, property, and money of J. P. Gordon therein, being of the value of sixty dollars or more, and this intent to commit said felony must be proved to have existed in the mind of defendant as a matter of fact and not as a presumption of law. 2. If the jury are in doubt upon any material fact sought to be proved by the prosecution, or upon the general evidence introduced as to the guilt of the defendant, they should give the defendant the benefit of the doubt, and acquit."

Error is also alleged in the giving by the court the following instruction: "It is not necessary for the prosecution to prove that the defendant intended to steal sixty dollars' worth of money or property, or more, but it will be sufficient if the jury believe from the evidence, beyond a reasonable doubt, that the defendant then and there intended to steal any amount, either more or less than sixty dollars' worth of property or money. The intent of the defendant is to be gathered from his acts and all the circumstances."

The first instruction asked by defendant and refused by the court, and the instruction given by the court and excepted to by defendant, both involve the main question at issue in the motion for arrest of judgment (namely, Must the intended larceny, as charged in the indictment, necessarily be a felony?), and can be disposed of in the consideration of that branch of the case.

The remaining objection, to wit, the refusal to give the following instruction: "If the jury are in doubt upon any material fact sought to be proved by the prosecution, or upon the general evidence introduced as to the guilt of the defendant, they should give the defendant the benefit of the doubt, and acquit," involves the question of doubt, which is, perhaps, of all ideas the most difficult for juries to understand and apply.

Section 357 of our criminal practice act, revised laws, page 415, provides that "in case of a reasonable doubt whether defendant's guilt be satisfactorily shown, he is entitled to be acquitted." The doubt here provided for is a reasonable one, and courts have for years exercised their ingenuity and learning in endeavoring to frame an instruction which would convey to a jury a practical understanding of a reasonable doubt, with little satisfaction to themselves, and probably little assistance to the juries.

In the instruction asked for, however, the court is relieved of any effort to define that perplexing term, but is asked to instruct the jury that in case of *any* doubt they must acquit. Such an instruction if good

in one case would be good in all, and would render a conviction for crimes almost impossible. The instruction was properly refused.

The first ground upon which the motion in arrest of judgment was asked is, that the indictment did not conform to section 234 of the criminal practice act. Section 293 provides that "when the objections mentioned in section 285 of said act appear upon the face of the indictment they can only be taken advantage of by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts do not constitute a public offense, may be taken in arrest of judgment."

That the indictment does not substantially conform to section 234 is one of the grounds provided for by section 285, and such an objection should be taken by demurrer unless section 293 is abrogated by section 426. The two sections are apparently inconsistent, and a judicial construction seems necessary to the intelligent understanding of our criminal practice. These two sections are found in the same act, and if possible, should be so construed as to give force and effect to both.

It is not to be presumed that the legislature intended that any part of a statute should be without its proper meaning, force, or effect. The established rule of construction is, "that the intention of the law-giver and the meaning of the law are to be discovered and deduced from a view of the whole and of every part of the statute taken and compared together:" Dwarris on Stat. 188.

In People v. Nash, 1 Idaho, 206, we find the following language in the opinion of the court: "After the verdict the defendant moved in arrest of judgment, and although several grounds are assigned, we can only consider one of them, because under section 293 objections which are grounds of demurrer can only be taken advantage of on demurrer, except two, viz.: want of jurisdiction in the court, and that the facts do not constitute a public offense. The defendant did not urge the objection on demurrer, * * * that the indictment does not conform to the requirements of sections 233 and 234, criminal practice act, and she is precluded from raising it afterwards, except the objection that the indictment does not show facts constituting a public offense."

This question was fully considered in People v. Shotwell, 27 Cal. 402. In deciding this branch of the case, we can not do better, perhaps, than to adopt the language of the court in that case as adapted to our statute: "If section 426, which provides that a motion in arrest of judgment may be founded on any of the defects mentioned in section 285, be read without reference to section 293, its language, it may be concluded, is comprehensive enough to embrace the objection made. But we are not at liberty to disregard the two hundred and ninety-third section, inasmuch as section 426 may be interpreted as referring only to the causes for arresting the judgment, which stand unaffected by section 293. The alleged defect in the indictment can not be considered on a motion in arrest of judgment."

The consideration of the remaining objection, to wit, that the alleged intent must be to commit a felony, involves the construction of the statute upon which the indictment was drawn. The statute reads as follows: "Every person who shall in the night-time forcibly break and enter, etc., any house whatever, or tent, with intent to commit murder, rape, mayhem, larceny, or other felony, shall be deemed guilty of burglary:" Rev. Laws, 332, 359.

It is argued by appellant that from the peculiar arrangement, punctuation, and combination of the words "mahem, larceny, or other felony," the intention of the legislature must be interpreted to be that there can be no burglary except the breaking is combined with the intent to commit a felony. The objection to this argument is, that larceny in this territory is not necessarily a felony, and no amount of punctuation and illogical combinations of words can make it such.

It is stated that our statute was taken from California, and under the authority of the People v. Murray, 8 Cal. 519, the meaning of the statute has been adjudicated and determined. The decision referred to was made in 1857. In 1858 the legislature of that state, recognizing the validity of the decision, amended the law to conform to it. In 1864 the statute under consideration was enacted by the Idaho legislature. There was no such statute in California at the time, nor had there been for six years prior to the enactment of our statute.

It is hardly reasonable to suppose that our legislature would seek a statute in any state with an adjudication which had been regarded for six years as unworthy to be on their own statute book for the purpose of making it a part of our law. The doctrine that in adopting a statute from one state we adopt the adjudications of it, though true, yet is so limited as to be hardly applicable to the case at bar The authority cited by appellant in Campbell v. Quinlin, 3 Scam. 288, reads, "The construction supposed to be adopted is one that the statute has received by a *uniform series* of judicial expositions." A single decision in force but a year can hardly be called a series of judicial expositions. We are unable to see that the construction insisted upon necessarily follows the statute, nor do we feel assured that the statute was taken from California. It is an exact copy of the Massachusetts law, and is also the common law upon that subject, except that the word "felony" is left out and "specific felonies" substituted therefor, and "larceny" added thereto. At common law, burglary is defined to be the crime of breaking, etc., with intent to commit a felony: 2 Arch. Cr. L. 263. Under our statute, that crime is defined, "the act of breaking, etc., with intent to commit robbery, mayhem, larceny, or other felony." We have no authority to add the word "grand" or "petit" to the term "larceny." Larceny is general, and includes both grand and petit. In Massachusetts all larceny was a felony; and their law, in the exact words of ours, punished all breakings with intent to commit larceny of any grade. We think our legislature intended the same thing. The Massachusetts law punishes burglaries where the intent was to commit larceny of over one hundred dollars with a more severe penalty than when the amount was less than one hundred dollars. Our legislature might have made a distinction in the punishment between burglaries with intent to commit grand and petit larceny, but they have not yet done so, and the penalty is the same whatever the amount intended to have been stolen.

The judgment below is affirmed.

MORGAN, C. J., and PRICKETT, J., concurred.

UTAH & NORTHERN RAILWAY COMPANY *v.* FISHER, Assessor, etc.

Filed February 16, 1884.

INDIAN RESERVATIONS—LANDS OF, WHETHER EMBRACED IN TERRITORY.—None of the lands embraced within the boundaries of Idaho territory are excepted out of said territory by the provisions of section 1 of the organic act, except such as, by the provisions of pre-existing treaties with Indian tribes, were not, without the consent of such Indian tribes, to be included within the limits of any state or territory.

AT THE TIME OF THE PASSAGE OF THE ORGANIC ACT OF IDAHO TERRITORY, no treaty existed between the United States and any Indian tribe providing that the lands embraced within the Fort Hall Indian reservation should not, without the consent of such tribe, be included within any state or territory; such lands, therefore, became part of Idaho territory upon the passage of said organic act, March 3, 1863, and have not since been withdrawn from or excepted out of said territory.

THE FORT HALL INDIAN RESERVATION BEING A PART OF AND INCLUDED WITHIN IDAHO TERRITORY and Oneida county, the property of the Utah & Northern Railway Company situated thereon is subject to taxation for territorial and county purposes.

APPEAL from a judgment of the district court for Oneida county, entered in favor of the defendant. The opinion states the facts.

Williams & Young, for the appellant.

Willard Crawford, for the respondent.

PRICKETT, J. This appeal has been submitted upon briefs, without oral argument. The facts, as shown by the record, are, that the Utah & Northern Railway Company is a corporation, owning and operating the Utah & Northern railway, extending into and through the county of Oneida, in this territory; that sixty-nine and eighteen hundredths miles of said railway are within and upon the Fort Hall Indian reservation, a tract of land situated within the exterior boundaries of said Oneida county, but which, by an order of the president of the United States, dated July 30, 1869, in pursuance of a treaty with the eastern band of Shoshones and the Bannock tribe of Indians, concluded July 3, 1868, was set apart as a reservation for the Bannock Indians. That the respondent, being the assessor and *ex officio* tax collector of said Oneida county for the year 1882, assessed plaintiff's railroad and other property situated upon said reservation. That there was levied upon the railroad and property situated upon the reservation, for the year 1882, a tax, for territorial and county purposes, of four thousand four hundred and seventy-eight dollars and forty-two cents. That such tax not having been paid within the time required by law, the defendant, as tax collector, was proceeding to enforce and collect the same under the laws of the territory, by advertisement and sale of the property, when the plaintiff commenced this action to enjoin and restrain him therefrom. A temporary injunction was issued, which at the trial was by the judgment of the court dissolved and set aside, and the defendant also recovered judgment for costs. From that judgment the plaintiff appealed to this court.

The sole question presented for the consideration and decision of this court is whether or not the Fort Hall Indian reservation is a part of Idaho territory and of Oneida county.

The act of congress organizing the territory of Idaho, approved March 3, 1863, 12 Stat. 808, includes within its exterior lines the tract of land now known as the Fort Hall Indian reservation, and by the act of the legislative assembly of this territory creating and defining the boundaries of Oneida county, it is included within the exterior boundaries of that county; but section one of the organic act of the

territory contains a proviso as follows: "That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory so long as such rights shall remain unextinguished by treaty with the United States and such Indians, or to include any territory which by treaty with any Indian tribes is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Idaho, until said tribe shall signify their assent to the president of the United States, to be included within said territory; or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed."

No provision similar to the foregoing is to be found in any act of congress creating a territory, prior to that organizing the territories of Nebraska and Kansas: 10 U. S. Stat. 277; and the reason for it in that act was, that before the organization of those territories, the United States, by treaty with the Shawnee tribe of Indians, and perhaps other tribes occupying lands embraced in those territories, had agreed not, without their consent, to include any of their lands within any state or territory thereafter to be formed; and for the same reason, congress required a like provision to be incorporated into the constitutions of Kansas and Nebraska, before admitting them into the Union.

The form of the organic act of those territories, in this respect, seems to have been uniformly followed by congress in organizing the other territories created since that time, without reference to the question whether such proviso was needed to save and protect any rights previously guaranteed or not.

It is not claimed that prior to the passage of the organic act of Idaho any treaty existed containing provisions similar to those in the treaty with the Shawnees, which would exclude or except out of the territory any portion of the lands embraced within the Fort Hall Indian reservation. Such lands were therefore included within the territory, March 3, 1863, by the terms of the organic act.

The proviso in the act creating the territories of Kansas and Nebraska, similar to that found in section 1 of our organic act, above set forth, was several times considered and construed by the courts in Kansas.

In the case of McCraken v. Todd, 1 Kan. 148, taken by writ of error to the supreme court of Kansas, one of the questions presented was, whether certain judicial proceedings which took place on the lands belonging to the Delaware Indians when Kansas territory was organized were not transacted without the territory, and therefore null and void. That court, after reciting the proviso, say: "This ground of objection calls for no comment by the court, further than a statement that nowhere in any treaty with the Delaware Indians is there a provision that the lands of that tribe shall not, without its consent, be included within the territorial limits of any state or territory. All the lands of that tribe within the boundaries specifically described in the law referred to were therefore included within the limits of the territory."

In the case of the United States v. Todd, McCahon, 198, the circuit court of the United States for Kansas, Miller, J., presiding, held that the state court, and not that of the United States, had jurisdiction to try and

punish for the crime of murder committed upon the Kansas reservation, because the treaty with the Kansas Indians contained no provision excepting their reservation from the territorial limits or jurisdiction of any state or territory.

The lands embraced within the Fort Hall Indian reservation having been included within and made a part of the territory by section 1 of our organic act, passed March 3, 1863, we will next inquire whether those lands have since been withdrawn therefrom. If so, it must be because of some provision in the treaty between the United States and the eastern band of Shoshones and the Bannock tribe of Indians, concluded July 3, 1868, and of the executive order made in pursuance thereof: 15 Stat. 673; for it is by and under these that the Bannock tribe of Indians occupy said reservation. Section 2 of that treaty provides as follows: "It is agreed that whenever the Bannocks desire a reservation to be set apart for their use, or whenever the president of the United States shall deem it advisable for them to be put upon a reservation, he shall cause a suitable one to be selected for them in their present country, which shall embrace reasonable portions of the Port Neuf and Kansas (meaning Camas) prairie countries, and that when this reservation is declared, the United States will secure to the Bannocks the same rights and privileges therein, and make the same and like expenditures therein for their benefit, except the agency house and residence of agent, in proportion to their numbers, as herein provided for the Shoshone reservation." On the thirtieth day of July, 1869, in pursuance of this treaty, the president, by order of that date, set apart the Fort Hall Indian reservation, for the use and occupation of the Bannocks, but there is nothing in this treaty or order from which to imply that such tract of land was withdrawn from or taken out of the territory of Idaho. It was set apart merely for the use and occupation of the Bannock tribe of Indians.

The appellant relies for the reversal of the judgment in this case upon the decision of the supreme court of the United States in Harkness v. Hyde, 98 U. S. 476. That court there held that the territory embraced within the Fort Hall Indian reservation was "as much beyond the jurisdiction, legislative or judicial, of the government of Idaho, as if it had been set apart within the limits of another country, or of a foreign state," which would certainly be conclusive in favor of the position assumed by the appellant but for the decision of the same court upon the question subsequently rendered in the case of Langford v. Monteith, 102 U. S. 145, which is relied upon by counsel for respondent.

In the last case cited, Mr. Justice Miller, delivering the opinion of the court, says: "The act of congress of March 3, 1863, to provide a temporary government for the territory of Idaho, 12 Stat. 808, contains a clause precisely similar to that admitting Kansas into the Union. This court in Harkness v. Hyde, relying upon an imperfect extract found in the brief of counsel, inadvertently inferred that the treaty with the Shawnees, like that with the Shoshones, contains a clause excluding the lands of the tribe from territorial or state jurisdiction. In this it seems we were laboring under a mistake. Where no such clause, or language equivalent to it, is found in a treaty with Indians within the exterior limits of Idaho, the lands held by them are a part of the territory, and subject to its jurisdiction, so that process may run there, however the Indians themselves may be exempt from that jurisdiction." The

decision in the case of Harkness v. Hyde is therefore no longer authority upon the point made in the appellant's brief.

Our conclusion is that the railroad and property of the appellant is subject to taxation, notwithstanding its location and situation upon the Fort Hall Indian reservation. The judgment of the district court is affirmed.

MORGAN, C. J., and BUCK, J., concurred.

JONES v. ST. JOHN IRRIGATING COMPANY.

Filed February 18, 1884.

ON APPEAL FROM A JUDGMENT, WITHOUT A STATEMENT OR BILL OF EXCEPTIONS, nothing belongs to the record except the judgment roll, and no question arising outside the roll can be considered. The mode of presenting questions not arising on the judgment roll for review on appeal is by statement or bill of exceptions.

ON APPEAL THIS COURT CAN ONLY NOTICE THE ERRORS COMMITTED AGAINST THE APPELLANT, not those committed against the successful party.

APPEAL from a judgment of the district court for Oneida county, entered in favor of the defendant. The opinion states the facts.

Heed & Standrod, and *James L. Onderdonk*, for the appellant.

Smith & McCollum, for the respondent.

PRICKETT, J. This action was commenced in the district court of Oneida county by the filing of a complaint therein, September 12, 1883. The object of the action was to recover as damages the sum of one thousand dollars, alleged to have been sustained by the plaintiff by reason of the diversion by defendant of water from plaintiff's premises, to which he alleges he was entitled for irrigation. The amended answer of the defendant denies that it at any time diverted any water from the stream named to which plaintiff was entitled, and denies that plaintiff has been injured by the defendant in the sum of one thousand dollars, or any other sum whatever. Upon the issues made by the complaint and amended answer, the cause was tried by jury and a verdict and judgment were rendered for plaintiff for the sum of fifty dollars.

A question having arisen in the court below as to whether the plaintiff was entitled to recover his costs upon a verdict for less than one hundred dollars, under the statutes, the court below awarded the plaintiff his costs. The plaintiff appealed from the judgment.

A paper purporting to be a bill of exceptions has been stricken out of the transcript, on motion, because it was not settled and filed in the mode prescribed by statute, and the case now stands for review on the judgment roll alone. On an appeal from a judgment without a statement or bill of exceptions, nothing belongs to the record except the judgment roll, and no question arising outside the judgment roll can be considered. The mode of presenting questions not arising on the judgment roll for review on appeal is by statement or bill of exceptions properly settled, signed, and filed.

It is urged by respondent's counsel, that though the court has stricken out the bill of exceptions, the chief questions in dispute can be reviewed upon the record as it still stands; that there is no issue formed by the complaint and amended answer; that the amended answer is evasive;

and that the plaintiff was entitled to judgment on the pleadings in the court below; but we think the denials of diversion by the defendant and damages sustained by the plaintiff do certainly raise material issues between the parties to the action.

Another point made by the appellant's counsel is that the amended answer, after filing and verification, was again amended by striking out certain matter, and that after being so reamended it was never verified, and that it thus became an unverified answer to a verified complaint, and for that reason should not be considered as an answer at all; but these objections do not appear upon the face of the judgment roll, and if they existed, should have been brought into the record by the proper objections and bill of exceptions.

On the part of the respondent, it is urged that under our statutes, in an action for damages, where the plaintiff recovers less than one hundred dollars, he is not entitled to costs, and that the allowance of costs to the plaintiff by the district court was error which can and should be corrected here, but on appeal this court can only notice the errors committed against the appellant, not those committed against the successful party, or the respondent in the appeal: Seaward v. Malotti, 15 Cal. 304; Travers v. Crane, Id. 12; Stevenson v. Smith, 38 Id. 102.

The judgment is affirmed.

MORGAN, C. J., and BUCK, J., concurred.

WINTERS *v.* SWIFT ET AL.

Filed February 19, 1884.

DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE.—A deed absolute on its face, given by A. to B., for real estate therein described, and a bond given by B. to A., agreeing to convey to A. a portion of the same property at a stipulated time, although given on the same date and for the same price, if not intended to be a mortgage or security for money by the parties themselves, and do not appear to be such on the face of the instruments, will be held to be an absolute bargain and sale, and not a mortgage.

THE INTENTION OF THE PARTIES IS TO BE LEARNED, first, from the instruments themselves; secondly, from parol testimony; and when ascertained, will be carried out by the courts.

APPEAL from a judgment of the second judicial district court for Alturas county, entered in favor of the defendants. The opinion states the facts.

F. Ganahl, L. Vineyard, and *D. E. Waldron,* for the appellant.

James H. Beatty, for the respondents.

MORGAN, C. J. It appears from the evidence and the findings of the court in this cause, that Wilhelm Jaikowski was the owner and in possession of a two-thirds interest in the North Star mine and a one-half interest in the American Eagle mine, both situated in Warm Spring district, Alturas county, Idaho; that one Riley was the owner of the one third of the North Star mine, and one half of the American Eagle; that in working said mines, Jaikowski, prior to the seventh day of September, 1881, had become indebted to Pinkham & Leonard in the sum of two thousand and eighty-two dollars and ninety-eight cents, for which he had given his note and mortgage on one third of the North Star mine, dated respectively January 7, 1881; that he was then also indebted to J. O.

Swift & Co., a firm composed of J. O. Swift and T. E. Clohecy, both defendants herein, to the amount of between three thousand and four thousand dollars; that to pay off said indebtedness, and obtain means to work said mines, Jaikowski, about the first of March, A. D. 1881, employed defendant Clohecy to go to Salt Lake City and procure a loan of six thousand dollars; to enable Clohecy to secure said loan, Jaikowski executed to said Clohecy a note for six thousand dollars, with place where payable and name of payee in blank, dated March 1, 1881, and due in five months from date; he also executed to Clohecy a power of attorney to sell or mortgage his interest in said North Star mine; that Clohecy thereupon went to Salt Lake City and secured a loan from McCormick & Co. in the sum of six thousand dollars; that Clohecy delivered to said McCormick & Co. the said promissory note, properly filled out and indorsed by him; that he also, for the purpose of securing said note, executed a trust deed conveying Jaikowski's interest in the North Star mine to William H. Greenhow and George A. McCormick, with power to them or the sheriff of the county to sell said interest on default of payment of the debt. With the six thousand dollars thus obtained, Clohecy paid off various items of indebtedness due from Jaikowski, including the debt due Pinkham & Leonard.

During the summer of 1881 Jaikowski made various attempts to sell his interest in the North Star mine; employed Clohecy and others to aid him in effecting said sale. The mine was not sold. The latter part of August, Jaikowski went to Salt Lake. The note and trust deed were coming due September 1, 1881. Jaikowski attempted to get further time on the six-thousand-dollar note, which was refused by McCormick & Co. About the first of September, J. O. Swift, defendant, went to Salt Lake, and at Jaikowski's request went with him to various persons to effect a sale of the mine, but was unable to do so. After all these failures to sell Jaikowski's interest in these mines, during which he had offered the whole for twelve thousand dollars, he (Jaikowski) offered to sell to Swift, on the sixth day of September, 1881, two thirds of the two mines, all the ore on the dumps, with the cabin, tools, cooking utensils at the mine, and his claim for contribution against Riley, his partner, if Swift would pay the debt to McCormick & Co., his debt to J. O. Swift & Co., and furnish him money to go back to Idaho. Swift, after seeing McCormick & Co. and obtaining further time on that debt, on the seventh day of September told Jaikowski that he would accept his offer, and would pay the debt to McCormick & Co. and the debt to J. O. Swift & Co., and would furnish him sixty dollars to return to Idaho,if Jaikowski would sell the property to him at that price. The terms, as above stated, being agreed upon by both parties, they went together to the office of W. C. Hall, an attorney; the terms of the sale were stated to the attorney in the presence of both parties, and he was directed to draw up a deed for two thirds of both mines, a bill of sale of all the ores on the dump of said mines, all the tools, cabin, cooking utensils, and an assignment of Jaikowski's claim for contribution against his mining partner, Riley, for the consideration aforesaid, which was stated to be eleven thousand and fifty-eight dollars and forty-nine cents.

The attorney drew the said deed, assignment of claim for contribution, and bill of sale of tools, etc., all absolute on their face, according to instructions given in the presence of both parties. These papers were duly

signed by Jaikowski and acknowledged before a commissioner of deeds, the parties going to another office for the purpose of acknowledgment.

Shortly after the execution of these papers, and the same day, the parties again appeared in the office of Hall, the attorney aforesaid, and Swift directed Hall to draw up a bond for the conveyance of the two-thirds interest in the two mines by Swift to Jaikowski on or before the seventh day of December, A. D. 1881, in case the latter should pay him the sum of eleven thousand and fifty-eight dollars and forty-nine cents. This was accordingly done, signed by Swift, and delivered to Jaikowski.

As soon as the papers were completed, Swift went with Hall to McCormick & Co., paid the interest on the six thousand dollars to September 1, 1881, amounting to one thousand and eighty dollars; assumed, in the name of J. O. Swift & Co., his firm, the payment of the note of six thousand dollars, in consideration of which McCormick & Co. reduced the rate of interest to one per cent. per month. On the same day Swift wrote to his firm at Ketchum, stating that he had bought out Jaikowski, and directed them to charge the account due the firm from Jaikowski to his private account, which was accordingly done. Swift paid Jaikowski the sixty dollars to return to Idaho, and also paid for Jaikowski ten dollars to the attorney for drawing the papers. In the latter part of September or first of October Swift went into possession of the mines and other property, and has continued to hold and work them until the present time. On the tenth day of October, 1881, Jaikowski executed to one Shaeffer, consideration being an open account, four hundred and thirty-two dollars, or four hundred and fifty-two dollars, and some small sums of money, the amount of which the parties were not able to state, a deed for the two-thirds interest of the said mines, and assigned to him the bond.

This sale, as Winters, plaintiff herein, testifies, was negotiated and promoted by him, and he states he had had his eye on this property as being valuable ever since he came to Wood River. On the seventeenth of November, 1881, Shaeffer executed to plaintiff Winters a deed to said property and assigned to him the bond. On the third day of December, 1881, plaintiff John B. Winters commences this suit, files his complaint, praying that said deed to Swift of September 7, 1881, and bond to Jaikowski, be declared a mortgage, and that said plaintiff be allowed to redeem; that to ascertain the amount to be paid to Swift an accounting be had between J. O. Swift & Co., T. E. Clohecy, and J. O. Swift and Jaikowski, with various other prayers not now necessary to mention.

To the said complaint the defendant Swift answered, and averred that the said transaction that took place between himself and Jaikowski on said seventh day of September, 1881, was an absolute bargain and sale of all said Jaikowski's interest in said mines to defendant Swift; was never intended or understood by either party to be a mortgage; that said bond was executed and delivered to said Jaikowski to give him an opportunity to repurchase said mines, if he desired so to do, on or before the said seventh day of December, 1881. Defendant Clohecy answered, denying any interest in the transaction of September 7, 1881, or any interest in the result of the suit substantially.

The cause was tried before the court at the July term of the district court in and for Alturas county, and resulted in the following findings by the court as conclusions of law:

1. That the transaction of the seventh of September, 1881, between

Jaikowski and the defendant Swift was one of bargain and sale, and not one of security for debt. There being no pre-existing debt, no loan at the time, and no continuing indebtedness, there could be no mortgage, and the deed operated as an absolute sale and conveyance of the property to Swift.

2. That the bond from Swift to Jaikowski was not a defeasance of the deed, but simply an option to repurchase.

3. Neither Jaikowski nor his assigns having tendered the stipulated price within the period limited, the plaintiff is not entitled to relief.

4. That upon the whole case the equities are with the defendants, and they are entitled to judgment for the dismissal of plaintiff's bill of complaint, and for their costs in the action.

Plaintiff made a motion for a new trial, which motion was denied by the court. From the judgment of the court denying the motion for a new trial an appeal is taken to this court, and the following errors assigned:

The court erred in its conclusions of law and the same are not justified or supported by the evidence in the case in this, to wit:

1. The transaction of the seventh of September, 1881, between Jaikowski and Swift was one of mortgage and not of sale, there being a pre-existing and continuing debt, carrying interest beyond the seventh day of September, 1881.

2. The bond from Swift to Jaikowski being signed on the same day, and witnessed by the same parties, and acknowledged by and before the same officer, expressing the same consideration, and for the same property as that in the deed from Jaikowski to Swift, was a defeasance to the deed and constitutes with it one instrument, viz., a mortgage; and the action being brought for a redemption and praying an account, no tender was necessary.

3. The promissory note of McCormick & Co. is usurious, and no claim for interest thereon can be collected, as the same was made and delivered in this territory, and not in Utah.

4. That upon the whole case the equities were with the plaintiff. In debt, pressed by his creditors, wanting time, everything tends to show that he was not a free man, and that in doubtful cases of like character the law always construes transactions of like character a mortgage, and not a sale.

It will be at once seen that the main question, in short, almost the only question, before the court is, Was the transaction between Swift and Jaikowski on the seventh of September, 1881, a sale, with a bond giving Jaikowski an option to repurchase, or was it a mortgage?

In construing any instrument the first matter to be examined is the language of the instrument itself. The ordinary provision in a legal mortgage is, that in case the grantor shall pay, or cause to be paid, the sum mentioned in the deed, with interest thereon, then the deed shall be void, otherwise, etc., or any words equivalent to these in the deed itself, which shall indicate that it was intended as a security for money loaned, or security for the payment of a debt by the parties to such instrument, then it is a mortgage: 1 Jones on Mort., sec. 242; Adams v. Stevens, 49 Me. 362.

Upon the most cursory reading, it will be at once seen that the deed from Jaikowski to Swift, executed on the seventh of September, 1881, contains no such provision, and none equivalent thereto. It is a deed,

pure and simple; it is not claimed to be other than an ordinary deed in and of itself.

Was there any separate deed executed at the time or soon thereafter which was intended by the parties as a defeasance? It is claimed by the plaintiff that the bond for a deed which was executed by Swift to Jaikowski soon after the deed was executed was a defeasance, and was so intended by the parties thereto. The same rules of construction must be applied to this as to the other, that is: 1. Does the instrument itself show upon its face that it was so intended? Upon examination, it will be seen that it makes no reference to the deed whatever. There is nothing in it which shows that it had any reference whatever to the deed that had before been executed. There is nothing in it which indicates that Jaikowski was indebted to Swift in any sum whatever, nor is there anything in the deed which indicates that Jaikowski is indebted to Swift. Taking both instruments together, and assuming that they were both executed at the same time, and there is nothing which shows that they were intended as a mortgage—there is no obligation on the part of Jaikowski to pay, and no continuing indebtedness, and no intimation of such an obligation.

In this case the defendant Swift had no remedy against the person of Jaikowski; there was nothing in either or both of the papers executed which would enable Swift to obtain a judgment against Jaikowski. There is no acknowledgment of a pre-existing debt, nor any covenant for repayment. These must exist in order to constitute it a mortgage: See Conway's Ex'rs v. Alexander, 7 Cranch, 236; Henley v. Hotailing, 41 Cal. 28; Farmer v. Grose, 42 Id. 173; Flagg v. Mann, 14 Pick. 478.

There being nothing in the deed, nothing in the bond, nothing in both, if construed together, to constitute the transaction a mortgage, we must next inquire into the intention of the parties at the time the deed was executed. This is to be gathered from the testimony. Hall, the attorney who drew the deed, and who is a disinterested witness, testifies that Swift and Jaikowski came into his office. Swift, in presence of Jaikowski, said he had bought a two-thirds interest in North Star and American Eagle; asked me to draw a deed, which I did, and explained the legal effect thereof to Jaikowski. The parties agreed upon the consideration, and I put it in. Some time after deed and bill of sale of cabin and tools were executed, Smith said he had concluded to give Jaikowski a bond, so that he might have a chance to turn round; which I then drew up, and Swift signed it. There was nothing said about its being intended as a mortgage or security for any debt. I would not be positive when the deed was signed. Something was said about giving bond back. The bond was signed when Smith came back, within half an hour.

Swift, defendant, testifies: Grosbeck and Jaikowski had been talking about a sale. Jaikowski told me about Grosbeck wanting the property. I went to Grosbeck and told him I would take half the mine if he would take half, at twelve thousand dollars. Grosbeck refused. Jaikowski offered both mines, North Star and American Eagle, for twelve thousand dollars. I did all I could to assist him to sell the property. I offered to Chambers to buy the property with him, but he also refused. I went to several mining men after that for Jaikowski, but could get none of them to take it. Jaikowski came to me every day to do something with the property. On the sixth day of September, 1881, Jaikowski said if I would pay the McCormick & Co. note, and the J. O. Swift & Co.

debt, and give him money enough to go back to Wood River, he would give me his entire interest in the two mines. I told him I would see McCormick, and that I might trade with him; saw McCormick, and then told Jaikowski I would take property at his proposition. Deed was drawn up and acknowledged. I paid the interest on McCormick's note, and assumed the payment of the note; assumed payment of J. O. Swift & Co. debt; paid Jaikowski sixty dollars and Hall ten dollars. When we were coming back from getting deed acknowledged I told Jaikowski I would give him a bond for ninety days, if he wanted. We went back to Hall's office, and I did so. The transaction between us was understood to be a sale, and not a mortgage. The bond was spoken of first when we were returning from having deed acknowledged.

On the twenty-eighth day of October, 1881, Jaikowski made an affidavit before Greenhow that the sale to Swift was absolute and *bona fide*, and was not made as a security for payment of any debt; that Shaeffer and Winters, plaintiffs, had induced him while intoxicated to make an affidavit to the contrary.

Peter Wise testifies that between the tenth and fifteenth of September, 1881, Jaikowski, after his return from Salt Lake, said that he had sold North Star and American Eagle to Jim Swift; told me the terms, and said he was glad Swift had taken it, for he did not want McCormick to get it for the six thousand dollars, and that Swift had given him a bond.

Stiner testifies that he had a conversation with Jaikowski in September or October, 1881, in presence of Wise, in which Jaikowski said he had sold the North Star and American Eagle to J. O. Swift.

Greenhow and Clohecy testify to similar conversations with Jaikowski, in which he told them he had sold all out to Swift.

On the part of the plaintiff, Jaikowski testifies as follows: On the sixth of September, 1881, I met Swift and he said if I would give him security on the North Star and American Eagle mines my claim against Owen Riley for his one third due for all the debts incurred on the North Star, embracing the McCormick & Co. claims of six thousand dollars and interest, and the debt to Swift & Co. claimed to be three thousand five hundred and ninety-eight dollars and fifteen cents, my cabin, tools, etc., ore on the dumps, he would pay off the debts and give me three months time, and if any ore was sold in the mean time he would give me credit. I told him all right, and he told me to meet him next day and see what he could do. I saw Swift next day. He said everything was ready. We went into the lawyer's office and sat down. The lawyer finished the papers, read them to me, I signed two papers then, and Swift signed one. Swift took them all and went to the commissioner or notary public. I signed the deed and bill of sale to Swift, and he signed the bond and gave it to me.

This is substantially all the testimony upon both sides, with reference to the intention at the time of the execution of the deed and bond. If we leave out the testimony of the two parties, Swift and Jaikowski, and take the instruments, with the testimony of Hall as to what was said by the parties at the time of their execution, the manner of their execution, with the statement of Jaikowski to Stiner, Wise, Greenhow, and Clohecy, the conclusion is irresistible that the intention of the parties was to make an absolute sale, with a bond allowing Jaikowski to repurchase within the time stipulated. The testimony of Swift is strongly corroborated by testimony of Hall and all the witnesses to whom Jaikowski

had talked, and also by the affidavit made by Jaikowski before Greenhow, notary public, as well as the character of the instruments themselves.

On the other hand, the testimony of Jaikowski with reference to the intention of the parties is not at all corroborated by any of the circumstances nor any witness. The proof is also complete that there was no negotiation between the parties respecting a loan of money, no proposition respecting a mortgage—all the conversation between Jaikowski and Swift and other parties was in reference to bargain and sale. During the summer before, Jaikowski, with those whom he had employed to assist him, was all the time trying to sell the mine. This deed was not given to secure a pre-existing debt. Swift had no interest in the McCormick & Co. debt, and only a partial interest in the debt to J. O. Swift & Co. These are all given as strong indications of absolute bargain and sale, and not of mortgage: Conway's Ex'rs v. Alexander, 7 Cranch, 236. Where there is no debt and no loan, an agreement to resell will not change an absolute conveyance into a mortgage: Henley v. Hotailing, 41 Cal. 25; Seaver v. Payn, 19 Wend. 521; Rich v. Doane, 35 Vt. 125; and other cases cited in 41 Cal. 25.

The question as to inadequacy of consideration cuts no figure whatever, as the complainant alleges that the mines at the date of the commencement of the suit, December 3, 1881, were worth one hundred thousand dollars; it is entirely immaterial what they were then worth, the only proper question would be what were they worth on the seventh of September, 1881—a matter not put in issue by the pleading.

It is urged by the plaintiff that when the deed and defeasance are executed at the same time, or are agreed upon at the same time, it is a conclusion of law that they constitute a legal mortgage. 31 Pa. St. 131, 295, are cited to sustain the position. It is clear that when the separate instrument is intended as a defeasance by the parties, this principle is correct; both the cases cited are cases where the parties both intended the instruments as mortgages, and denominated them as such on the face of the instruments; it is also indicated by the proof, that one was a loan of money, and the other a loan of credit upon which to raise money; neither case is all like the one at bar, and it is remarkable that they should be quoted as sustaining the principle that a separate agreement for repurchase is by operation of law a mortgage. Again, it is asserted that at law an absolute deed and separate defeasance or agreement to reconvey, executed at the same time, amount to a mortgage, and a large number of cases are cited. It is only necessary to say that where the parties intended them to be such, and such intention is indicated either on the face of the instrument or by parol testimony, then they are such, and not otherwise, and this only is indicated by the cases cited beyond question.

There is no case that we have yet been able to find which holds that an absolute deed and a bond to convey the same property, when not intended as mortgage or security for money, as evidenced by the deed or parol testimony, is held by the court to be a mortgage. A large number of cases which were cited by the plaintiff have been examined, and they all tend to the same point, that where the parties intend the instruments as simply a security for money, then they are construed as mortgages by the courts; and this intention of the parties is to be ascertained, first, from the instruments themselves; secondly, by parol testimony.

The third error assigned is, that the promissory note given to McCormick & Co. is usurious, and no claim for interest thereon can be collected, as the same was made and delivered in this territory, and not in Utah. The evidence shows that Jaikowski executed a note in blank and gave Clohecy a power of attorney authorizing him to sell or mortgage his interest in the mines, to raise money in Salt Lake City, Utah. Clohecy was the agent of Jaikowski, and executed and delivered the note and trust deed to McCormick & Co. in Utah; they are not usurious, therefore, being in accordance with the laws in force there. It is therefore concluded by the court, that the instrument executed by Jaikowski to Swift, September 7, 1881, is an absolute deed, as the result of a bargain and sale of the property therein described; that the bond given by Swift to Jaikowski, of the same date, is an agreement to convey a portion of the same property, upon the payment of a sum of money at a stipulated time, which has not been either paid or tendered, and that they are not and were not intended to be a mortgage or security for money.

The judgment of the court below is therefore affirmed.

PRICKETT and BUCK, JJ., concurred.

SUPREME COURT OF OREGON.

BETT ET ALS. *v.* POPPLETON.

Filed January 14, 1884.

THE ASSIGNEES OF PORTIONS OF AN AWARD MAY MAINTAIN A SUIT IN EQUITY to recover the amount of their respective assignments from the person against whom the award was made.

AN AWARD WILL NOT BE SET ASIDE BECAUSE CERTAIN ITEMS WERE CONSIDERED by the arbitrators which were not included within the terms of the written submission, when the party against whom the award was made consented to such action on the part of the arbitrators, especially if he subsequently promised to perform the award.

AN AWARD WHICH DOES NOT DETERMINE EVERY MATTER SUBMITTED is not binding. But a subsequent ratification takes away all objection on this ground, and a promise to perform the award is such ratification.

APPEAL from a judgment of the circuit court for Polk county, entered in favor of the plaintiffs. The opinion states the facts.

R. S. Strahan and *A. C. Sweet*, for the appellant.

Bonham & Ramsey and *M. L. Pipes*, for the respondent.

WATSON, C. J. The respondents instituted this suit as assignees of a certain award, given in favor of O. D. Buck and against the appellants, to obtain payment respectively of the amounts severally assigned to them out of such awards. The complaint sets out the submission and awards, which were in writing, in full, and alleges a subsequent parol promise by appellant to pay the same. It also sets forth the several assignments to the respondents. According to the terms of the submission, the controversy to be determined by the arbitrators was "in relation to a certain contract" for the construction of a brick store, and also in relation to demands of the said Buck against the said Poppleton (appellant) for extra work done and extra materials furnished on and for said store building, and for changes made by said Poppleton in the plans and speci-

fications of said store building, as set forth in said contract, during the progress of work on said store building, and in relation to certain verbal agreements made subsequently to the original contract.

The award includes the following, among other items:

Amount due Buck, extra work and material	$265 55
Surplus material sold to Poppleton	132 27
Damages for being unlawfully dispossessed of the building by Poppleton	200 00

It also contains a statement that the sum of one hundred and ten dollars is to be retained by Poppleton from the aggregate thus found due to Buck, until a dispute between Buck and Angus Campbell over a claim for damages by the former against the latter, involving that amount, and growing out of the latter's contract to furnish materials, for the price of which he had filed a lien on the building, should be settled between them; when, if determined in Buck's favor, the said sum of one hundred and ten dollars should be included, otherwise deducted from the aggregate amount so awarded.

The complaint alleges the settlement of this dispute in Campbell's favor before the bringing of the suit, and only claims the balance of the amount awarded, after deducting said sum of one hundred and ten dollars.

The appellant demurred to the complaint, on the grounds: 1. The facts alleged do not make a case in equity; 2. The award goes beyond the submission in some particulars; 3. Some of the matters submitted are not determined by the award.

The demurrer was overruled. An answer was then filed by the appellant, and upon the issues made the proofs were taken, and the decree brought here for review rendered in favor of the respondents. But as the allegations in the complaint seem to us fairly sustained by a preponderance of the evidence, the only questions of law for us to determine arise upon the demurrer thereto.

1. As to whether the case stated in the complaint is properly cognizable in equity, it seems to us there can be no doubt. Assuming that the assignments to the respondents are of portions of the award, and not merely of the proceeds therefrom, as they have been treated in the arguments of counsel, still they would only be partial assignments and incapable of enforcement by proceedings at law. The authorities to this effect appear to be both numerous and uniform: Story's Eq. Jur., sec. 1044; Bliss on Code Pl. 65; Field v. Mayor etc. of New York, 2 Seld. 179; Grain v. Aldrich, 38 Cal. 514.

2. The item of one hundred and thirty-two dollars and twenty-seven cents for surplus material sold to the appellant, allowed to Buck by the award, is not within the terms of the written submission as we construe that instrument. But the testimony shows the matter was before the arbitrators without objection, and was fully considered.

Buck testifies that he proposed to the appellant to let him have such material, consisting of "cement, sand, paint," etc., at first cost, and freight, which proposition was accepted by the appellant. They both then went with the arbitrators to where the material was and figured up what the portion appellant got came to, and the remainder was set apart for Buck by the arbitrators. Appellant admits in his testimony that he afterwards used a portion of this material and sold a portion of it on his own account.

Buck's statement as to how the matter came before the arbitrators is not disputed. In view of these admitted facts, and the appellant's subsequent express promise to pay the amount awarded to Buck, and including the value of this material, which we find from the testimony to have been made, the appellant is certainly precluded from making the objection now that the subject of the surplus material was not within the terms of the submission.

As the submission might have been by parol, the subsequent parol promise to perform the award, including the value of the surplus material, was a valid ratification of the award in that respect: Page v. Pendergast, 2 N. H. 233.

As to the item of two hundred dollars damages awarded Buck on account of his having been dispossessed of the premises by appellant before his contract had been completely performed, the preponderance of the evidence shows that the matter was considered by the arbitrators with the knowledge of and without any objection from the appellant on the ground that it was not embraced in the submission. If any dispute upon this subject did in fact exist when the submission was entered into, it might clearly be deemed a controversy "in relation to the contract" for the construction of the store, and therefore covered by the very terms of the submission.

And the fact that the matter was brought before the arbitrators and considered by them without objection by the appellant, on the grounds either of there having been no such dispute, or of its not being within the submission, must be held conclusive that such dispute did exist, and was therefore included in the submission.

But had the facts been otherwise, the subsequent promise to pay the award would have taken away the objection.

3. Upon the last point, it is clear the respondents must have failed if they had not succeeded in proving appellant's promise to pay the award after it was made known to him. The general rule undoubtedly is, that an award which does not determine every matter submitted is not binding: Watson on Arbitration and Award, 121; Wright v. Wright, 5 Cow. 197; Jackson v. Ambler, 14 Johns. 96; Jones v. Welwood, 71 N. Y. 108; Davis v. Dyer, 54 N. H. 146. But a subsequent ratification takes away all objection on this ground; and a promise to perform the award is sufficient: Cross v. Cross, 17 N. J. Eq. 288; Williams v. Williams, 11 Smed. & M. 393; Culver v. Ashley, 19 Pick. 300.

We find no error in the decree of the lower court, as alleged by the appellant, and it is therefore affirmed.

STEPHENS v. ALLEN ET AL.

Filed January 14, 1884.

DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE.—Whether a deed given in consideration of the grantee's assuming and paying the debts of the grantor is an absolute sale of the land conveyed, or a mere mortgage to secure the repayment of such debts, depends upon the intention of the parties at the time of conveyance. Such intention may be ascertained by evidence, oral or otherwise, of the situation of the parties, the value of the consideration in connection with the value of the property conveyed, the conduct of the parties before and after the conveyance, and of all the surrounding circumstances tending to explain the real character of the transaction. The evidence in this case reviewed, and the conveyance in question held to be a mortgage.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the plaintiff. The opinion states the facts.

George H. Williams and *B. Killin*, for the appellants.

Thayer & Williams and *H. T. Bingham*, for the respondent.

LORD, J. The object of this suit is to have certain conveyances of lands, made by the plaintiff to the defendants by deeds absolute upon their face, declared to be mortgages, to secure an accounting for so much of said lands as have been sold by the defendants, and to compel them to reconvey the residue of said lands to the plaintiff. The principal question involved, and to which the argument is almost wholly directed, is whether the transaction between the parties was an absolute sale of the lands in dispute, or a pledge of them to secure the payment of the debt and expenses which the defendants paid and assumed on behalf the plaintiff. As such a transaction receives its character from what the parties intended to make it at its inception, the ascertainment of that intention always becomes the important inquiry. This necessarily requires evidence of the situation of the parties, of the price fixed in connection with the value of the property, the conduct of the parties before and after, and all the surrounding facts and circumstances so far as they are adapted to explain the real character of the transaction.

"As the equity upon which courts act," says Field, J., "arises from the real character of the transaction, it is of no consequence in what manner this character is established, whether by deed or other writing, or by parol. Whether the instrument, it not being apparent upon its face, is to be regarded as a mortgage, depends upon the circumstances under which it was made, and the relations subsisting between the parties. Evidence of these circumstances and relations is admitted, not for the purpose of contradicting or varying the deed, but to establish an equity superior to its terms:" Pearce v. Robinson, 13 Cal. 116; Peugh v. Davis, 96 U. S. 336; Cornell v. Hall, 22 Mich. 377; Campbell v. Dearborn, 109 Mass. 130; Brant v. Robertson, 16 Mo. 143; Horn v. Keteltas, 46 N. Y. 608; Jones on Mort., sec. 258.

As a consequence of this doctrine, each case must be scrutinized and judged by its own surrounding facts and circumstances, and when the result of the evidence is to produce doubt, the courts incline to construe the instrument to be a mortgage: Conway's Ex'rs v. Alexander, 7 Cranch, 218; 3 J. J. Marsh. 354; Jones on Mort., sec. 279.

It appears by the evidence that at the time the transaction in question took place, "the times were unusually dull," and the sales of real estate in that vicinity slow and low in price. By a series of untoward circumstances, the plaintiff had become financially embarrassed, and his property —much of it consisting of city lots—mortgaged, and about to be subjected to a forced sale.

In this emergency, and to prevent what the plaintiff conceived would result in the sacrifice of his property, he sought the counsel and assistance of the defendants, who were his friends of many years, and whom he had accommodated and assisted with his means when the circumstances of their lives were reversed, and which they acknowledged had materially aided them in securing the competency they then enjoyed. Indeed, it is to the credit of the defendants that the evidence is replete with so many acts and declarations which indicate the deep sense of their gratitude and obligation to him, their genuine sympathy at his embarrassment, and disposition to afford him whatever assistance or relief they could. The re-

sult was that they determined to help him out of the financial troubles and difficulties in which he was involved. They agreed to raise the money and to pay off the indebtedness of the plaintiff, and that he should deed to them, as security for the same, and the interest that might accrue thereon, all his property; that the defendants should have the right to sell such property in parcels as purchasers could be obtained, and that the money realized from such sales should be applied to the indebtedness assumed by them on his behalf, and also accruing interest and expenses attending the sales of the same; that the defendant Allen should give his personal attention, in conjunction with the plaintiff, in making sales of the property, and that he should be allowed a reasonable compensation therefor; and that after the payment of the amount so due the defendants, including interest and expenses of management, the plaintiff was to have back the entire residue of property so deeded.

In compliance with this agreement, the plaintiff, by deeds absolute upon their face, conveyed to the defendants all his property, and they paid off his indebtedness, and the defendant Allen entered upon the business of negotiating sales, and did thereafter effect sales of a considerable portion of the same, which he applied to the payment of the principal and interest so due by him to them, and the expenses attending the management of the property. Let it be noted here that the indebtedness of the plaintiff paid was only about half the value of the property, and that he remained in possession of the most valuable portion of the property, the sales referred to being principally city lots. It is objected, conceding the facts to be true, that there was no debt created by the transaction between the plaintiff and defendants. But it is said, in Campbell v. Dearborn, 109 Mass. 681, that a mortgage may exist without any debt, or other personal liability of the mortgagor. If there is a large margin between the debt, or sum advanced, and the value of the land conveyed, that of itself is an assurance of payment stronger than any promise or bond of a necessitous borrower or debtor. And in the case of Russell v. Southard, 12 How. 139, where the question raised was that there was no promise to repay the money, the court say: "The memorandum does not contain any promise by Russell to repay the money, and no personal security was taken, but it is settled that this circumstance does not make the conveyance less a mortgage."

The fact that no note or other personal obligation was given is not conclusive of the nature of the transaction. A debt may well exist without those, and when the whole evidence of it rests in the memory of witnesses: Brant v. Robertson, 16 Mo. 143. But the fact is, a debt was created by the transaction.

When the defendants paid to Ladd and Tilton the amount of the indebtedness the plaintiff owed them, the plaintiff became the debtor of the defendants for that amount, because it was paid at his request and on his account. The want of an express promise to repay in such case is not fatal to the transaction, for the law will imply a promise to do so, and as was said in Southard v. Russell, *supra*, an action of *assumpsit* would lie. Note the language of Judge Story in Flag v. Mann, 2 Sum. 534: "Now, it seems to me clear upon admitted principles of the law, that, on the payment by Walker and Fisher to Bennett of the money due from Richardson to Bennett, Richardson became the debtor of Walker and Fisher for that amount, as it was paid at his request and for his benefit." And the decision of the court in that case was that the conveyance from Richard-

son to Walker and Fisher was a mortgage. With change of names, apply this language to the case at bar, and Stephens, plaintiff, becomes the debtor of Hawthorne and Allen, defendants, for the amount paid Ladd and Tilton, as it was paid at his request and for his benefit: Jones on Mort., sec. 272, and authorities cited in note. It is with regard to the actual facts, and not to the form of the transaction, by which equity will be governed in ascertaining and fixing the real character of the instrument. Whether intended as an absolute conveyance, or a mortgage, the instrument is equally valid, and equity will give effect to it according to the substantial interest of the parties: Horn v. Keteltas, 46 N. Y. 606.

And it seems to us, when the facts show that the plaintiff conveyed his real property to the defendants to secure them in the payment of money advanced or paid by them for his benefit, and agreed with them that they should proceed together and sell off the different parcels of it to liquidate that indebtedness, and that when the object should be accomplished, the remainder of the land should come back or belong to the plaintiff, the transaction bears the impress of a mortgage. It is the conveyance of lands for the purpose of securing the payment of a sum of money, and when that object is accomplished the purpose of the transaction is consummated, and the right to the residue, to redeem the remainder, would seem to belong to the plaintiff upon every principle of justice and equity. In Jones on Mortgages, section 271, it is said that "an agreement that the grantee may sell all the property for the best possible price and retain from the proceeds the amount due him, paying the residue to the grantor, shows that the transaction is a mortgage until the power of sale is executed." And in Crane v. Buchanan, 29 Mo. 270, it was held after the sale the excess over the amount of the debt should be paid to the grantor.

In Lawrence v. The Farmers' Loan & Trust Co., 13 N. Y. 209, the court say: "But I do not understand that a power of sale granted by the mortgagor, at the time when the mortgage is made, conflicts with the policy, or the rules established by courts of equity. The object of the pledge is to secure a debt; to effect this purpose the right of disposition must exist somewhere, and be founded on the contract of the parties, either express or implied. A judicial sale is but the enforcement of the contract—one mode of appropriating the mortgaged property to the satisfaction of the debt. The authority resulting from the contract which a court may exercise in behalf of one of the parties, the mortgagor may confer upon the mortgagee or a third person, it would seem, without any violation of principle. A power to dispose of the property to satisfy the debt for which it is pledged is not collateral; but, like the right of redemption, inheres in the subject. It is not in addition to the mortgage but a part of it, and the mode in which it may be exercised is as proper a subject of agreement *prima facie* as the terms of the mortgage itself." A conveyance of lands for the purpose of securing the payment of a sum of money, if it leaves a right of redemption upon payment of the debt, and if there be a power of sale, whether in the creditor or to some third person, it is still in effect a mortgage. "If there is a power of sale," says Miller, J., in Shellaber v. Robinson, 97 U. S., "whether in the creditor or some third person, it is still in effect a mortgage, though in form a deed of trust, and may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery." To

effect the object of this transaction, it was necessary to convey the property in the form adopted, not only as security for the payment of the money advanced or paid for the plaintiff, but to enable them to make the sales necessary to liquidate that debt, and when this was done, when the transaction had accomplished its purpose, it would seem, upon equitable principles, that the residue of the property, like the excess over the amount of the debt after sale, as decided in Crane v. Buchanan, *supra*, would belong to the grantor or plaintiff. Such being the object of the transaction, it would be a fraud on the plaintiff, when the debt secured by the property is paid, to defeat the right of the plaintiff to the residue. Equity, which abhors fraud, will not permit this: Sunlyn's Appeal, 71 Pa. St. 264; nor a fraudulent use of the statute for the prevention of frauds: Ryan v. Dox, 34 N. Y. 308.

The evidence indicates quite clearly that it was not expected to require the sale of the whole property to liquidate this indebtedness. The amount of the debt assumed or paid by the defendants for the plaintiff was scarcely half the value of the lands conveyed; and when it is considered that immediately before these conveyances were made, Mr. Ladd, to whom the plaintiff owed the indebtedness which was subsequently paid by the defendants for the plaintiff, and for which the deeds in question were taken, offered in consideration that the plaintiff would deed these same lands to him, that he would cancel this indebtedness, and in addition thereto give the plaintiff ten thousand dollars in cash and the use of the homestead for life, and then the plaintiff refused to accede to this proposition, and the defendants knew this when he sought them, and that the arrangement which was effected was considered the better for his interest and a sufficient security to them, the inadequacy of the price, considered as a sale, becomes apparent, and an important element in establishing the character of the transaction: Kerr on Fraud and Mistake, 186, and note. Another circumstance, too, which is entitled to much weight, is the fact that the plaintiff continued to use and occupy a valuable portion of this property, and received rent for some other, after these apparent conveyances were made. The declarations and conduct of the defendants at the time and after the conveyances were made, taken in connection with these facts and the relations of intimacy and friendship subsisting between the parties, are of decisive import in fixing the real character of this transaction.

While it is true declarations or admissions should be closely scrutinized and weighed with caution, on account of the liability of witnesses misapprehending the language used, and the difficulty of correctly repeating its import, yet when such admissions are deliberately made to a large number of persons, some in the course of business dealings in relation to the property and extending through the whole period of the transaction, and the general tenor and effect of such declarations or admissions are of like import, they become the most satisfactory evidence. All through the testimony—and there is no attempt to deny or dispute it—are the declarations of the defendants to numerous persons during the period of this transaction to the effect that they had got all of Stephens' property; that Uncle Jimmy (plaintiff) had helped them out in times of troubles, and that they were going to help him; and when they sold property enough to get the money back which they had paid for him, Uncle Jimmy got the rest of the property. As cases of this character must be determined upon their special facts, it is admitted that these facts

should be of clear and decisive import. They should lead the court to a satisfactory conclusion as to what the parties intended and meant by this contract, so that it may be enforced according to that intent. We are satisfied from the evidence that the lands in question were conveyed as a security for the payment of a debt, with the understanding that the defendants might sell so much as would effectuate that object, and when this was accomplished, that the plaintiff should have the right to redeem the residue.

The decree of the court below must be affirmed.

ADAMS, Adm'r, etc., *v.* PETRAIN ET ALS.

Filed January 21, 1884.

THE CIRCUIT COURT HAS NO JURISDICTION OF AN ACTION BROUGHT BY AN ADMINISTRATOR against a former administrator of the same estate, who had been removed from his office, to obtain an accounting and a judgment for the balance of the property of such estate in the hands of the latter. Such an action is within the exclusive jurisdiction of the county court.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the plaintiff. The opinion states the facts.

Sidney Dell, for the appellants.

Northrup & Gilbert, for the respondent.

WATSON, C. J. This action was begun by the respondent Adams, administrator *de bonis non* of the estate of Joseph Petrain, deceased, against the appellants, Charles A. Petrain, the former administrator, and Holton and Manceit, his sureties upon his official bond, to recover an alleged unaccounted for balance in his hands, belonging to the estate. Joseph Petrain died in Washington territory, of which he had been a resident, in March, 1876, leaving both real and personal property in said territory, and also leaving some money on deposit, and some claims to be collected in this state. His widow, Catherine Petrain, was appointed administratrix of the estate in the territory, and the appellant Charles A. Petrain the administrator thereof, in the state of Oregon. The latter was afterwards removed from his trust, and his letters revoked, for misconduct in the administration of the portion of the estate coming into his hands, in a proceeding instituted for that purpose by the petition of the said Catherine in the county court of Multnomah county. The county court found, upon the hearing of such petition, that the said Charles had been unfaithful to his trust as charged, and decreed his removal therefrom, but neither then nor since has any settlement of his accounts as such administrator ever been had in said court, nor any proceeding taken there with such end in view. In this action in the circuit court such account was taken for the first time, and judgment rendered for the balance found due against the said Charles and the sureties on his official bond.

And this is the judgment which appellants seek to have reversed on this appeal. They contend that, waiving all other grounds of objection, the judgment must be set aside for want of jurisdiction in the circuit court, appearing from the foregoing facts. The state constitution provides that "the county court shall have the jurisdiction pertaining to

probate courts:" Art. 7, sec. 12. And the statute defining its jurisdiction declares: "The county court has the exclusive jurisdiction in the first instance pertaining to a court of probate, that is: 1. To take proof of wills; 2. To grant and revoke letters testamentary of administration and guardianship; 3. To direct and control the conduct and settle the accounts of executors and administrators," etc.: Code, sec. 869.

In the case before us the account of the administrator was not settled in the county court. The circuit court undertook to discharge that duty, and the judgment which the respondents obtained in the action is based upon the settlement of accounts had in the circuit court. Was the settlement of this account a matter pertaining to the jurisdiction of a court of probate? It can not be denied; and besides, the statute quoted from expressly enumerates such settlements as within the jurisdiction belonging to a court of probate. And if it is a subject of probate jurisdiction, which is undeniable, then it is within the exclusive jurisdiction of the county court, and the action of the circuit court was unwarranted. This conclusion, from the case already stated, is irresistible.

But respondent's counsel relies upon subsequent provisions in the same statute as authorizing such a proceeding in the circuit court. Section 1162 gives the county court authority to remove an executor or administrator who has violated his trust, and prescribes the mode of proceeding for that purpose: "Any heir, legatee, devisee, creditor, or other person interested in the estate," may institute the proceeding by filing a petition setting forth the alleged misconduct. The executor or administrator, as the case may be, alone is cited, and the cause is summarily disposed of. Section 1066 provides that in case of removal, "administration of the estate remaining unadministered shall be granted to those next entitled, if they be competent and qualified." Section 1067 is as follows: "Sec. 1067. The surviving or remaining executor or administrator, or the new administrator, as the case may be, is entitled to the exclusive administration of the estate, and for that purpose may maintain any necessary and proper action, suit, or proceeding on account thereof against his sureties or representatives."

It is claimed in behalf of the respondent that this last section authorizes the circuit court to entertain actions like the present, and several authorities from other states have been cited in support of this construction. But the statutes under which these decisions were rendered are dissimilar to our own in every instance, and in most quite different. That of Missouri, perhaps, contains provisions more nearly resembling those in section 1067, above quoted from our code, than are to be found in the statutes of any other state.

The decisions cited from the reports of that state were made upon statutory provisions substantially the same as those which have been incorporated in sections 48 and 55, on pages 8 and 9, volume 1, of the revision of 1879. The first of these sections provides, that "if any executor or administrator die, resign, or his letters be revoked, he or his legal representatives shall account for, pay, and deliver to his successor, or to the surviving or remaining executor or administrator, all money, real or personal property of every kind, and all rights, credits, deeds, evidences of debt, and such papers of every kind, of the deceased, at such times and in such manner as the court shall order on final settlement with such administrator or executor, or his legal representatives, to be made on motion of his successor or remaining or surviving executor or adminis-

any of the circumstances can be deemed either "necessary" or "proper," in view of the exclusive jurisdiction of the county court in probate matters. This seems to us to be not only the natural and easy construction of the provisions of this section, but the only one in harmony with those contained in the preceding section of the same act, defining the jurisdiction of the county court in probate matters. And it is certainly the only one consistent with the preservation of the symmetry, if not the efficacy, of our probate system. These considerations appear to us sufficient to require its adoption as the true construction of the provisions of the code upon the subject: Baker v. The State, 21 Ark. 405; Beall v. New Mexico, 16 Wall. 540. We hold, therefore, that the circuit court had no jurisdiction of the cause, and that its judgment therein must be reversed.

The other points made by counsel for appellants we do not think it proper to decide. The judgment of the circuit court is reversed, with directions to dismiss this action.

Judgment reversed.

SUPREME COURT OF UTAH.

ZION CO-OPERATIVE MERCANTILE INSTITUTE *v.* HOLLISTER.

Filed June 23, 1883.

NOTES ISSUED FOR CIRCULATION—WHAT ARE.—Orders drawn by a mercantile corporation to pay to certain persons or bearer a certain number of dollars, in merchandise, at retail, issued to those who were willing to take their pay in merchandise, and as a means of convenience in exchange for produce, do not perform the office of money, and are not notes in the sense in which that word is used in the United States statutes providing "that every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of ten per centum on the amount of their own notes issued for circulation and paid out by them:" Supplement to R. S., vol. 1, 1874–1881, p. 133, sec. 19.

APPEAL from a judgment of the district court, entered in favor of the plaintiff. The opinion states the facts.

P. T. Van Zile, for the appellant.

J. L. Rawlins, for the respondent.

TWISS, J. The plaintiff in its complaint alleges that it is and was at the time therein mentioned a corporation organized and existing under the laws of this territory, solely for the purpose of carrying on mercantile business. That the defendant at and during the same time was and is the acting collector of internal revenue for the United States. That in 1876 the plaintiff made certain mercantile orders of the denomination of one, two, and five dollars, which were used in paying its employees who were willing to take their pay in merchandise, and also as a means of convenience in exchange for produce, which it was agreed should be paid for in merchandise, and that they were not made nor used nor paid nor circulated for any other purpose whatever. That upon the twenty-fifth day of July, 1878, the United States commissioner of internal revenue set down and assessed against the plaintiff a special tax of ten per cent., amounting to ten thousand dollars, as a tax upon notes alleged to have been used by plaintiff for circulation, and paid out by it for and during the two months ending on the thirtieth day of November, 1876, and be-

tween the thirtieth day of November, 1876, and the first day of June, 1878. That the list containing said assessment was by said commissioner of internal revenue placed in the hands of the defendant as such collector. That the defendant, on the seventh day of August, 1878, as such collector, demanded of the plaintiff the payment of the aforesaid tax, assessed as aforesaid, and threatened that unless payment of the same was made, he, the defendant, as such collector, would seize upon and sell sufficient of plaintiff's property to pay said tax; that while defendant was so threatening to sell and about to sell the property of plaintiff, the plaintiff, under protest and with notice then and there given by it to the defendant that the said tax was erroneous and illegal, and that suit by the plaintiff would be commenced against the defendant to recover the same, and to prevent the seizure and sale of plaintiff's property as threatened by the defendant, paid to the defendant the amount of said taxes, the sum of ten thousand dollars. That on the twenty-fifth day of September, 1879, the plaintiff, in due form of law, made its appeal to the commissioner of internal revenue to have said sum assessed against and paid by plaintiff refunded. That said commissioner, on the fourteenth day of October, 1879, decided said appeal against the plaintiff, and refused to refund the same or any part thereof, excepting five hundred dollars. That the said assessment, demand for payment, and payment were made upon the said alleged merchandise orders, and upon no others, and for the use and circulation of them as above stated. That by reason thereof there remains due and owing to the plaintiff from the defendant the sum of nine thousand five hundred dollars, with interest thereon.

The defendant in his answer alleges that the orders described in the complaint were printed on good paper, in their general appearance resembled bank notes, and would be taken and considered as such by the masses of the people, or as a circulating medium; that in addition to the words and figures given in the complaint as descriptive of said orders, the denomination of each of them appeared upon the face thereof, and across the same in their places, in large letters and figures. Defendant denies that the plaintiff did not use, make, pay out, nor circulate said notes or orders, except for the purpose of paying its employees, or as a means of convenience in exchange for produce; and upon information and belief, says that during the months of October and November, 1876, and during the time from November, 1876, until July, 1878, the plaintiff issued its notes or orders, to the amount of one hundred and four thousand five hundred dollars, in substantially the form above described, and of such form, material, and appearance as to be readily taken and passed as money and a circulating medium. That plaintiff paid out and issued said notes or orders to any and all persons who would accept them in payment of any debts owing by plaintiff for the produce, labor, or other commodities or causes, the same as money; also received them in payment for goods or other commodities sold, or for debts due plaintiff; took and received said orders and notes the same as money, and again paid out said notes and orders in the course of trade the same as other money. That after the issue of said notes or orders by plaintiff they were used for circulation as a circulating medium at Salt Lake City, as well as in other places in this territory, by a large portion of the people in all their business transactions, the same as money, and by them treated as money; and to a considerable extent, said notes and orders, during the years 1876 to 1878, inclusive, did displace as a circulating

medium, to the amount of such notes or orders, the lawful currency and money authorized by the government of the United States; and denies there is the sum of nine thousand five hundred dollars, or any part thereof, or interest thereon, due or owing to the plaintiff. That the tax or assessment levied and collected by plaintiff was the same as assessed, levied, and collected on account of the issue and circulation of said notes and orders, and says that in the matter of said assessment and collection of said taxes, and in all he did connected therewith, he acted only by virtue of his authority as assessor and collector of the internal revenue of the government of the United States, and under the direction of the proper officer of the United States government.

Upon the trial it was admitted by the defendant that the sample copies annexed to the complaint were true and correct copies of all the instruments taxed, or for or on account of the use of which the assessment and collection of the money sought to be recovered in this action were made, and that no part thereof had ever been refunded to the plaintiff, whereupon the plaintiff rested its case.

The following is a copy of one of the instruments:

"No. 318, Series A. SALT LAKE CITY, October 16, 1876.

"Pay David O. Calder or bearer five dollars, in merchandise at retail.

"To H. B. CLAWSON. G. H. SNELL."

It was in open court agreed by counsel for the respective parties, that the only questions in dispute were: 1. Whether the instruments—the terms and character of which had been admitted—were liable to the tax assessed against them; 2. If so, whether they were, in fact, used for circulation as money, and paid out by plaintiff as money. Whereupon the plaintiff rested its case. The defendant offered in evidence the return made by the plaintiff to the defendant, as the United States collector of the district of Utah, and offered to prove: 1. That these instruments were issued by the plaintiff, drawn upon one of its officers, and that they were used for circulation and paid out by plaintiff; 2. That they were used for circulation and paid out by plaintiff as money; 3. That they were so used by the plaintiff, and paid out by plaintiff as money; 4. That by reason of the circulation and use of these instruments by the plaintiff they displaced to a large extent the currency of the United States.

To all of which offers the plaintiff objected, and the objections were sustained by the court. At the request of the plaintiff, the defendant objecting, the court instructed the jury to find for the plaintiff in the full amount claimed by the plaintiff, with interest, to which instruction the defendant at the time excepted. The verdict was in compliance with the instructions. Judgment was entered accordingly. Motion for new trial was filed and overruled, and appeal taken to this court. The following is the statutory provision under which the assessment was made: "That every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of ten per centum on the amount of their own notes issued for circulation and paid out by them:" Supplement to Rev. Stat., vol. 1, 1874-1881, p. 133, sec. 19.

The material question of this case is, In what sense did congress use the term "note" in this section? To determine the question, we are permitted to look at the subject-matter of the statute, as well as to the name given by it to the instrument. A statute imposing a tax should be clear and unambiguous, and when, by its terms, it clearly and without doubt

imposes a tax upon a particular class of property, it should not, by a forced construction, be held to include other property, which is not with reasonable certainty included by its language. A citizen about to make investments or to engage in business should be enabled, by the exercise of ordinary judgment and discretion, to know with reasonable certainty what his obligations under existing laws as a tax-payer may be; and the ordinary use and force of the language used—the obvious intention of the legislature—will determine his rights and liabilities as to this matter: Cooley on Taxation, 199–208. In cases where the language of the statute is so obscure as to cause "doubts as to the liability of an instrument to taxation, the construction is in favor of exemption, because a tax can not be imposed without clear and express words for that purpose:" United States v. Isham, 17 Wall. 504.

There are many instruments properly called notes, but in matters of commerce the word "note" means an instrument recognized as a note in the mercantile sense of the word—a promise to pay money, unless the term is qualified. "Notes used for circulation" are necessarily negotiable and payable in money. They are intended to and do represent money, and do the work of money in business transactions; and on a day therein named become money: 1 Parsons on Notes and Bills, 42–45. A note of this description, made and "paid out" by the plaintiff with the design and intention that it should be and is put into circulation, and does the work of money as a circulating medium, is clearly within the statute and taxable. But an order to pay D. O. C. or bearer five dollars, in merchandise at retail, is of another class or description of paper, which does not perform the office or function of money, and is not a note in the sense in which the word is used in the statute: United States v. Van Aukin, 96 U. S. 366.

We are for these reasons of the opinion that there was no proof that the respondent issued any notes within the intent and meaning of the statute, and that the court below did not err in excluding the evidence offered by the appellant, of the issuing and circulation by the respondent of its orders or promises to deliver merchandise, and the other evidence offered by the defendant at the trial, and that there was no error in the instruction to the jury.

The judgment of the district court is affirmed.

HUNTER, C. J., and EMERSON, J., concurred.

RASMUSSEN ET AL. v. MCKNIGHT ET AL.

Filed February 13, 1884.

PLEADING FACTS CONSTITUTING FRAUD.—In an action to annul a conveyance on the ground of fraud, when the facts constituting the fraud are not clearly known by the plaintiff, the same may be alleged in the alternative.

IN SUCH ACTION, WHEN THE FRAUD CONSISTS IN TAKING A DEED in the name of a married woman, and in giving a mortgage to the grantor in the name of her husband, he being the person who committed the fraud, the wife is a necessary and proper party whether she was a *particeps criminis* to the fraud or not.

APPEAL from a judgment of the third district court, entered in favor of the defendants. The opinion states the facts.

Arthur Brown, for the appellants.

James McKnight, for the respondents.

EMERSON, J. The only question raised on this appeal is, Does the complaint state facts sufficient to constitute a cause of action? It alleges in substance that the plaintiff Rasmussen being the owner of certain premises in Salt Lake City, and described in the complaint, entered into a contract with the defendant James McKnight to sell and deed to him the premises for the sum of four hundred and seventy dollars. McKnight to pay one hundred dollars in cash and execute a mortgage back to secure the balance. That the defendant named, pretending to be a lawyer, drafted said papers, and when completed, read them to the plaintiff named, as in pursuance to the contract, viz.: A deed to McKnight and a mortgage back from him to the plaintiff named, and he signed the deed under that belief. "That since that time the plaintiff Rasmussen has discovered that the said deed, as it appears upon record, was in the name of the wife of the said James McKnight as grantee, to wit, the said Mary Ann McKnight." "That the said plaintiff Rasmussen does not know whether the said McKnight obtained the said deed in his wife's name by misreading the same to plaintiff Rasmussen, or by obliterating his name and putting in hers, and does allege that by whatever means it was done, it was done fraudulently and for the purpose of robbing and wronging the said plaintiff Rasmussen."

It then alleges a deed of one half the land and one half the cause of action to the plaintiff Brown. That plaintiff Rasmussen, previous to the discovery of the fraud, commenced an action against James McKnight alone to foreclose the mortgage; that afterwards a decree was obtained and the property sold to plaintiff Rasmussen for less than the face of the mortgage debt, and he obtained a deed therefor conveying all the interest of James McKnight. "That the said Mary Ann McKnight received the said conveyance without any consideration moving from her. That she is a party to and cognizant of the said frauds herein alleged." And then the prayer for relief. The defendants demurred upon various grounds, but none except the one mentioned, viz., "that the complaint does not state facts sufficient to constitute a cause of action," was argued or called to our attention. We shall therefore treat the others as abandoned.

On the ground of demurrer stated, the complaint is assailed principally because the facts constituting the fraud are not more specifically stated. The plaintiff Rasmussen states all that he knows about the transaction, and that a fraud was perpetrated on him in one of two ways, by which he was led to believe that he was conveying the land to James McKnight and not to his wife, or he certainly would not have taken a mortgage from James McKnight to secure the unpaid purchase money, for if he intended to or knew that he was deeding the property to Mrs. McKnight, the mortgage from the husband was no security at all. If it was accomplished in either of the methods he mentions, the statements he makes are the facts constituting the fraud. Statements of facts which the court can see do, in fact, constitute a fraud. The plaintiff's statement of how it was accomplished must necessarily and under the circumstances be in the alternative, and the complaint is not bad for that reason.

The complaint alleges that the defendant Mary Ann McKnight was a party to and cognizant of the fraud. She is a proper party, and the complaint states a cause of action against her. She would be a prope-

necessary party, even if she knew nothing about the fraud. Under the circumstances alleged in the complaint, aside from the allegation of her knowledge of and participation in the fraud, she is the holder of the naked legal title which the plaintiffs seek to have subjected to their equities. "Equity will relieve by canceling the fraudulent apparent transfer, and by compelling a reconveyance or reassignment, even as against the holder who is innocent of wrong:" 2 Pomeroy Eq. Jur., sec. 913.

The judgment of the court below is reversed with costs, and the cause is remanded to the third district court, with directions to the court to overrule the demurrer.

PEOPLE, etc., v. TREMAYNE.

Filed February 13, 1884.

A FUGITIVE FROM JUSTICE CHARGED WITH A FELONY has no right to be heard on any appeal made in his behalf.

NEITHER AN ORDER FORFEITING A DEFENDANT'S BAIL for failure to appear at the trial, nor an order refusing to entertain a motion to set aside the same while the defendant was still a fugitive from justice, nor an order directing the payment of the forfeited bail money into the treasury are appealable.

APPEAL from the third district court. The defendant was indicted in the court below for burglary. When arraigned he pleaded not guilty, and his bail was fixed at one thousand dollars, which sum he deposited with the clerk in lieu of bail, in accordance with the provisions of section — of the criminal practice act, and was thereupon discharged from actual custody. At a subsequent term of the court the case was set for trial on a certain day, and when the case was reached for trial on that day, the defendant did not appear in person, but was represented by the attorney who had appeared with and for him at the time of the arraignment. When the case was called for trial, the defendant not appearing, the prosecution moved for a forfeiture of the money deposited in lieu of bail. The attorney who had before appeared for the defendant, at this time objected to the defendant's being called, or any proceedings being taken to declare the deposit forfeited, "on the ground that the indictment in said cause did not set forth any public offense against the laws of the territory of Utah," and requested the privilege of being heard on the sufficiency of said indictment. The district attorney objected to the appearance of said attorney, and to his right to be heard as requested, on the ground that the defendant had no right to appear by attorney or counsel, and that his attorney had no right to be heard in the case. The court so decided, and thereupon the defendant was called, and not appearing, an order of forfeiture was entered; to all of which the attorney for defendant excepted. Afterwards, but during the same term, and without any personal appearance on the part of the defendant, and without his surrendering himself in any way to the custody of any officer, his counsel moved the court to discharge the order of forfeiture upon the same grounds, substantially, on which he had sought to resist the entry of the order. The hearing upon this latter motion was postponed from time to time, and finally came on to be heard during the April term of the court, at which time the district attorney objected to the hearing of the motion, on the ground that the defendant was at large, and could not be heard in

an application to discharge the forfeiture unless personally present, and in support of his objection, presented a certificate of the United States marshal showing that the defendant was still at large, a fugitive from justice. The court received the certificate and refused to entertain said motion, to which counsel for defendant excepted. Afterwards the court ordered the clerk to pay over said deposit of money to the territorial treasurer, as directed by section 411 of the criminal practice act.

Arthur Brown, for the appellant.

Zera Snow, for the respondent.

EMERSON, J. This appeal, prosecuted on the part of defendant by his counsel, is from the order of the court forfeiting the money deposited in lieu of bail, upon the default of the defendant in not appearing when the case was called for trial, and from the ruling of the court in refusing to entertain the motion to discharge the order of forfeiture made by his counsel while the defendant was still at large, a fugitive from justice, and without his having in any manner surrendered himself to the jurisdiction of the court subsequent to the order of forfeiture, and no excuse whatever being offered for his failure to appear at the trial, and also from the order of the court directing the clerk to pay over the money deposited to the territorial treasurer. When the cause was called for argument the assistant district attorney (Zera Snow, Esq.) moved the court to dismiss the appeal, on the ground that the defendant was still at large, a fugitive from justice—this fact is made to appear by the certificate of the United States marshal, nor is it denied by the counsel who prosecutes this appeal for the defendant—and upon the further ground that the orders themselves are not appealable. The appeal should be dismissed on both grounds.

The offense charged is a felony, and so long as defendant remains a fugitive from justice he has no right to be heard upon any appeal in his behalf in this court: People v. Redings, 55 Cal. 290, where many cases are reviewed, all holding the same way. Certainly, this defendant has no right to be heard while he refuses to submit himself to the jurisdiction of the court upon any matters connected with the proceedings appealed from.

The orders are not appealable. They were but steps in the criminal proceedings commenced by the filing of the indictment, and if reviewable at all could only be so on an appeal from a final judgment: People v. Clark, 42 Cal. 622.

The appeal is dismissed.

SUPREME COURT OF WASHINGTON TERRITORY.

PARKER ET AL. v. DENNY.

Filed July 11, 1883.

AN APPEAL WILL NOT BE DISMISSED FOR FORMAL DEFECTS IN THE NOTICE OF APPEAL in regard to the title of the court and cause and the particular description of the judgment appealed from, when the provisions of the statute are substantially complied with in such respects.

A NOTICE OF APPEAL SHOULD CONTAIN A PARTICULAR DESCRIPTION of every ruling, order, decree, or decision whereby the appellant has been aggrieved. All that it is essential for the appellant to say in such regard is, that he has been aggrieved by the following orders, rulings, and decisions, and then enumerate them severally by descriptions sufficient to identify each.

APPEAL from the dictrict court. The opinion states the facts.

A. E. Isham, for the appellant.

Allen & Thompson, for the appellee.

GREENE, C. J. We are agreed that the formal defects of this notice of appeal in regard to the title of the court, and title of the cause, and the particular description of the judgment appealed from, are not such as would warrant a dismissal of the appeal. It is not every non-compliance with the provisions of section 458 that will fall outside the saving provisions of section 464. What the court is from which the appeal is taken, and what the cause and judgment are which are brought here, sufficiently appear from the notice. In these particulars there is a substantial compliance with the statute. But this notice has faults not so easily overlooked. Two sorts of notices are prescribed by section 458. One is for cases in error, the other for cases upon appeal. These two, though they are intended to be similar in structure, do not necessarily assume the same form. The one must contain a particular description of the errors assigned, the other a particular description of each ruling or order whereby the appellant claims to have been aggrieved; or, in other words, one must have in it a specific assignment of errors, the other a specific list of injurious rulings, orders, or decisions. A like purpose is intended to be accomplished both by the list and by the assignment. It is to narrow the range of controversy to its *minimum*, to define it, and to apprise the adverse party and the appellate court of its extent. But the nature of the device for effecting this purpose is different in the one from what it is in the other. Under the old common-law practice, an assignment of errors was a pleading, the allegations whereof were to be proved by the production of the record from the lower court, and its nature is still the same when incorporated in the notice required by our statutory practice.

But the list of obnoxious rulings required to be in the notice, under our statute, in an appeal case, is not in the nature of a pleading, but of an election. Notwithstanding this distinction, however, there is no reason why the same rules for brevity and simplicity of statement should not apply as well to the list as to the assignment. They have been assimilated by the legislature on purpose to simplify and unify the procedure for getting common-law and chancery cases into this court for review. It is possible to choose a form of words which will serve equally well for the one as for the other. All the statute requires on appeal is a particular description of every ruling, order, decree, or decision whereby appel-

lant has been aggrieved. What more is it necessary for him to say, then, than that he has been aggrieved by the orders, rulings, and decisions following, and then enumerate them severally by descriptions sufficient to identify each? But in the notice before us, the particular description of orders objected to is a bewildering mass of involved statement, repetition, and surplusage. Sixteen or eighteen pages are filled with a stretching and stuffing of what might be amply stated in a couple of pages.

All that was done by the referee was covered by the order of the judge in passing upon the referee's report. A designation of that single order, as one by which appellant has been aggrieved, would have been enough to bring before this court the entire doings of the referee.

We feel compelled to strike from this notice, therefore, all in it relating to interlocutory matter. This will not necessitate a dismissal of the appeal, although it may render an amendment of the notice desirable. We wish to say further, in regard to this notice, that it is altogether too prolix from beginning to end. Among other peculiarities, we remark that it embodies matter showing that a bill of exceptions was made in the lower court, and includes much that constitutes that bill. A bill of exceptions has no place nor function in a chancery cause; besides incumbering the records, it greatly and uselessly enhances cost. Motion denied; and it is ordered that all matter in the transcript from the third line of page 286 to the sixteenth line of page 307, inclusive, be stricken out.

WINGARD and HOYT, JJ., concurred.

CRAWFORD ET AL. *v.* HALLER.

Filed July 24, 1883.

FAILURE TO FILE TRANSCRIPT—DISMISSAL OF APPEAL.—Where the transcript on appeal was filed less than fifeeen days before the commencement of the term, the appeal will be dismissed unless the appellant shows himself guiltless of inexcusable laches in not having filed the transcript sooner.

ERROR to the district court. The opinion states the facts.

Struve, Haines & McMickin and *J. R. Lewis*, for the plaintiff in error.

McNaught, Ferry, McNaught, and *Mitchell*, for the defendant in error.

GREENE, C. J. The transcript in this cause was filed less than fifteen days before the term, and was unaccompanied by any authenticated copy of the notice of appeal. On account of a want of compliance, in these respects, with sections 459 and 460 of the code, appellee moved to dismiss the appeal.

Hearing of this motion was continued, and meantime leave was given to appellants by a day certain to bring in a duly certified copy of the appeal notice, and to show themselves guiltless of inexcusable laches in not having the transcript filed sooner. Afterwards, on the set day, appellants filed the certified copy of notice, but failed, and still fail, to make the proposed showing; very earnestly they contend that no showing is necessary; each party, after full argument, submits the motion.

Resort must be had to a number of sections of our code in order to determine intelligently the questions involved. Especially applicable and entirely decisive, to our mind, are the various provisions of the code

touching the taking of appeals and the curing of defects and informalities. Section 453 begins with a clause which fixes six months next after judgment as the period within which an appeal must be taken.

Putting the case at bar to a computation, we find that the six months had elapsed on the fourth day of last May, sixty-six days before this term commenced. Embraced in section 458 is a clause that prescribes that an appeal "shall be taken by filing with the clerk of the court in which the judgment or order appealed from is entered a notice stating the appeal from the same, or some specific part thereof, and serving a copy of said notice on the adverse party or his attorney." Continuing the subject of taking an appeal, section 459 says that "an appeal shall not be perfected until the notice has been served on the adverse party or his attorney of record," and then proceeds to provide that upon payment of his fees, the clerk shall *forthwith* transmit a transcript of the record in the cause. The word "forthwith" in this section, 459, does not cast on the clerk any unreasonable instantaneousness of action, nor does it, together with the connected words, take from appellant the right, nor relieve him from the duty, of looking after and supervising, or abridge his privilege of interrupting, the preparation of his transcript. Obviously, the intent of the language is, that the clerk shall, as quickly as may reasonably be, consistently with the nature of the record and the appellant's actions and directions, send up the transcript. Failure of the transcript to reach this court speedily, even after payment of fees, is not to be imputed to negligence of the clerk until the presumption that he has acted as he ought is fairly rebutted.

Passing to sections 460 and 461, we find the former enacting that the notice "must be served at least thirty days, and the cause docketed at least fifteen days, before the first day of the next term of the supreme court, or the same shall not then be tried unless by the consent of parties;" and the latter, that "if the appellant fails to file a transcript and have the same docketed, as provided in the preceding section, the appellee may file a certified copy of the judgment or order appealed from, and of the notice served, and on motion have the appeal dismissed, *provided*, that when the failure to file the transcript is owing to the fault or omission of the clerk of either the appellate or inferior court, or other circumstances over which the appellant has no control, the court shall not dismiss the cause, but shall fix such time for hearing the same as shall insure fair trial."

Effect must be given to both these last two sections, and such that they shall not conflict. Referring to section 453, we see that a party to a judgment in the district court has a full six months within which to decide whether he will appeal. Six months may expire, and consequently his decision to appeal may occur, where the time remaining before the next term of the supreme court is too short to admit of a service of notice and filing of transcript, outside the periods limited in section 460. Over the date of expiration of his statutory time for appeal appellant has no control. No fault, therefore, could be attributed to him if the failure to file in time depended upon that date. Such a case, and all other cases where through any circumstance beyond his control the statutory periods of section 460 may not have been observed, are met and provided for in that clause of the section which says, that either of those periods failing, there shall be no trial at the return term unless by consent.

In section 460 provision is thus made for the rights of parties whenever tardiness or omission of service or filing has happened from some circumstance not under appellant's control, or otherwise excusable; while in section 461 provision is made for the rights of appellee in cases where such tardiness or omission is owing to any circumstance which was under appellant's control.

Section 461 manifestly contemplates that there shall be a dismissal under certain circumstances, and plainly intends that those circumstances shall be adjudged to exist where there is inexcusable negligence on the part of the appellant. Nothing of value in the way of interpretation or construction can, as we think, be got from gazing at the narrow literal purview of the first half of section 461.

Our opinion is that the question thence arising, whether or not there is a total omission or only a mere delay, is entirely a barren one. The legislature is here dealing with very grave interests, that surely ought not, and can not be intended to, turn on a consideration which is not of the slightest practical importance. Great weight, no doubt, in construing this and the preceding sections, should be given to the liberal provisions of our code, and particularly those of section 466, regarding defaults, defects, and informalities.

On careful review of those provisions, however, it will be easily gathered that they are not meant, in any case, to shield a man from the consequences of his own inexcusable neglect.

Our duty is to apply those provisions generously to aid all proper cases, but not to extend them to situations they were never meant to cover. Defendants below, appellants here, while showing no excuse whatever for their failure to file this transcript in time, would, were this motion denied, succeed in putting the appellee to an injurious election, either to argue this cause at this term without the full statutory time for preparation, or to have determination of his suit, and perhaps collection of his demand, postponed at least a year.

Motion granted, and appeal dismissed.

WINGARD and HOYT, JJ., concurred.

STILES *v.* JAMES.

Filed August 6, 1883.

VENUE, WHEN MUST BE ALLEGED.—In an action to recover the possession of specific personal property, the jurisdiction of the court must be shown by an allegation in the complaint of the place of detention. A failure to make such allegation can not be taken advantage of after verdict when the sheriff's return shows that the property was taken in the county over which the court had jurisdiction.

ERROR to the district court of Columbia county. The opinion states the facts.

Sturtevant, *Scott*, and *J. B. Allen*, for the plaintiff in error.

George and *Goodman*, for the defendant in error.

WINGARD, J. This was an action begun in the above-mentioned court for the recovery of the possession of specific personal property, to wit, two horses. Upon issues joined, the cause was tried by a jury at the regular June term, 1882, and a verdict was returned in favor of the

plaintiff. Upon the return of this verdict, the defendant's counsel filed a motion in arrest of judgment, on the ground that the court had no jurisdiction of the subject-matter of the action, for the reason that the complaint failed to show that at the commencement of this action the property was detained in Columbia or Garfield counties, for which said court was holden, or elsewhere. The court below sustained the motion, and subsequently, during the term, a motion was made by defendant's attorney to dismiss the action, which motion was likewise sustained by the court. This action of the court in sustaining the aforesaid motions is assigned as error.

The return of the sheriff in the transcript before us shows that the property was found and taken by him within the jurisdiction of the court, to wit, in Garfield county aforesaid. We are of opinion that an allegation of venue in the complaint was essential to give the court jurisdiction of the subject-matter; but although no mention appears to have been made during the proceedings in the court below of the sheriff's return, the court was bound to have knowledge of the record, and that record discloses that the property was within the jurisdiction of the court. The substantial rights of the defendant, therefore, were not affected by the defect in the complaint, and the court should have disregarded it: Code of 1881, sec. 113.

Let the judgment of the court below, in arresting the judgment and dismissing the action, be reversed.

GREENE, C. J., concurred.

HOYT, J., concurring. I concur in the result, but am not prepared to hold that an allegation of venue in cases of this kind is essential to jurisdiction.

BENNETT v. UNITED STATES.

Filed August 6, 1883.

AN APPEAL FROM A JUDGMENT RENDERED IN FAVOR OF THE UNITED STATES can not be perfected without service of notice upon the United States. Such service should be made upon the United States attorney; service upon his assistant is not sufficient.

MOTION to dismiss writ of error. The opinion states the facts.

Struve & Haines, for the plaintiff in error.

J. B. Allen, United States attorney, and *C. H. Hanford, assistant United States attorney*, for the defendant in error.

HOYT, J. Whatever rule of practice applies in cases of this kind, it is necessary to the perfecting of an appeal that there should have been service upon the United States; and the United States attorney for this territory is the only representative thereof upon whom service could have been made, and service upon his assistant was not service upon him, and could not therefore bind the said United States, and the writ of error must be dismissed for want of service of notice thereof on the adverse party. It is proper for us to state further that, in our opinion, the legislative assembly of this territory has failed to prescribe any rule of practice applicable to cases to which the United States is a party, and that, in the absence of such legislation, the rules of practice as they existed at common law, so far modified as to make them applicable to our institutions and condition, govern in these cases.

GREENE, C. J., and WINGARD, J., concurred.

CITY OF WALLA WALLA *v.* MOORE ET AL.

Filed August 6, 1883.

A DEFENDANT WHO CONSENTS TO TRY A CASE WITHOUT A JURY THEREBY WAIVES his right to afterwards object that the plaintiffs' remedy was in law rather than in equity.

DESCRIPTION BY REFERENCE TO MAP—ESTOPPEL.—One who records his claim to certain real estate, describing the same as bounded by a certain street as shown upon a recorded map, and who afterwards receives a deed to such property by the same description, is estopped to deny the existence of the street as shown by such map.

APPEAL from a judgment of the district court. The opinion states the facts.

Langford & Anders, for the appellants.

Allen and *Thompson*, for the appellees.

HOYT, J. This was a suit in equity to have a certain building declared a public nuisance, and have it abated as such, and was brought by the city of Walla Walla against the defendants, who were in possession of said building.

A large number of questions have been raised and ably argued by counsel, but as the court finds difficulty in harmonizing its views as to some of the most important of them, we have concluded to pass upon only such as are necessary for the purposes of this case. The first objection urged by the appellants to the proceedings below is, that the court overruled their demurrer to the complaint, which they claim should have been allowed, because the complaint did not show the plaintiff entitled to equitable relief, but we think that the said city in prosecuting this action was acting for the public at large, and was therefore, for the purposes of said suit, clothed with all the attributes of sovereignty; besides, the defendants, by consenting to try the case without a jury, in our opinion, thereby waived the right to afterwards object that the action was in equity rather than at law.

The principal question in the case was as to whether the land upon which the said building was situated was a part of Second street in said city or the private property of the defendants. The only title claimed by defendants was claimed from one D. S. Baker, and if the said D. S. Baker was not in a situation to assert his title to said land as against the public, at the time he conveyed the land, it will follow under the circumstances of this case that defendant will occupy the same situation.

It is conceded, or is sufficiently shown, that the disputed land is a part of Second street, as it appears upon the recorded plat of said village, and the decisive question is as to whether said Second street, as it appears upon said plat, must be taken to be correct, and for the purposes of this case we think it must, as the said D. S. Baker had by his acts so far adopted said plat in reference to the particular portion thereof affecting this question that he will not now be allowed to make any claim in opposition thereto. As early as 1861 he caused lots 1 and 10, in block 12, to be recorded on the city records of said city in his name, describing them in his claim therefor as such according to the recorded plat, upon which plat said Second street appeared as bounding said lot 1 on the side, and covering the very property in question in this suit. He afterwards made to said city a verified claim to a part of the same lots, describing said lot 1 as bounded by Second street, along that very

boundary which in fact was bounded by the land in question, and upon his said claim received from it a deed with a like recognition of the disputed territory as a part of Second street; these acts, and some others of similar nature appearing in the record, in our opinion, estop him as above stated. Whence it follows, that, as between the parties to this suit, the building in question is in said Second street, and that the judgment of the court below so deciding and decreeing its abatement must be affirmed, and it is so ordered. Let the cause be remanded, with instructions to the court below to carry into effect its said judgment and decree.

GREENE, C. J., and WINGARD, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,352.

CLARKE ET AL. v. HUNDLEY, Judge, etc.

Department Two. Filed March 3, 1884.

A PLAINTIFF CAN NOT DISMISS AN ACTION OF HIS OWN MOTION after the defendant has answered and averred matters upon which affirmative relief is asked, growing out of the transactions set forth in the complaint.

APPLICATION for a writ of *mandamus*. The opinion states the facts.

George Cadwalader, for the petitioners.

J. D. Goodwin, for the respondent.

MYRICK, J. This is an application for a writ of mandate requiring the respondent, as judge, and the court in which he presides, to proceed with the trial of a case.

Eleanor Murdock, as administratrix of her deceased husband, commenced an action against the petitioners herein, as defendants, for an accounting, by reason of matters set forth in her complaint, and to obtain a decree that the said defendants convey to her certain real estate which had been conveyed to them by plaintiff's intestate as security for certain moneys; alleging the amounts received by the defendants and the value of use and occupation to be sufficient to pay off the indebtedness. The defendants answered, averring further advances, and the payment of expenses by them of more than the amounts received, claiming a balance and the original amount loaned to be still due, and asked for an accounting, and that the real estate conveyed as security as above mentioned be sold to satisfy the amount due them. This action was pending in the court in which the respondent presides. While so pending, and before October 10, 1883, the cause was set down for trial on the twenty-ninth of October, 1883. On said tenth of October the plaintiff's attorney filed with the clerk a paper in which it was stated that "the plaintiff dismisses the above-entitled action at the costs of said plaintiff, and the clerk of said court is hereby requested to enter such dismissal in his register of said actions." He also filed another paper, in which he moved the court to dismiss the action at plaintiff's cost, without prejudice. Notice of the motion was given, and a hearing thereon was had October 18th, and denied. No order for or relating to the dismissal appears on the register, but in the blotter are entries of items of clerk's

costs, including the papers above referred to. On the twenty-ninth of October, the day on which the cause had been set down for trial, the parties appeared by counsel, and the plaintiff objected to the trial of the cause proceeding, on the ground that she had dismissed the action by filing the paper first above referred to. The court declined to proceed with the trial, for the reason that the action of the plaintiff had dismissed the suit, and there was no cause pending before the court.

We are of opinion that the plaintiff did not, and that she could not, dismiss the action of her own motion. The defendants had averred matter upon which they sought affirmative relief, growing out of the transactions set forth in the plaintiff's complaint: See C. C. P., sec. 581, subd. 1.

Let the writ issue as prayed for.

SHARPSTEIN and THORNTON, JJ., concurred.

No. 9,187.

SHINN *v.* CUMMINS.

Department Two. Filed March 6, 1884.

FAILURE TO INDORSE THE NAME OF THE PLAINTIFF'S ATTORNEY ON THE BACK OF THE SUMMONS does not invalidate the same when such name is written on the face of the summons.

THE PENDENCY OF A MOTION TO VACATE A PRETENDED SERVICE OF SUMMONS does not extend the time specified therein for answering.

APPEAL from a judgment of the superior court for Lassen county, entered in favor of the plaintiff. The opinion states the facts.

Goodwin & Kelly, for the appellant.

C. McClaskey, for the respondent.

SHARPSTEIN, J. Appellant insists that it is essential to the validity of a summons that the name of the plaintiff's attorney be indorsed on it. The code provides that "the name of the plaintiff's attorney must be indorsed on the summons:" C. C. P., sec. 407. There was not in this case a literal compliance with that provision. The name of the plaintiff's attorney appears on the *face* and not on the *back* of the summons. Therefore it is not *indorsed on* the summons. And if we could see that the defendant might possibly be prejudiced by this circumstance, it would be our duty to reverse the judgment. But we can not. The object of the law doubtless is to have the name of the plaintiff's attorney indorsed on the summons, so as to inform the defendant who such attorney is. While it is advisable in all cases to literally comply with the provisions of the code, nothing short of a substantial departure therefrom can properly be held to be fatal to a proceeding under it. "Its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice:" Id., sec. 4.

The pendency of the defendant's motion "to dismiss, vacate, and set aside the pretended service of summons and copy of complaint" did not extend the time specified in the summons for answering the complaint. When the default was entered, there had been no appearance in the case by the defendant, and we are unable to discover any ground on which the judgment should be reversed.

Judgment affirmed.

MYRICK and THORNTON, JJ., concurred.

WEST COAST REPORTER.

WHOLE NO. 12. MARCH 20, 1884. VOL. II. NO. 4.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

Continued.

WHERE the prior appropriation extends to all the water flowing in the stream at the point of diversion, the appropriator may enlarge his ditch at pleasure, and so increase the amount actually diverted, and other parties whose claims to the stream are subsequent can not complain of such enlargement.[1] Where the prior appropriation extends only to a portion of the stream, and is determined by the amount actually diverted, the measure of such appropriation and of the appropriator's right seems to be the quantity of water which could actually be carried by his ditch in the size and condition in which it was when the subsequent appropriation above him on the stream was made. The rule under these circumstances is thus stated by the supreme court of California: "He is entitled to have the water [of the stream flowing down to his ditch] undiminished in quantity, so as to leave sufficient *to fill his ditch* as it existed at the time the subsequent appropriations above him were made."[2] The supreme court of Nevada has formulated the rule in somewhat more precise terms: "It seems that the quantity of water appropriated is to be measured by the capacity of the ditch or flume at its smallest point; that is, at the point where the least water can be carried through it."[3] It may well be doubted, I think, whether there is any material difference between

[1] James v. Williams, 31 Cal. 211. In Feliz v. City of Los Angeles, 58 Id. 73, it was held that the city had acquired a right to all the water of a river, and that plaintiff's use was permissive, not adverse.

[2] Bear River etc. Co. v. New York M. Co., 8 Cal. 327.

[3] Ophir Silver M. Co. v. Carpenter, 6 Nev. 393; 4 Id. 534. Also in Barnes v. Sabron, 10 Id. 217, the court held that where the prior appropriator of a stream has constructed ditches in order to irrigate his land, if the capacity of his ditches is greater than is necessary to irrigate his farming land, he must be restricted to the quantity needed for the purposes of irrigation, of watering his stock, and of domestic uses; but if the capacity of his ditches is not more than sufficient for those purposes, then, under the facts of this case, no change having been made in the ditches since their construction, and no question as to the right of their enlargement being involved, he must be restricted to the capacity of his ditches at their smallest point.

these two modes of expressing the rule. But the *actual* physical condition of the ditch at the time the use of the water by its means began, and during some period of time after such commencement, and the amount of water *actually* diverted and carried by it at and during these times, do not always furnish an inflexible test or measure of the extent of the appropriator's right. The ditch might be so imperfectly constructed, with irregular and improper grades, and with incomplete excavation, that it could not actually carry so large an amount of water as its general plan and size rendered it capable of carrying, and as its proprietor had intended to appropriate. Under these circumstances, unless the use of the ditch had continued so long a time as to show an intention of the appropriator to adopt it in its existing imperfect condition, the proprietor would be entitled to perfect his ditch by removing obstructions, improving the grades, and the like, so that it could actually carry the amount of water indicated by its general size and character, and originally intended to be appropriated; and the increase in the actual flow of water thus caused would not be an invasion of the rights of subsequent appropriators, although their rights accrued before the improvements were made. The case of White v. Todd's Valley W. Co.[4] arose out of such circumstances. The defendants had made a ditch for mining purposes; and the plaintiff afterwards made a ditch, taking water from the same stream. The plaintiff complained because the defendants had enlarged their ditch, after the plaintiff's appropriation, and had thereby caused a diversion of a greater amount of water, to the plaintiff's injury, and prayed for an injunction. The court held that the defendants were not restricted to the amount of water *actually* taken by their ditch at the very beginning of its use, unless by its general plan, size, and grade it was not capable of carrying more water than was then actually taken by it. If by reason of obstructions in the ditch, or irregularity of its grade at that time, it was not capable at first of taking so much water as its general plan and size would indicate, the defendants would have a reasonable time within which to remove such obstructions or to adjust the grades, and could then divert the water to the full capacity of the ditch. But if the defendants continued to take only the original quantity of water long enough to indicate an intent to divert *only that amount*, or if they delayed for an unreasonable time to remove the obstructions or regulate the grades, then they would be restricted to the amount thus actually taken at first, and the plaintiff would be entitled to all the residue. The rule laid down by this decision is plainly

[4] 8 Cal. 443.

confined, in its scope and operation, to the very special circumstances above described; it can hardly be regarded as furnishing any *general* test or measure of the amount included in a prior appropriation. A few other cases, which deal only with questions of fact as to the amount of water appropriated, are cited in the foot-note.[5]

5. *Subsequent appropriation, and the relations between successive appropriators of the same stream.*

In the previous sections, which particularly describe the mode of effecting a prior appropriation, the rights of the prior appropriator and the amount of water included within a prior appropriation, the relations of the subsequent appropriators, and especially the limitations or restrictions upon their rights growing out of the superior claims of the prior appropiator, have necessarily been involved and stated. I shall not repeat the discussions of these previous sections, and reference must be made to them in order to obtain a full view of the relations subsisting between the prior and the subsequent appropriators and the limitations placed upon the rights which can be acquired by the latter parties. In the present section I purpose to describe the *affirmative* rights, which may be obtained and held by subsequent and successive appropriators, to divert and use the waters of a public stream which have already been appropriated by the prior acts of another party.

Whenever a certain person, A., has made a prior appropriation at a certain point on a stream, even though of the whole amount of water, it has already been shown that another party, B., may make a subsequent appropriation at a place higher up on the stream, may divert and use the waters, and return them, undeteriorated in quality and undiminished in quantity, into the natural channel of the stream above the head of A.'s ditch, and no right of A.'s would thereby be infringed, because his use of the water would not be in any way interfered with.[6] This particular case is simply an instance of the following general doctrine, which has been firmly settled by numerous decisions:

A prior appropriation having been made on a public stream, the residue or surplus remaining of its waters, not embraced within the amount of such prior appropriation, may afterwards be appropriated, either above or below on the same stream, by other parties, if no interference with the rights of the prior appropriator is thereby caused.

[5] Higgins v. Barker, 42 Cal. 233; Reynolds v. Hosmer, 51 Id. 205; Dougherty v. Haggin, 61 Id. 305; Stein Canal Co. v. Kern Island etc. Co., 53 Id. 563.

[6] See *ante*, p. 76, vol. 2.

The doctrine extends to and admits of a succession of such appropriators; and there is no limit to its operation, except such physical limits as arise from the size of the stream itself and the amount taken by each claimant. Among the successive appropriators, each is in the position of a prior one towards all who are subsequent to himself.[7] This general doctrine has been stated in the following modes by different decisions: "In controversies between prior and subsequent appropriators of water, the question is, Has the use and enjoyment of the water, *for the purposes for which the first appropriator claims it*, been impaired by acts of the subsequent claimant?"[8] A decree prohibiting a party situated on a stream below the dam at the head of a ditch belonging to another person from diverting or interfering with the water *above* such dam, does not hinder him from using the surplus water which flows down the stream after the ditch is supplied.[9] The surplus water of a stream, after a prior appropriation, may be the subject of a new appropriation, and the second appropriator will have a paramount right to use all the waters which are not required for the special purposes of the prior appropriator.[10] If a prior appropriator of water for mill purposes suffers a portion of the water, or the whole amount of it, after driving the mill, to flow down its accustomed channel, other parties below him on the stream may appropriate this residuum, so as to obtain a vested right to its use.[11] In Lobdell v. Simpson,[12] the doctrine was briefly but comprehensively stated: "A second appropriator has a right to have the water continue to flow as it flowed when he made his appropriation." The same court said, in Proctor v. Jennings:[13] "A person appropriating a water right on a stream already appropriated acquires a right to the surplus or residuum which he appropriates; and those who hold the prior rights, whether above or below him on the stream, can in no way change or extend their use of the water to his prejudice, but are limited to the rights enjoyed by them when he secured his own."

It makes no difference in the application of this doctrine how the surplus or residue of the water may arise. It may be constant, resulting from an appropriation of a portion only of the water; or it

[7] Stein Canal Co. v. Kern Island etc. Co., 53 Cal. 563; Broder v. Natoma W. Co., 50 Id. 621; Smith v. O'Hara, 43 Id. 371; Higgins v. Barker, 42 Id. 233; Nevada W. Co. v. Powell, 34 Id. 109; Davis v. Gale, 32 Id. 26; Hill v. Smith, 27 Id. 476; American Co. v. Bradford, Id. 361; McKinney v. Smith, 21 Id. 374; Ortman v. Dixon, 13 Id. 33; Butte C. Co. v. Vaughn, 11 Id. 143; Kelly v. Natoma W. Co., 6 Id. 105; Lobdell v. Simpson, 2 Nev. 274; Proctor v. Jennings, 6 Id. 83; Barnes v. Sabron, 10 Id. 217.

[8] Hill v. Smith, 27 Cal. 476.

[9] American Co. v. Bradford, 27 Id. 361.

[10] McKinney v. Smith, 21 Id. 374.

[11] Ortman v. Dixon, 13 Id. 33.

[12] 2 Nev. 274.

[13] 6 Id. 83.

may be intermittent, resulting from an appropriation of all the water during only a part of the time. If a prior appropriation is of such a character that it only takes and uses the water on certain days of the week or month, a second appropriator may acquire a vested and paramount right to the same amount of the water flowing through the stream on the other days not embraced in the prior claim. A. having appropriated the entire water of a stream to be used only on Mondays, Tuesdays, and Wednesdays, B. may subsequently acquire an equally perfect right to use the same quantity of the water on Thursdays, Fridays, and Saturdays.[14] This rule is stated in the Nevada case in the most general terms: "If the first appropriator only appropriates a part of the waters of a stream for a certain period of time, any other person may not only appropriate a part or the whole of the residue, and acquire a right thereto as perfect as that of the first appropriator, but he may also acquire a right to the quantity of water used by the first appropriator at such times as it is not needed or used by him."

The rights of the subsequent appropriator conferred and protected by this doctrine may exist and be exercised under the following different conditions of fact: (1) A subsequent appropriator may always take and use *any* amount of water at a place higher up the stream than the point of the prior appropriation, and without any reference to the amount embraced in such prior appropriation, provided he returns all the water after its use, undeteriorated in quality, to its natural channel in the stream, before it reaches the prior appropriator's place of division—the head of his ditch; since under these circumstances the prior appropriator is in no manner injured. (2) When a prior appropriation includes only a certain portion of the water flowing in a stream—measured, for example, by the capacity of the ditch—a subsequent appropriator, at a place higher up on the stream, may always take from the stream, use and consume without returning, any quantity of its water, provided he leaves flowing down the natural channel after his own diversion a sufficient amount of the water at all times to meet the demands of the prior appropriation; in other words, so as not to lessen nor interfere with the amount which the prior appropriator is entitled to draw off by his means of diversion. (3) When a prior appropriator takes and uses the whole or any portion of the water of a stream, for milling or other similar purposes, by which the water is not consumed, and then after such use returns the water to the stream so that it thenceforth flows down its natural

[14] Smith v. O'Hara, 43 Cal. 371; Barnes v. Sabron, 10 Nev. 217; and see Lytle Creek W. Co. v. Perdew, 1 West Coast Rep. 866.

channel, a subsequent appropriator lower down the stream may appropriate and obtain a vested right to the whole or any part of the same water so discharged and flowing down the natural channel after its former use. (4) When a prior appropriator takes and uses a certain portion or quantity of the water from a stream, and by the nature of his use consumes the same without restoring it or any part of it to the stream, then the surplus or residue of the stream not so diverted but continuing to flow down the natural channel, or any part thereof, may be subsequently appropriated by another party lower down the stream, and his rights of appropriation in such surplus or residue will be vested and perfect. (5) In all these conditions, a subsequent appropriator may appropriate and obtain a vested right to use the water during the fixed intervals of time when it is not taken and used by the prior appropriation. All the possible cases which can arise may be accounted for and explained by a combination among the foregoing general conditions of fact. Whenever successive appropriations have been properly and lawfully made on the same stream, each party is, with respect to the extent of his appropriation—the amount included therein—in the legal position of a prior appropriator towards all the others.

J. N. P.

(TO BE CONTINUED.)

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

KENNEDY v. CITY OF SACRAMENTO.

Decided February 18, 1884.

NO ACTION MAINTAINABLE ON THE MUNICIPAL BONDS OF SACRAMENTO ISSUED UNDER CHARTER OF 1858.—The city of Sacramento being largely indebted, its charter of 1858 provided for the funding of such indebtedness by the issue of bonds, bearing interest at six per cent., to the creditors who should surrender their former evidences of indebtedness and accept these bonds in place thereof. This charter provided, among other things, that "none of the claims herein specified shall be liquidated or paid except in the manner herein specified;" also, that "the city shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final." It further provided that the city government should levy an annual tax of one per cent. on taxable property for municipal purposes, and that of the tax thus levied and of other revenues specified there should be annually set apart and appropriated "fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest and the final redemption of the bonds issued for the city indebtedness, in accordance with the provisions of this act;" with a further provision that the interest and principal of all these bonds should be paid from this interest and sinking fund. In 1863 this charter of 1858 was repealed, and another charter was adopted, which re-enacts all of the provisions above recited without any material change. The plaintiff is the holder of bonds of the city issued in pursuance of the charter of 1858, and he brings a suit against the city to recover the amount of the unpaid and overdue interest coupons of such bonds. *Held*, That the parties who surrendered their prior evidences of indebtedness and took these bonds took them under the provisions of the charter of 1858, which was a contract made between the city and them, to the effect that the bonds should be collected and paid only in the particular manner therein specified, and in no other, and that the city should not be liable to be sued; and that such contract was made upon a valuable consideration of advantage moving to both parties, and was valid and binding; and therefore no action can be maintained by the holders of said bonds, against the city, to recover the amounts unpaid and overdue thereon. If the provision of the state constitution, making all corporations liable to be sued like natural persons, has any application to municipal corporations, it had been waived by the bondholders.

MANDAMUS THE REMEDY.—It seems the proper and only remedy of the bondholders is by *mandamus* against the city treasurer to compel him to pay the interest out of the fund in his hands; or, if there is no such fund, then by *mandamus* against the city government to compel them to raise and appropriate the fund by taxation, as directed by the original charter of 1858. The provision of that charter being a part of the contract between the city and the bondholder, for his benefit, its repeal by the legislature would be nugatory.

Before SAWYER, Circuit Judge.

ACTION to recover interest due on municipal bonds of the defendant. The opinion states the facts.

J. W. Winans, for the plaintiff.

J. H. McKune, *A. P. Catlin*, and *W. A. Anderson*, for the defendant.

By the Court, SAWYER, Circuit Judge (delivering an oral opinion). This is an action brought to recover nine thousand dollars due on coupons of the Sacramento city bonds. It is an ordinary action upon the instruments, not a *mandamus* against the officers of the county, but an action against the city of Sacramento to recover on these coupons as upon a contract. Under the charter of Sacramento of 1851, a large amount of indebtedness had accrued, for which bonds were issued.

In 1858, the city and county of Sacramento were consolidated into a municipal corporation like the city and county of San Francisco, the boundaries of the city and county being co-extensive with the former

boundaries of the county. In that act consolidating the city and county, provision was made for funding the then existing debt of the city and of the county of Sacramento, and provision was made in the act for the purpose of liquidating, funding, and paying the claims against the city and county of Sacramento hereinafter specified. "The treasurer shall cause to be prepared suitable bonds for the county of Sacramento, not exceeding the sum of six hundred thousand dollars, and for the city of Sacramento not exceeding one million six hundred thousand dollars, bearing interest at the rate of six per cent. per annum, from the first day of January, 1859:" Stat. 1858, p. 280, sec. 37. Then it provides for raising a fund for the payment of the interest, and ultimate extinguishment of that prior indebtedness of the city of Sacramento so funded. In the last clause of the section, it provides that "*none of the claims herein specified shall be liquidated or paid except in the manner herein provided.*"

The act also provides that "the city and county shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects, be subject to any attachment, levy, or sale, *or any process whatever, either mesne or final:*" Id., 268, sec. 1; thereby cutting off all right of suit, and providing that none of the funds, or revenues from taxation, or otherwise, shall be reached, on account of this indebtedness, otherwise than as provided in the act.

Section 34 provides that the board of supervisors shall not have power to levy any greater taxes than as follows, viz.: "On the real and personal estate, except such as is exempt by law throughout the city and county, a tax of one hundred cents on the one hundred dollars," shall be levied, and the amount is limited to that sum annually except for state and special purposes. But it provides further that "they shall levy for municipal purposes, on all real and personal property within the city, except such as is exempt by law, a tax of one hundred cents on one hundred dollars."

Section 350 provides that "the revenue derived from and within the city limits for municipal purposes, namely, taxes, licenses, harbor dues, water rents, and fines collected in the mayor's court, or otherwise, when paid into the treasury, shall be set apart and appropriated as follows: *Fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest and the final redemption of bonds issued for city indebtedness, in accordance with the provisions of this act,*" referring to the bonds which were to be issued in liquidation of the prior indebtedness of the city in pursuance of the terms of this act.

Section 38 provides: "*The annual interest and principal of all bonds issued for claims against the city shall be paid from the interest and sinking fund provided in section* 35, *and in the manner otherwise provided in this act.*"

There is then a provision for funding the prior indebtedness of the city to the amount of one million six hundred thousand dollars, and provision that fifty-five per cent. of the taxes and other revenues of the city shall be set apart to pay the interest, and to secure the ultimate extinguishment of the bonds; and it provides that "*none of the claims herein specified shall be liquidated or paid except in the manner herein provided;*" and it provides that there shall be no suit against the city on these or any other claims, and no execution or other process shall issue by which

any of the property or revenues or moneys or other resources of the city shall be reached.

The rate of interest was annually six per cent. to be paid upon the indebtedness. The parties who surrendered their prior evidences of indebtedness and took these bonds took them under the provisions of this act, which was a contract made between the city and them, that the bonds should be collected only in that particular manner, and paid in that particular mode, and no other, and that there should be no other remedy for them—that the city should not be sued. The advantages which they obtained are subject to the provisions made for their payment—to the limitations put upon their remedy. The advantage to the city was that it should not be harassed by any other kind of suit, an extension of the time for payment, and the reduction of the rate of interest. The advantage to the holders was the specific, certain, and permanent provision made for prompt payment in future.

This was a fair contract, entered into between the city on the one hand and its creditors on the other, in virtue of the provisions of this act. There were advantages gained and rights surrendered by each, and a valuable consideration moving from and to both contracting parties. In 1863 that charter was repealed and another one passed.

The city and county were restored by the charter of 1868. In that charter it is provided that the city of Sacramento may be sued upon bonds or covenants, etc., "provided, however, that such bond, covenant, agreement, contract, matter, or thing, that was the cause of action, has been made or entered into after the passage of this act:" Stat. 1863, p. 415, sec. 1; so that by implication, in providing the kinds of bonds upon which suit might be brought, it was limited to the covenants or bonds or liabilities accruing after the passage of the act. Thus with reference to these bonds in question, there is no change in the law with reference to the liability of the city to be sued. And in that act it is also "provided further that none of the lands, tenements, hereditaments, taxes, revenues, franchises, actions, choses in action, property, or effects of any kind or nature whatsoever of said city or of either or any of its trusts or uses shall be attached, levied upon, or sold on any process whatever, either original, mesne, or final," thereby continuing as to *all* demands against the city that provision of the charter of 1858 having reference to the inability to execute a judgment when obtained, by virtue of any process, mesne or final, against the city itself. With reference to the city of Sacramento, therefore, and with reference to these bonds, in both of these particulars the law as laid down in the act of 1858 is continued.

The third clause of section 2 of the act of 1863 also provides that the board of trustees shall have power "to levy and collect taxes and assessments on all property within the city, both real and personal, made taxable by law for state or county purposes, which taxes shall not exceed one per cent. per annum upon the assessed value of all property:" Stat. 1863, p. 416. That is the same amount that they could levy under the old charter.

Section 26 continues the provision for the payment of the bonds in question with one exception in language. In this act the words "*net water rents*" are used instead of "water rents." This is the only change. The provision is as follows, viz.: "The revenue derived from and within the city limits for municipal purposes, viz., taxes, licenses, harbor dues, *net* water rents, and fines collected in the police court or otherwise, ex-

cept as hereinafter provided, when paid into the treasury, shall be appropriated and divided as follows: *Fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest upon the bonds legally issued for city indebtedness issued under the act of* 1858; *the excess of said fund, after the payment of said interest, shall be applied to the redemption of said bonds, in such manner as the board of trustees may determine:*" Id. 426, sec. 26.

Thus in the act of 1863 the same provision for the payment of these bonds is continued that was made in the act of 1858, and the same limitations upon the remedy are continued by providing that no suit shall be maintained against the city, and that none of its property, or revenues, or funds shall be reached under any process, mesne or final.

With reference to the amount levied, one word is changed only, the positive provision in the old act that one hundred cents on the one hundred dollars shall be raised each year for the purposes of revenue is made permissive in form instead of mandatory in the new act. This is the only change in the act in that particular, the same provision otherwise continuing as provided in the other act. But words permissive in form, when a public duty is involved, are construed as mandatory. Under the provisions of these acts, in my judgment, the city is not liable to be sued on these bonds or coupons. It is one of the terms of the contract between the city and the bondholders, and a part of the consideration upon which the bonds were issued, that the city shall not be sued on them. The remedy alone is to compel the treasurer, by *mandamus*, to pay any money in the sinking fund upon the coupons.

If the board of trustees refuse to provide that fund, the remedy is to compel them to provide a fund by a *mandamus*, in accordance with the duty imposed upon them by law. These are proceedings personally against the officers to compel them to perform a duty enjoined by law in respect to which they have no discretion.

Both of these remedies are remedies against officers to compel the performance of duties required by these express provisions of the act for the payment of these bonds, and not a suit against the city. Those remedies, the supreme court of California has held, are available.

In the case of Meyer v. Brown, decided on September 28, 1883, the supreme court held that the board of trustees is subject to be compelled to perform its duty to provide this fund by *mandamus*. On page 157 of the Pacific Coast Law Journal, the court says: "Having thus made provision for the payment annually of the interest on the bonds, and ultimately for their redemption, the legislature offered them in payment of the legal claims against the old city government.

"The offer was accepted, and the holders of the latter surrendered their claims, in consideration of which the consolidated government issued to them its bonds, pursuant to the provisions of the act. The bonds carried with them the pledge of an annual tax for municipal purposes on all real and personal property within the city limits, except such as is exempt by law, of one hundred cents on the one hundred dollars, fifty-five per cent. of which to be set apart and appropriated to an interest and sinking fund to be applied to the payment of the annual interest upon the bonds and to their final redemption. The tax was the chief security offered the creditors as an inducement to accept the bonds in payment of their claims.

"When the bonds, for whose payment with interest provision was thus

made, were issued and accepted by the creditors of the old city government, a contract was made as solemn and binding, and as much beyond subsequent legislation, as it would have been if made between private persons. These views will be found sustained and amplified in an able opinion recently rendered by the supreme court of the United States in a case entitled Louisiana v. Pillsbury, reported in 105 U. S. 278."

I have examined that case, and it fully sustains this proposition. It is a similar case. The contract was enforced by *mandamus* upon the officers.

"It is well occasionally," added the court, "to recall the fact that there is no more reason to permit a municipal government to repudiate its solemn obligations entered into for value than there is to permit an individual to do so. Good faith and fair dealing should be exacted of the one equally with the other."

In that case, then, it was held that the board of trustees was bound to go on and levy this tax in pursuance of the old law, if that was more advantageous to the parties than the new one. It is incompetent for them to repeal the old statute, so far as it affected the right of these bondholders, and in a recent case, decided February 13, 1884, the case of Meyer v. Porter, the supreme court of California again takes a similar view.

The question was, whether the treasurer may be compelled to pay the interest out of the fund provided, and the supreme court holds in this case that the treasurer may be compelled to pay out of the moneys which are in that sinking fund the interest due upon coupons that are presented, irrespective of the fact that only one party presents his coupons. Under this decision, so long as there is any money in the fund, the holder of coupons due is entitled to his money on their presentation, and it is not necessary to file a bill in equity to enforce a trust, making all the holders of the bonds and coupons parties, for the purpose of distributing the fund *pro rata*, but that any man having overdue coupons may by *mandamus* compel the treasurer to pay out the funds upon such coupons, so long as there are funds. Under those decisions of the supreme court of the state, supported by the authority of the supreme court of the United States, the holders of bonds and coupons have the exact remedy which the provision of the charter of 1858 provides for the payment of those bonds, and which the act of 1863 continues; and if the latter act does not in all respects continue the remedy in the particulars wherein the former act was repealed, the repeal is void, and the old act in force.

The plaintiff insists that the provisions of the charter of Sacramento of 1858, that the city shall not be sued, and continued with respect to the bonds and coupons in question in the act of 1863, is void under the provision of the state constitution, that "all corporations shall have the right to sue and shall be subject to be sued in all courts in cases like natural persons:" Old Constitution, art. 4, sec. 33. It may well be doubted whether this provision applies to municipal corporations and counties made corporations. But if it be otherwise, the contract in this case takes the bonds in question out of the provision. It was one of the conditions upon which the bonds were issued by the city and accepted by the bondholders, that there should be no suit on the bonds, and no other remedy than that provided by the charter. This was a part of the benefit to inure to the city by the arrangement, and an important and valuable part of the consideration for its action in issuing the bonds and making the extraordinary and permanent provision and appropriation

for payment beneficial to the bondholders. This part of the contract is as important and as binding as any other. The provisions are, that the city shall not be sued, and that none of its property, revenue, or funds shall be taken upon any mesne or final process, and that none of the claims herein specified shall be liquidated or paid except in the manner herein provided.

Also, that "the annual interest and principal of all bonds issued for claims against the said city shall be paid from the interest and sinking fund provided by section 35, and in the manner otherwise provided in this act." The action brought against the city, therefore, in the face of these provisions of the contract, can not, in my judgment, be maintained, for the reasons and upon the grounds stated. The only remedy is to proceed by *mandamus* against the officers personally, to compel them to perform their respective duties as prescribed by the act of 1858, and under the act of 1863, also, so far as that act is in accord with the act of 1858. The supreme court, as we have seen, has held that it was incompetent for the legislature to repeal the provisions of the charter of 1858, so far as they affect the means provided for liquidation of these bonds. Consequently, that the board of trustees could be compelled by *mandamus* to provide the funds in accordance with the requirements of the charter of 1858; and, when so provided, that the treasurer having the custody of the funds could be compelled in like manner to pay the coupons as presented out of the funds provided.

There must be judgment for defendant on the grounds indicated, viz.: that a suit against the city is not the proper remedy, and can not be maintained in the face of the contract entered into under the statute; and it is so ordered.

BALFOUR ET AL. *v.* SULLIVAN, Collector, etc.

Decided March 10, 1884.

GRAIN BAGS MANUFACTURED IN THE UNITED STATES, RETURN OF, FREE OF DUTY.—Under section 9 of the act of congress of February 8, 1875, grain bags manufactured in the United States, when exported filled with American products, may be returned to the United States free of duty, notwithstanding such bags were manufactured from foreign material, and at the time of exportation the manufacturers were paid a "drawback" for duties on such material.

THE PROVISION OF SUCH SECTION AUTHORIZING THE RETURN "under such rules and regulations as shall be prescribed by the secretary of the treasury," does not authorize that officer to prohibit the return unless duties are paid.

SUIT to recover from the defendant, as collector of the port of San Francisco, the amount paid as duties on certain grain bags. The opinion states the facts.

Page & Eells and *Milton Andros*, for the plaintiffs.

S. G. Hilborn, United States attorney, and *Ward McAllister, Assistant United States attorney*, for the defendant.

By the Court, SAWYER, Circuit Judge. This is a suit to recover of defendant the sum of one hundred and eighty dollars, collected as duties on eleven thousand eight hundred and fifty grain bags, which collection of duties is claimed to be unlawful. The grain bags had been manufactured by Dietrick & Co., manufacturers of bags, at San Francisco, out of material of foreign production, upon which the importers had paid the proper

duties. The bags were stamped, "Dietrick—Drawback Right Reserved," and sold to grain producers of the state of California. These bags having been purchased by the grain growers, and filled with wheat produced in California, were, with their contents, afterwards sold to plaintiffs, in the ordinary course of business in the grain market, who shipped the wheat in the bags, as so purchased of the producers, to Liverpool, England, where the wheat was sold, and emptied from the bags, and the bags were afterward brought back to San Francisco, whence they had been shipped by plaintiffs, the ownership of the bags remaining in the plaintiffs from the time of their purchase filled with California wheat till their return to San Francisco empty. Upon their leaving San Francisco, filled with wheat, Dietrick & Co. claimed the drawback of duties paid on the material used in the manufacture of the bags, and the drawback was paid to them in assumed pursuance of the provisions of section 3019 of the revised statutes of the United States and the regulations of the secretary of the treasury for carrying those provisions into effect. On the return of the bags the plaintiffs claimed, upon various grounds, that they were entitled to bring the bags to San Francisco and receive them free of duty. The collector took the ground that the drawback having been paid on exportation, in pursuance of section 3019 and the regulations of the secretary of the treasury, duties must be paid; and plaintiffs were compelled to pay the duties claimed in order to obtain the bags. The action of the collector, in collecting the duties, was affirmed by the secretary of the treasury, and this action is brought to recover the duties so collected.

Section 9 of the act of congress of February 8, 1875, "To amend existing customs and internal revenue laws, and for other purposes:" Sup., R. S. 130, provides that "*grain bags*, the manufacture of the United States, when *exported, filled with American products, may be returned* to the United States *free of duty*, under such rules and regulations as shall be prescribed by the secretary of the treasury." There is no exception to these provisions. The *bags*, whatever may be said of the *material*, were "the manufacture of the United States," and they were exported *filled with American products*, and being such were entitled under this act to "be returned to the United States *free of duty*." It does not appear to me that this explicit language is open to construction. The only exception is, that they shall be returned "under such rules and regulations as shall be prescribed by the secretary of the treasury." The authority of the secretary only extends to the *modus operandi*—the course to be pursued in identifying and returning the "grain bags;" and that power does not extend to an imposition of a duty in the face of the provision of the statute that they "may be returned * * * free of duty." The statute in no sense authorizes the imposition of a duty, as a part of the rules and regulations to be prescribed by him. The omission to provide for a repayment of the drawback in such cases may be an oversight on the part of congress. But whether so or not, to require by regulation the collection of the regular duties upon bags manufactured in the United States, because the bags, when exported, paid a "drawback" for duties on the material of which they were manufactured, is to ingraft an exception on the provisions of the act, authorizing the bags which were "exported filled with American products," "to be returned * * * free of duty," which congress either did not see fit, or omitted to adopt. The secretary of the treasury was not authorized to make any such exception: Merritt

v. Jones, 106 U. S. 466; Merritt v. Welsh, 104 Id. 702; Balfour et al. v. Sullivan, 8 Saw. 648.

Under the provision of the act cited, the bags in question were entitled to re-enter the United States "free of duty," and the duties on that ground were illegally demanded and collected. None of the other provisions of the statute cited affect this ground relied on for a recovery, and they therefore need not be discussed. There must be a judgment for plaintiffs for the amount of duties unlawfully collected, and it is so ordered.

CIRCUIT COURT, DISTRICT OF OREGON.

WALLAMET IRON BRIDGE CO. *v.* HATCH ET AL.

Filed March 3, 1884.

BILL OF REVIEW.—An application to file a bill of review, without the performance of the decree, ought to be made to the court by petition and on notice to the adverse party, and if it appears that the performance of the decree would destroy the subject of the litigation, it ought to be allowed.

IDEM.—On the hearing of a bill of review, the court can only consider the errors of law apparent on the face of the record, and a fact found or determined by the decree is presumed to have been sufficiently proved by the evidence.

THE WALLAMET RIVER A NAVIGABLE WATER OF THE UNITED STATES.—The Wallamet river, though wholly within the state of Oregon, by means of its connection with the Columbia river, forms a highway for interstate and foreign commerce, and is therefore a navigable water of the United States, and subject, as such, to the control of congress.

NAVIGABLE WATERS IN OREGON ARE COMMON HIGHWAYS.—The act of February 14, 1859, 11 Stat. 383, admitting Oregon into the Union, which declares that the navigable waters therein shall be "common highways, and forever free" to the citizens of the United States, is not a compact made with or condition imposed upon the state in consideration of its admission into the Union, but is, so far, an absolute and valid regulation, made by congress in pursuance of its power over the navigable waters of the United States, as a means of interstate and foreign commerce, which it might as well have enacted before or after as at the time of such admission.

OBSTRUCTION TO "COMMON HIGHWAY."—Congress, by the act of 1859, having declared the Wallamet river "a common highway," the state can not authorize any one to build a bridge across the same, which, under the circumstances of the case, will needlessly impede or obstruct the navigation thereof.

JURISDICTION OF THE UNITED STATES CIRCUIT COURT.—The Wallamet river being declared "a common highway" by congress, the question of what constitutes a needless, and therefore unlawful, obstruction thereto, arises under a law of the United States, and therefore the United States circuit court has jurisdiction to hear and determine a suit involving the same.

THE ORDINANCE of 1787.—*Semble*, that the clause in the fourth article of the compact in the ordinance of 1787, concerning the navigable waters of the north-west territory, was not abrogated or superseded by the formation of states therein and their admission into the Union.

BILL of review. The opinion states the facts.

George H. Williams and *Rufus Mallory*, for the plaintiff.

Walter W. Thayer and *John M. Gearin*, for the defendants.

DEADY, J. This is a bill of review, filed May 27, 1883, and brought to reverse the final decree given in this court on October 22, 1881, in a suit between the parties hereto, commenced by the defendants herein on January 3, 1881, to obtain an injunction restraining the plaintiff herein from further constructing a bridge across the Wallamet river, at the foot of Morrison street, in Portland, upon the ground that such a bridge as

said plaintiff was then engaged in building was an unnecessary and unlawful hinderance and obstruction to the navigation of said river—particularly with sea-going vessels—because of the insufficient character and improper position of the piers and the lack of width in the draw; that said bridge would be a public nuisance, injurious and damaging to the rights and interests of defendants herein as the owners and lessees of valuable wharf property in Portland, a short distance above the site of said bridge, and contrary to the act of congress of February 14, 1859, 11 Stat. 383, which provides, "that all the navigable waters of said state [Oregon] shall be common highways."

An application was made to the district judge on the bill, and affidavits and counter-affidavits for a provisional injunction, and after a hearing, in which the corporation maintained its right to build the bridge in question under and by authority of an act of the legislature of Oregon, of October 18, 1878, authorizing "the Portland Bridge Company," a corporation formed under the laws of Oregon, "or its assigns," to build a bridge, "for all purposes of travel and commerce," across the Wallamet river, between Portland and East Portland, "at such point or location on the banks of said river," as it might select, "on or above Morrison street of said city of Portland"—"provided that there shall be placed and maintained in said bridge a good and sufficient draw of not less than one hundred feet in the clear, in width, of a passage-way, and so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of vessels through said bridge."

On March 28, 1881, an order was made continuing the application for an injunction until the April term, and until the circuit judge should be present, and restraining the corporation in the mean time as prayed for in the bill: Hatch et al. v. Wallamet Iron Bridge Co., 7 Saw. 127.

On April 11, 1881, the corporation put in its answer to the bill, alleging that it was a corporation duly formed under the laws of Oregon, and the assignee of the Portland Bridge Company aforesaid; and admitted that it was building the bridge, as alleged, under authority of the act of the legislature aforesaid, except that the draw was one hundred and five feet in the clear, instead of one hundred, and that the piers were sufficient and at right angles with the current; and denied the same was or would be any hinderance or obstruction to the navigation of the river, or any injury to the defendants herein.

At the April term the application for a provisional injunction was further heard upon the bill, answer, and further affidavits and counter-affidavits, before the circuit and district judge, the counsel for the plaintiff herein then conceding that the law of the case had been correctly ruled on the former hearing before the district judge: Hatch v. Wallamet I. B. Co., 7 Saw. 127; and that the only question in the case for the consideration of the court was whether, under the circumstances, the proposed bridge was an unreasonable use of this common highway; and on April 17th an order was made allowing the provisional injunction restraining the corporation, as prayed for in the bill: Id. 141.

Subsequently the cause was put at issue by the filing of a replication to the answer, and testimony taken by both parties; and at the October term it was finally heard before the circuit judge, who, on October 22, 1881, gave a decree therein for the defendants herein, perpetually enjoining the corporation as prayed for in the bill; and also requiring it to remove the

material already placed in the river in the construction of the peirs. From this decree an appeal was allowed to the plaintiff herein on October 22, 1883.

An application was made for leave to file the bill of review, without first performing the decree requiring plaintiff therein to remove the unfinished piers from the river. The application was based upon a petition or allegation in the bill, stating the grounds thereof. Upon notice to the adverse party, it was heard and allowed upon the ground that the performance of the decree, in this respect, would involve large expense, and the destruction, so far, of the subject of the litigation, so that, if the decree is reversed for error, the plaintiff herein will nevertheless suffer an irremediable loss, as in the case of the cancellation of a bond in obedience to a decree: Story's Eq. Pl., sec. 406; Davies v. Speiden, 104 U. S. 83.

But I think the better method of making the application is by a separate petition for that purpose, against which the adverse party may show cause and the matter be fully heard and determined thereon. The right to file the bill may depend upon a question of fact not determined or affected by the proceedings or decree in the case, as the pecuniary ability of the party to pay a given sum of money, and therefore the application should be made in such manner as will best enable the parties to be fully heard in the premises.

The rule requiring the performance of the decree is said to be "administrative" rather than "jurisdictional," and therefore a bill filed without such performance or leave would give the court jurisdiction to review the decree; and if the adverse party did not move to strike it from the files, he would be held to have waived the objection: Davis v. Speiden, 104 U. S. 85.

The defendants herein demur to the bill, for that there are no errors in the record, nor any sufficient matter alleged in the same to require a reversal of the decree. The bill contains an assignment of errors, eleven in number, most of which are predicated upon the reasons given in the opinion of the court allowing the provisional injunction, rather than the decree itself, and all but one are simply variations of the allegation that the court erred in deciding that the act of congress of February 14, 1859, was in any degree a limitation or restraint upon the power of the state to obstruct or authorize the obstruction of the navigation of the river by the construction of a bridge of any character across the same. The exception is the assignment No. 4, which alleges that the court erred in deciding, as a matter of fact, that the bridge in question is or will be a nuisance and serious impediment to the navigation of the river.

This is a proceeding to review the former determination of this case, and obtain a reversal of the decree then given therein, for errors of law apparent on the face of the record—the pleadings, proceedings, and decree—without reference to the evidence in the case: Story's Eq. Pl., sec. 407; Shelton v. Vankleek, 106 U. S. 532. No question is made but that the allegations of the original bill are sufficient to authorize the decree; and the law presumes that the evidence was sufficient to sustain it.

It follows, then, that for the purpose of this proceeding it must be considered settled that this bridge, as and where it was being built, is and would be, as a matter of fact, a serious and unnecessary impediment and obstruction to the navigation of the river, by reason of which the defendants herein suffered and would suffer, as riparian proprietors, special damage.

But whether such obstruction is also unlawful is the question, and the only one properly arising on this bill of review. The assignment of errors in law, as has been stated, are, in effect, that the act of 1859 has no application to the case; that congress has made no provision on the subject of the navigation of the river; and that therefore the whole question of the lawfulness of the proposed structure arises under the state law, and is without the jurisdiction of this court.

The argument of counsel for the corporation, in support of this conclusion, is, in substance and effect:

1. The Wallamet river is wholly within the state of Oregon, and therefore not within the power of congress to regulate or conserve its use as a vehicle or means of interstate or foreign commerce.

Now, this proposition has no countenance or support in either reason or authority. In fact, and for all the purposes of commerce, the Wallamet river is a part of the Columbia, of which it is an important affluent or branch. Together, they form, or help to form, a continuous highway between Oregon and the other Pacific states and territories and foreign countries; therefore, in contemplation of the constitutional grant of power to congress over the subject of commerce between these states and countries, and for the purpose of regulating the same, it is the property of the nation—a navigable water of the United States.

The authorities from Gibbon v. Ogden, 9 Wheat. 1, to Miller v. City of New York, 3 S. C. Rep. 234—a period of sixty years—are uniform and unqualified on this point. In Gilman v. Philadelphia, 3 Wall. 724, Mr. Justice Swayne says: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress. This necessarily includes the power to keep them open and free from any obstruction to their navigation, interposed by the states or otherwise; to remove such obstructions when they exist; and to provide, by such sanctions as they may deem proper, against occurrence of the evil, and for the punishment of the offenders."

In The Daniel Ball, 10 Wall. 557, it was held that Grand river, a comparatively insignificant water, lying wholly within the state of Michigan, but emptying into the lake of that name, and only navigable forty miles from its mouth to Grand Rapids, for a boat of one hundred and twenty-three tons burden, is a navigable water of the United States and subject to its control as a highway of commerce, interstate and foreign, on account of its junction with Lake Michigan, of which it forms a part. In delivering the opinion of the court, Mr. Justice Field said (page 563) the common-law test of the navigability of a river—the ebb and flow of the tide therein—does not apply to the rivers of this country. "Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a contiued highway over which commerce is or may be car-

ried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

In Escanaba Co. v. Chicago, 107 U. S. 678, it was held that the Chicago river, lying wholly within the city of Chicago, and a little local stream compared with the Wallamet, is a navigable water of the United States, because it leads into lake Michigan; and in Miller v. The City of New York, *supra*, the same rule was applied to the East river, a water wholly within the state of New York, but connecting the Hudson and the sound, and therefore a highway of interstate and foreign commerce. Mr. Justice Field delivered the opinion of the court in both these cases, and referred to and relied on the above citation from the opinion in the case of The Daniel Ball. See also Hatch v. Wallamet I. B. Co., 7 Saw. 131.

2. That if congress has the power to regulate the navigation of the Wallamet river, as a navigable water of the United States, it can not do so by a special act, as the statute of 1850, applicable alone to the waters of Oregon, but only by a general law, which shall operate uniformly upon all such waters in the United States. And this proposition is also without a shadow of foundation in either reason or authority. It is rather late in the day to question the right of congress to exercise its authority over the navigable waters of the United States specially—from time to time and place to place—as it may consider the exigencies of commerce to require. Congress has been making appropriations from time to time for years to maintain and improve the navigation of the Wallamet river, but on this theory of its power all such acts are void and usurpations of power, unless a like provision was made at the same time for every other navigable water of the United States.

In the last fifteen or twenty years congress has legislated largely on the subject of bridges over the Ohio, Mississippi, and Missouri rivers, prescribing when, where, and how they may or may not be built: Hatch v. Wallamet I. B. Co., 7 Saw. 138; and although important interests have been unfavorably affected by such legislation, it was never before suggested that it was invalid for want of such uniformity. It has also legislated specially upon the subject of a bridge over the East river in New York; and although the legality of this structure has since been contested from the circuit to the supreme court of the United States, Miller v. The City of New York, *supra*, no one appears to have ever questioned the legality of the act of congress authorizing its erection and prescribing its character and location, on this or any other ground.

The vice of the argument in support of each of these propositions is the assumption that the navigable waters within a state are exclusively the waters of such a state, and therefore congress has no power over them; or, if it may legislate concerning them in the interest of commerce, it can only do so by such general legislation as shall limit or affect the power of each state in the premises equally, so as to preserve, as it is said, its "equal footing in the Union with the other states."

But, as we have seen, this theory of the matter is founded upon a total misapprehension of the relation of the national and state governments to the subject and to one another. For the purposes of commerce and the exercise of the power of congress over that subject, every navigable water in the Union, which of itself or by means of its connections forms a continuous highway for interstate or foreign commerce, is primarily the navigable water of the United States, over which it has the same power for the purposes of such commerce as if it was wholly in a territory or

the District of Columbia. When and how far congress will exercise this power is a question for its determination in each case, looking to the public convenience and general welfare. In the exercise of this, as in the case of other congressional powers, no such thing as uniformity of action is desirable or attainable; and it is also to be considered, that what is lawful may not always be expedient.

3. That congress has no power, in the admission of a state into the Union, to impose, by compact or otherwise, any limitation or restriction on its powers or rights as a state, under the constitution; and therefore the act of 1859, admitting Oregon into the Union, so far as it attempts to restrict its power over the navigable waters within its limits, is void and of no effect. But admitting the premises, the conclusion does not follow.

Although the grant of power to congress to admit new states into this Union, U. S. Const., art. 4, sec. 3, is unqualified, yet it is well established by the supreme court that congress can not admit a state upon any other than an equal footing with the other states therein; and therefore can not, as a consideration of such admission, make any valid compact or enactment which shall deny to such state within its limits the municipal powers common to the others: Pollard v. Hagan, 3 How. 233; Permoli v. New Orleans, Id. 609; Strader v. Graham, 10 Id. 92.

The act of 1859, admitting Oregon into the Union, contains (section 4) four propositions to the people of Oregon concerning the public lands therein, which, in consideration of a valuable grant of public land, they accepted by an act of the legislature of June 3, 1859: Or. Laws, 101. But the admission of the state was not conditioned upon the acceptance of these propositions, and in fact preceded it. Nor did the state, in accepting it, undertake to relinquish any power or right that belonged to it, as a state of the Union, unless it is the right to tax "non-resident proprietors" higher than "residents." Therefore this portion of the act is valid, without reference to such acceptance, as a congressional enactment respecting the disposition of the public lands in Oregon: U. S. Const., art. 4, sec. 3; Pollard v. Hagan, 3 How. 224.

But the clause in section 2 of the act of 1859, declaring the navigable waters in Oregon to be "common highways," is no part of these propositions, and does not even purport to derive its force or vitality from this or any compact, but solely from the fact that it is an act of congress, duly passed by it in pursuance of its power to regulate commerce. The admission of the state and the enactment of the regulation are simply coincident in point of time. The one was admitted unconditionally, and the other enacted absolutely; and the regulation might have been enacted on the day before or the day after the admission, or at any time since as well as then.

But even if it had been made a condition of the admission of the state into the Union that the people thereof should consent to this regulation, it would nevertheless be valid as an act of congress, because that body had the power to pass it without their consent. Their consent would add nothing to its force or validity.

In the leading case on this subject, of Pollard v. Hagan, *supra*, the court say (page 229) of the following declaration contained in the compact entered into between the United States and Alabama, upon the admission of the latter into the Union, "that all navigable waters within the said state shall forever remain public highways, free to the citizens of said

state and the United States, without any tax, duty, impost, or toll therefor, imposed by the said state," 3 Stat. 492, that it was nothing more than a regulation of commerce, and as such a valid and binding act of congress, without reference to the supposed compact or the consent of the people of Alabama.

4. That the provision in section 2 of the act of 1859—"all the navigable waters of said state [Oregon] shall be common highways and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost, or toll therefor"—was not intended, and should not be construed as a restriction or limitation on the power of the state to impede and obstruct the navigation of the Wallamet river, at its pleasure, but only on its power to impose a toll upon any citizen of the United States on account of such navigation.

This clause had its origin in the fourth of the articles of compact of the ordinance of 1787, for the government of the north-west territory, in which it was provided that "the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor;" and has been applied to the states admitted to the Union since the formation of the constitution, and formed out of territory other than that included in the ordinance, it being generally supposed until a comparatively late day that these articles of compact, and particularly the clause in question, continued in force in the states formed out of such territory, except so far as altered by "common consent:" Straden v. Graham, 10 How. 97, McLean and Caton, JJ.; Palmer v. Commissioners of Cuyahoga County, 3 McLean, 226; Columbus Ins. Co. v. Cortinius, 6 Id. 209.

It is admitted that the provision does prohibit this state from imposing any tax or toll on any citizen of the United States on account of the navigation of the river. But the authority of the national government to restrain the state in this particular is no clearer than it is to prevent the state from authorizing or causing obstructions to the navigation of the river that may as effectually deprive the citizen of the United States of its use as a highway as any tax or toll could.

Counsel for the plaintiff herein contend that the words "common highways forever free," taken in connection with the rest of the sentence, show that the paramount purpose of this legislation "was to prevent any discrimination between the citizens of the United States" in the imposition of tolls on account of the navigation of the river. But there is no ground for this construction, for plainly the clause does not rest with the prohibition of discrimination in the imposition of such tolls, but goes further, and prohibits them altogether, as well in the case of the citizens of the state as of the United States.

But the clause contains two distinct provisions: the one an absolute prohibition against the imposition of tolls for the navigation of the river; and the other, a declaration that the river shall remain a "common highway" for the use of all the citizens of the United States. The two things are separate and distinct; and one is not to be considered the mere adjunct or amplification of the other, because it is found in the same sentence. The maxim, *Nascitur a sociis*, does not apply. And if either provision can be considered as subordinate to the other, it is the

one against tolls. A highway is a public way upon which all persons have a right to pass; and a public river is such a way, since it is open to all the king's subjects: Rapalje and Lawrence's Law Dict., Highway; 2 Smith's L. C. 175.

A declaration or act of the congress of the United States that a navigable water thereof shall be a "common highway" imports, *ex vi termini*, that such water shall not be closed up or obstructed by dams, booms, bridges, or otherwise, so as to materially impede or hinder the navigation of the same. And being a highway, no toll can be charged for travel thereon, except by consent of the sovereign power which declared and made it such—the congress of the United States—and they have forbidden it to be done. The plain purport and effect of the statute is this: 1. The Wallamet river is declared and made a "common highway" for the use of all the citizens of the United States; and, 2. It shall be a "free" highway, upon which no toll, tax, or impost shall be charged. Being a "common" highway, it is open to all citizens; and being also "free," it is open to them without toll or tax. From these premises, the conclusion follows that any obstruction to the navigation of this river which materially impairs its use as a "common highway" is contrary to the act of congress, and therefore illegal, whether authorized by the legislature of the state or not. It also follows, that a case involving the question whether any bridge or other structure is such an obstruction is a case arising under a law of the United States, and therefore within the jurisdiction of this court: Act of 1875, 18 Stat. 470.

The court, then, had jurisdiction to hear and decide the question whether this bridge is or would be such an obstruction to the use of this highway as is forbidden by the act of congress. Whether it properly decided the question or not, is a matter depending upon the circumstances of the case, as disclosed by the evidence, and can not be considered in this proceeding. The way to determine that is by an appeal from the final decree in the original case to the supreme court, where the whole question can be considered on its merits.

And in this connection it should be remembered that the court did not decide that the act of 1859 prohibited the erection of *any* bridge across the Wallamet. It prohibits, of course, the erection of a low, solid bridge, for that would be an impassable barrier—a complete closing of the highway. And it is equally certain that it does not prohibit the erection of a high suspension bridge, under which vessels navigating the river might pass without hinderance or delay. Neither does it prohibit a low bridge, properly constructed with a good and sufficient draw, through which vessels may pass without unnecessary danger or delay; the commerce, size, and condition of the river, as well as the state of the art of such bridge-building, being taken into consideration. It is well known that all highways, whether of land or water, are subject to be crossed by other highways. The commerce of the country can not be conducted on parallel lines. But where and in what manner such crossing shall be made or allowed depends largely upon the particular circumstances of each case: Hatch v. Wallamet Iron Bridge Co., 7 Saw. 136.

But the court found upon the evidence that, all the circumstances considered, the draw of the proposed bridge was altogether inadequate; that it ought to be at least one hundred and fifty feet wide on either side of the pivot pier, as provided in the act of congress of June 23, 1874, 18

Stat. 281, authorizing the Oregon and California Railway Company to bridge the river at this place; and therefore it was a material as well as needless obstruction to the navigation of the river, causing danger and delay to the passage of vessels thereon.

Neither did the court hold that such a bridge was even authorized by the act of the legislature of October 18, 1878. That act requires not only that the bridge shall have a draw of not less than one hundred feet in width, but that it shall be "so constructed and maintained as not to injuriously impede and obstruct the free navigation of said river, but so as to allow the easy and reasonable passage of said vessels through said bridge."

Upon this point the conclusion of the court was that the legislature did not intend to declare that a draw of only one hundred feet in width is sufficient, or to authorize the construction of a bridge otherwise than with a draw sufficient for the easy and safe passage of vessels, whether that must be one or two hundred feet in width; but that if it did, the act was invalid, because contrary to the act of congress, which on this point is the supreme law of the land: Hatch v. Wallamet I. B. Co., 7 Saw. 137.

And in this connection the court is reminded by counsel for the plaintiff herein "that it is a delicate duty for a court to declare an act of the legislature invalid." Of course, the court will not do so unless the conflict between it and the act of congress is plain. And for this reason the act of the legislature is to be construed, if it reasonably can, so as to prevent such conflict, and make it harmonize with supreme law.

But really it is well to remember, in a case like this, that the interested parties who prepare and procure the passage of an act granting themselves some special privilége or franchise like this, are more responsible for it than the members of the legislature. The average member, having no special interest in the matter, and knowing little if anything about it, but seeing that the act contains a plain provision that the bridge shall be built with a good and sufficient draw anyhow, with that understanding gives his consent to its passage; and I think it ought to be so construed by the court.

Considered in this its true light, the act is only a license to the corporation named therein, or its assigns, to build a draw-bridge at this point, subject to the act of congress of 1859; or in other words, so as not needlessly to impede or obstruct the navigation of the river, considered as a "common highway." Beyond this the legislature could not go, and it is not to be presumed that it so intended.

The decision in Escanaba Co. v. Chicago, 107 U. S. 678, so much relied on by the plaintiff herein, is not in conflict with these views. In a legal point of view the case is not new, though it contains some wholesome suggestions upon the application of the law to the facts and circumstances of that case, which are peculiar and altogether different from this.

A small bayou, called a river, with a current less than a mile an hour, not a mile in length below its two branches, not exceeding two miles in length each, not naturally over one hundred and fifty feet in width, and lying in the heart of a great city, was deepened and widened so as to serve as a canal or convenient water-way whereon to move the lake boats from the harbor in the lake outside, into which it drained, to the docks and warehouses along its banks. Over it there are a number of draw-bridges,

erected by public authority, on which pass daily great numbers of people —particularly in going to and returning from their business and employment in the morning and evening: Am. Cyclo., Chicago.

The city, by the authority of the state, and with a view of preventing the inconvience resulting from the unregulated and conflicting use of the bridges and the water-way, passed an ordinance requiring the draws to be closed for the benefit of the land travel for one hour in the morning and evening, and limiting the period during which a draw might be kept open for the passage of vessels to ten minutes at any one time.

The suit did not involve the right to build the bridges, nor the sufficiency of the draws. The right of the city on both these points was taken for granted, and the only question made and decided was whether, under the circumstances, this was a reasonable regulation, one that did not needlessly obstruct the use of the water-way, and the court, if I may be allowed to say so, very properly and wisely held that it was.

The case was brought in the circuit court of the United States upon the assumption that the provision of the fourth article of compact of the ordinance of 1787, whereby the navigable waters of the north-west territory were declared "common highways," was still in force in Illinois, and therefore the reasonableness of the city ordinance, when judged by this United States law, was a federal question, and the national courts had jurisdiction of the case, and the decision was actually made upon this hypothesis. But the learned justice who delivered the opinion of the court went further, and said that by the admission of Illinois into the Union, "on an equal footing with the original states in all respects whatever," the ordinance ceased to have any effect within her limits, and therefore there was no law of the United States regulating the use of the navigable waters of the United States within the state of Illinois, and therefore the latter was the judge of what was reasonable in the premises.

The cases cited in support of this latter conclusion are Pollard v. Hagan, 3 How. 212; Permoli v. New Orleans, Id. 589; and Strader v. Graham, 10 Id. 82.

By the first one, as we have seen, it was simply held that congress can not, by any compact or condition made with or laid upon a state on her admission into the Union, restrain or limit her municipal power, as such state; but that if the subject of the compact or condition is within the power of congress to enact or regulate, without the consent of the state —as to declare that the navigable waters therein shall be "common highways"—it is good as a law.

In Permoli's case the court only held that so much of the articles of compact as secured religious freedom to the inhabitants of the territory of Orleans—the same having been specially extended there by congress —ceased to have any force or effect therein upon the admission of the territory into the Union as the state of Louisiana, because the subject of religious freedom in a state was beyond the power of congress and exclusively within that of the state.

In Strader's case, it was decided on a writ of error to the supreme court of Kentucky, that the condition of a negro held as a slave in that state, and who had been allowed to visit Ohio, but afterwards returned, was, after such return and in said state, a question arising solely under the laws of Kentucky, and therefore not within the jurisdiction of the supreme court.

But in delivering the opinion of the court, Mr. Chief Justice Taney, referring to some sort of claim that had been made in the argument, that the provision in the articles of compact of the ordinance of 1787, prohibiting slavery in the north-west territory, of which Ohio was a part, had some bearing on the question of the *status* of the negro, denied that it could have any effect outside of such territory, and then took occasion further to say that the ordinance was no longer in force, even in Ohio, where it had been superseded by the organization and admission of the territory into the Union as a state, and added that it had been so decided in the cases of Permoli v. New Orleans and Pollard v. Hagan, *supra*. But this statement, though true generally, and in the light in which the chief justice was considering the articles, that is, so far as they trenched upon the municipal power of the state or were inconsistent with its control over its domestic affairs, was not otherwise accurate or correct. And for this reason both Justices McLean and Catron, while assenting to the decision that the ordinance had no application to the case in any view of the matter, and that the court had no jurisdiction to review the judgment of the Kentucky court, protested against this *dictum* of the chief justice—the latter putting his dissent especially on the navigation clause of the fourth article of the compact, and saying: "For thirty years the state courts within the territory ceded by Virginia have held this part of the fourth article to be in force and binding on them respectively; and I feel unwilling to disturb this wholesome course of decision, which is so conservative of the rights of others, in a case where the fourth article is nowise involved, and when our opinion might be disregarded by the state courts, as *obiter* and a *dictum* uncalled for."

And as we have seen, the only question decided in Permoli's, was that the clause in the compact securing religious freedom to the inhabitants of the territory was necessarily superseded upon its admission into the Union as a state; while it is admitted that the principle of this ruling would include all similar provisions in the compact. In Pollard v. Hagan, while it was held that a state could not be hampered or bound, in its admission into the Union, with conditions or compacts that would limit or restrain its municipal power and right, as compared with the other states therein, it was distinctly decided, that the clause in the ordinance—as applied to Alabama by the act of congress of March 2, 1819, 3 Stat. 489, authorizing the people of that territory to form a constitution—declaring the navigable waters of the future state "common highways," was not such a condition, but a valid law which congress had the power to enact, whether the waters were within a state or territory.

I therefore respectfully submit that the clause in the fourth article of the compact in the ordinance of 1787, relating to the navigable waters in the north-west territory, having been enacted by congress, 1 Stat. 50, was a valid commercial regulation as to the navigable waters in said territory or the states afterward formed therein until repealed by it; and therefore it is still in force in Illinois. But be this as it may, the decision does not touch the question of the validity or force and effect of the act of 1859. For on what possible ground can it be claimed that the admission of Oregon into the Union set aside or superseded an otherwise valid clause in the very act of admission, declaring the navigable waters of the future state "common highways"?

This case having been heard before the circuit judge and the decree under review having been made by him, I thought I ought not to decide

the matter without consulting him. Accordingly I submitted this opinion to Judge Sawyer, with copies of the briefs of counsel, and he has authorized me to say that he concurs in it.

There being, then, no error in the original decree, as it appears to this court, the demurrrer to the bill of review must be sustained and the bill dismissed, and it is so ordered.

DUNDEE MORTGAGE TRUST INVESTMENT COMPANY v. SCHOOL DISTRICT NO. 1 OF MULTNOMAH CO. ET ALS.

Filed March 6, 1884.

MULTIPLICITY OF SUITS.—Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law, when necessary to prevent a multiplicity of suits.

STATE STATUTE INVOLVING FEDERAL QUESTION.—In construing or determining the validity of a state statute involving a federal question, the national courts are not bound by the decision of the state court.

IMPAIRING THE OBLIGATION OF A CONTRACT.—At the date of the execution of a note and mortgage, the law of the state required the mortgaged premises to be assessed at their full cash value for taxation; and afterwards an act was passed requiring the note and mortgage to be assessed at its par value for taxation, and exempting so much of the land from taxation: held, that the latter act did not impair the obligation of the contract between the creditor and the debtor.

STATE POWER OF TAXATION.—The state has power, so long as it does not trench upon the constitution of the United States, to tax all persons, property, and business within its jurisdiction or reach; and whether any person, property, or business is so within its jurisdiction is not a federal question, and must be determined by the state for itself.

UNIFORM AND EQUAL TAXATION.—An act of the legislature providing for the taxation of mortgages as land, which in effect exempts all such mortgages from such taxation upon land in more than one county, violates section 1 of article 9 of the constitution of the state, which requires that taxation shall be uniform and imposed according to its value upon "all property" not specially exempt therefrom, and is therefore void and of no effect; and *semble*, that such act is also a "special" one for "the assessment and collection of taxes," and therefore in violation of subdivision 10 of section 23 of article 4 of the constitution of the state.

DUE PROCESS OF LAW.—The enforcement by the state of a tax levied under a void law is a deprivation of property without due process of law, contrary to section 1 of the fourteenth amendment to the constitution of the United States.

SUIT to enjoin the collection of a tax. The opinion states the facts.

William H. Effinger, *Charles B. Bellinger*, and *W. D. Fenton*, for the plaintiff.

William B. Gilbert, *H. Hurley*, and *Walter W. Thayer*, for the defendants.

DEADY, J. This is an application for a provisional injunction on the bill filed herein, on December 31, 1883, to restrain the defendants hereinafter named, and others, from selling and disposing of sundry notes and mortgages belonging to the plaintiff, for the non-payment of taxes levied thereon, in the district and counties where the mortgaged premises are situate, under the provisions and by the authority of the act of the legislature of Oregon, entitled "An act to define the terms 'land' and 'real property' for the purposes of taxations, and to provide when the same shall be assessed and taxed," etc., approved October 26, 1882. The defendants, the school district No. 1, and George C. Sears, the sheriff of Multnomah county, were duly served with a subpœna to answer, and an order to show cause why the provisional injunction should not issue; and the defendant, E. B. Collard, the sheriff of Yamhill county, appeared and showed cause against the application without service. None of the other defendants were served with the subpœna or order, or appeared.

From the bill it may be gathered that the plaintiff is a foreign corporation, duly incorporated under the laws of Great Britain, with its "principal office at the burg of Dundee, Scotland;" that for some years it has been and now is carrying on in this state, and by the permission thereof, the business of loaning money upon promissory notes secured by mortgage on real property therein, and payable in a certain period of years, with lawful interest, at Dundee—each of such notes containing, in addition to the ordinary promise to pay, these words: "This note is given on an actual loan secured by a mortgage, by the terms and conditions of which this note is to be governed;" that the money thus loaned is obtained from residents of Great Britain "on bonds or mortgage debentures," that entitle the holders thereof to be paid out of the assets of the plaintiff, including these notes and mortgages; that the plaintiff, as the successor and assignee of sundry similar corporations heretofore organized in Dundee, and engaged in the like business in Oregon, is the "owner and holder" of certain notes and mortgages made and executed to said corporations for money loaned in Oregon, and is also the "owner and holder" of certain other notes and mortgages made and executed to itself for money loaned therein, amounting in the aggregate to two and a half millions of dollars, upon all of which said "bond and debenture holders" have a lien for the money advanced by them to the plaintiff and its said assignors; that the said loans were all made before October 26, 1882, except one in Marion county for the sum of nineteen thousand dollars, and that they will become due and payable at periods varying from one to five years hence; that the notes and mortgages aforesaid were made and executed within this state, and afterwards transmitted to the "home office, Dundee," where they are kept until the borrower desires to pay the same, when they are returned here for that purpose; that the defendants, the school districts No. 1 and No. 18, and the several counties of which the other defendants are the sheriffs, respectively, have assessed said notes and mortgages, under the act of 1882, aforesaid, for taxation, within the respective districts and counties, so far as the mortgaged premises are therein situate—said district No. 1 having assessed the same within its limits at one hundred and sixty-five thousand five hundred and ten dollars, and levied a tax thereon of eight hundred and twenty-seven dollars and fifty-five cents; the county of Multnomah at two hundred and nine thousand six hundred dollars, and levied a tax thereon of three thousand two hundred and sixty-nine dollars and seventy-six cents; and the county of Yamhill, at —— dollars, and levied a tax thereon of eight hundred and thirty-four dollars and forty-six cents; and said defendants have demanded payment of the same, and are about "to coerce the payment" thereof, by the sale of the notes and mortgages so assessed; and that said assessment and levy are unlawful, because the act under which they were made and the defendants are proceeding is void and of no effect, for the reason that it is contrary to the constitution of the United States and the state; and that such debts and mortgages are beyond the jurisdiction of the state.

From the affidavit of the defendant George C. Sears, filed at the hearing, it appears that "several" of the notes and mortgages assigned to the plaintiff and assessed for taxation in school district No. 1 and the county of Multnomah, "were made to William Reid, manager," and payable in the state of Oregon; that the corporations of whose notes and mortgages the plaintiff has become the owner by assignment, as afore-

said, during all the time they did business in Oregon, had a managing agent residing herein, and duly appointed under the laws of Oregon concerning foreign corporations doing business here: Or. Laws, 617, sections 7 and 8; and the plaintiff, during the period it has done business here, has had a like agent in the state, whose business, in either case, it was and is to receive applications for loans and make the same; that in the course of such business such agents have retained in this state all money received on said loans, whether of principal or interest, and reloaned the same herein; and that a "large proportion" of the mortgages upon which the collection of the tax is by this suit sought to be enjoined, were made to secure loans of money so received and reloaned within this state.

The act of 1882 provides that a mortgage, "whereby land or real property, situate in no more than one county of this state, is made security for the payment of a debt, together with such debt, shall, for the purpose of assessment and taxation, be deemed and treated as land or real property;" Sec. 1; and "shall be assessed and taxed to the owner of such security and debt in the county, city, or district in which the land or real property affected by such security is situated;" and "the taxes so assessed and levied on such security and debt shall be a lien thereon, and the debt, together with the security, may be sold for the payment of any taxes due thereon, in the same manner and with like effect that real property or land is sold for the payment of taxes:" Sec. 2. The owner of such mortgage, "for the purpose of assessment and taxation," shall "be deemed to be the person to whom the security was given in the first instance," unless the contrary appears on the record thereof; and "all assignments and transfers of a debt" so secured shall, for the purposes aforesaid, "be null and void," unless the same "is made in writing upon the margin of the record of the security;" and all mortgages "hereafter executed, whereby land situated in more than one county in this state is made security for the payment of a debt, shall be void:" Sec. 3. For the purposes aforesaid, no payment on any debt so secured shall hereafter be considered by the assessor unless indorsed "on the margin of the record of such security;" and "the assessor shall assess such debt and security for the full amount of such debt, that appears from the record of such security to be owing," unless, in his judgment, the property by which such debt is secured is not worth that amount, in which case he shall assess the same "at their real cash value:" Sec. 4.

A debt so-secured on "property situated in no more than one county in this state shall, for the purposes of taxation," be considered "as indebtedness within this state," and the person owing the same may deduct the amount from his assessment, as such indebtedness:" Sec. 8. No "writing which is the evidence of a debt," wholly or partly so assessed, "shall be taxed for any purpose in this state," but such debt, and "the instrument by which it is secured, shall, for the purpose of assessment and taxation," be deemed real property, and "together be assessed and taxed" as therein provided: Sec. 10. Sections 5, 6, and 7 of the act relate to the duties of the county clerk in furnishing the assessor with a statement of the unsatisfied mortgages on record in his office, and recording the assignments of such mortgages, and of all payments thereon.

The real purpose and intent of this act is not far to seek or hard to

find. And first, it is not, as suggested in the brief of counsel for the defendants, to tax the mortgagee's interest in the land to the mortgagee and the remainder to the mortgagor. But the purpose is to tax the "debt" of the mortgagee and "the instrument by which it is secured," and by deducting the amount thereof from the value of the land so far exempt it from taxation.

In other words, it is a scheme to tax the debt of the mortgagee, and so far exempt the land of the mortgagor; and not only this, but to tax the debt, not at the residence of the creditor, but the debtor, in the county or district where the mortgaged premises are situate. The debt and mortgage are not the land, and not even a legislative act can make them so; but they are to be deemed and considered such, as a matter of convenience, for the purpose of assessment and taxation and the collection of the tax.

For many years prior to this act the law was such that a debt was taxed, or supposed to be, at the residence of the creditor, and the debtor was allowed to deduct the amount thereof from his assessment, provided the debt was owing in the state. The result was that the par value of the domestic indebtedness of the country, being deducted from the value of the land as appraised for taxation—about one third of its cash value—the value of lands left subject to taxation was very much reduced. In the rural districts, where the principal property is land, and borrowers are more numerous than lenders, the assessment rolls grew very light. The value of the land in a county, as appraised for taxation, was largely swallowed up in its indebtedness, while this was principally owned without its limits, and if it paid taxes at all, did not do so in the county where it was owing and secured and had taken the place of the land.

As an illustration, take the case of a farmer in Linn county. He owns a farm worth, in cash, ten thousand dollars. He borrows from some person or corporation in Portland five thousand dollars, and gives a mortgage upon his farm to secure the payment of the same. The county assessor, chosen by himself and neighbors for that special purpose, estimates the cash value of the farm, for the purpose of taxation, at not exceeding five thousand dollars, and it may be at only three thousand dollars. From this false valuation the farmer is allowed to deduct his indebtedness, at its par value, and thereby escapes taxation. But the county gets no revenue from ten thousand dollars' worth of land situate within its limits. Getting in debt becomes a recognized mode of escaping taxation.

To correct this evil, the legislature, instead of retracing the steps which led to it, by taking measures to secure obedience to the law requiring each "parcel of land" to be apppraised for the purpose of taxation at its "full cash value," Or. Laws, 754, sec. 29, and to prevent the deduction of any indebtedness from such valuation, concluded, in its wisdom, to go further in the doubtful direction it was already traveling. And to this end it passed this act, to secure the taxation of the indebtedness deducted from the valuation of the land, in the county where the land lies, so far at least as it was secured thereby. And to make this right of deduction uniform, it also allows the debtor to deduct his indebtedness from the valuation of his land, if secured thereon, without reference to the residence of the creditor, by declaring that such a debt shall be deemed an "indebtedness within this state," and therefore taxable in place of the land, and in the county where the land is situate.

Counsel for the plaintiff contends that this assessment and taxation of

its notes and mortgages is illegal and void for the following reasons: 1. The act of 1882, under which it is made, impairs the obligation of the contract between plaintiff and its debtors, by which the latter were bound to pay the taxes on the land covered by the mortgage; 2. The debts and mortgages of the plaintiff are in fact and in contemplation of law existing and owned without the limits of the state, as its residence is Dundee, and therefore beyond the jurisdiction of the state either to assess, tax, or sell; 3. This assessment and taxation are contrary to the constitution of the state of Oregon, which declares, article 9, section 1, that the "legislative assembly shall provide by law for *uniform* and *equal* rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of *all property*, both real and personal, excepting such only for municipal, etc., purposes, as may be especially exempted by law," and therefore void, because the act under which it is made arbitrarily and unjustly discriminates between debts and mortgages on land in no more than one county, and those on land in more than one county, and therefore does not provide for a "uniform" assessment of debts secured by mortgage, or for "a just valuation for taxation of *all property*," but the contrary; and, 4. That the act of 1882 being void, the collection of the tax levied under it would so far deprive the plaintiff of its property without due process of law, contrary to the constitution of the United States: Fourteenth amendment, sec. 1.

The jurisdiction of the court on the ground of the diverse citizenship of the parties is admitted; and its power to grant the relief sought, on the ground of preventing a multiplicity of suits and irremediable injury, is tacitly conceded. In this respect the case falls within the rule laid down by this court in Coulson v. The City of Portland, 1 Deady, 494. See also Pomeroy's Eq. Jur., secs. 243–275.

The validity of the act is questioned in the bill upon other grounds than these, as that it unlawfully discriminates between secured and unsecured debts evidenced by promissory notes, and that it was not passed in conformily with the requirements of article 4, section 19, of the constitution of the state, concerning the reading of bills during their passage through the legislature. But they were not pressed on the argument.

In Mumford v. Sewall, Daily Oregonian, May 25, 1883, the supreme court of the state held, that the act was duly passed and that the legislature has the power to authorize and require the taxation of mortgages on real property in Oregon, irrespective of the residence of the owner of the debt thereby secured, and that the act in no way impairs the obligation of the contract between the parties thereto; but whether the state has power to tax such a debt when payable to a non-resident, was not decided.

The national courts are not bound by the judgment of a state court, sustaining the validity of a state statute, so far as a federal question is involved therein: Louisville & N. R. Co. v. Palmes, 3 S. C. 193, and cases there cited. Therefore, the question of whether the act of 1882 impairs the obligation of the contract between the plaintiff and the maker of any of these notes and mortgages, is an open one in this court.

It does not distinctly appear from the bill how the alleged obligation of the mortgagor to pay the taxes on the mortgaged premises arose. The first impression is, that he directly contracted with the mortgagee to do so, but as no such contract is set out, in either words or substance, the inference is that none was made, and that the alleged liability of the mortgagor to pay such taxes was simply owing to the fact that by the

law as it stood when the loan was made, the land was taxed as the property of the mortgagor, and the mortgage was exempt.

But in any case, the act taxing the debt and mortgage of the plaintiff, and exempting a corresponding value in the land from taxation, does not impair the obligation of the contract. The state is no party to this contract; and its power of imposing and collecting taxes upon persons, property, and business within its jurisdiction can not be affected or restrained by it. True, the laws in force when the mortgage is made, defining what constitutes a valid mortgage, and prescribing the remedy for its enforcement, are to be regarded as part of the contract, and any essential change in these is so far invalid as impairing the obligation of the contract. But a law imposing taxes upon the subject of the contract or the property affected by it, or exempting either therefrom, is no part of such contract; and is so far within the power of the state to alter or repeal from time to time, as the public good or convenience may require.

It may be admitted that any provision in the mortgage itself or in a contemporary statute, providing who, as between the parties thereto, shall pay the taxes imposed by the state on the mortgaged premises, or the debt or mortgage itself in lieu thereof or otherwise, is beyond the power of the state to alter or modify to the prejudice of either party. To do so would impair the obligation of the contract.

But when and to what extent taxes shall be levied is a question for the state to decide. Parties interested in property liable to taxation may contract, as between themselves, on whom the burden of such taxation shall ultimately fall, but they can not by such means limit or control the power of the state in placing or apportioning this burden in the first instance; nor in enforcing its payment or collection accordingly.

The liability of the mortgagor to pay taxes on the mortgaged premises at the time of the execution of the mortgage was primarily to the state. It arose out of a law of the state, and not the contract with the plaintiff; and might thereafter be modified or discharged by the authority of the same, without any reference to the agreement or wishes of the parties. As a means of protecting himself against the delinquency of the mortgagor in this respect, the statute in force since 1854, Or. Laws, 770, sec. 105, expressly provides that the mortgagee may pay any delinquent tax on the mortgaged premises and add the amount to his mortgage and enforce the collection of the same as a part thereof.

But whether this provision or an express agreement to the same effect should be construed to include taxes levied under a subsequent statute on the debt or mortgage itself, or both of them, in place of the land or so much of its value, as being within the equity of the statute or contract, is a judicial question between the parties to the mortgage, and one over which the state has no legislative control. And if it should be determined in the negative, it would only add another to the many instances in which statutes and contracts made in contemplation of future events have not been found broad or full enough to comprehend and provide for all the changes and contingencies that may occur in the course of time in human affairs. But it is to be understood that the contract by which the parties to a loan or mortgage may provide between themselves for the payment of taxes imposed thereon or thereabout, is otherwise lawful when made. Neither is it material in this connection that the holders of the mortgage debentures issued by the plaintiff in Scotland, and upon which it obtained the money loaned on these notes and mort-

gages, may be inconvenienced or even injured by the enforcement of this tax in the mode prescribed, or that such notes may thereby lose their negotiability. The act is not responsible for the inconveniences which may result from disobedience to it. The restriction placed upon the negotiability of the notes by the act is only for the purpose of taxation, and can be of no inconvenience to any one except in a case of delinquency, and then the blame must rest on the delinquent.

Nor is it materal, if true, that the plaintiff may not be able to pay these debenture holders the rate of interest on their money that it expected or agreed to, because of the imposition of this tax. If the power of the state to levy taxes was in any way limited or restrained by the fact that its exercise might hinder or prevent any one from performing his contract with another, it would be useless. If A. rents a mill of B., and afterwards becomes unable to pay the rent on account of a tax which the state imposes on his business, it can not be admitted for a moment that the act imposing this otherwise valid tax is void, on the ground that it impairs the obligation of its contract to pay the rent. It may have impaired his ability or means of performing his contract, and so might a fire or flood; but the obligation to perform the contract would be untouched in either case.

But I suspect the truth about this complaint is, that after the payment of this tax, in addition to the interest due the debenture holders, the profits accruing to the plaintiff are just so much diminished; but that may happen to any one who loans money in a country where mortgages are taxable or liable to become so.

Whether these notes and mortgages are within the jurisdiction of the state, for the purpose of taxation, is a question in this case, but not, as I understand, a federal one. There is no provision in the constitution or laws of the United States that can be invoked to prevent the state from taxing any property, on the ground that it is not within its jurisdiction. The power of a state to levy and collect taxes is not directly limited or restrained by the national constitution, except in the case of duties on "imports and exports" and "tonnage:" U. S. Const. art. 1, sec. 10.

In a few other cases it is so restrained incidentally and by implication, as that the obligation of a contract shall not thereby be impaired, or that the powers of the national government or the agencies by which they are exercised shall not be hindered or interfered with: The Railway Tax Case, 8 Saw. 250. All other limitations upon this sovereign power must be found either in the constitution of the state or the wisdom and justice of the legislature and people. So long as a state does not intrench on the constitution of the United States it may tax anything within its reach —anything it can lay its hands on and subject to its power: Kirtland v. Hotchkiss, 100 U. S. 498.

It follows that this court, in deciding this question of the taxability of these subjects by the state, will be governed by the decisions of the supreme court of the state. In Poppleton v. Yamhill County, 8 Or. 341, it was held that notes and mortgages are personal property, and as such subject to assessment and taxation. In Mumford v. Sewall, *supra*, as we have seen, the court held that a mortgage upon real property in this state is taxable by the state, without reference to the domicile of the owner or the *situs* of the debt or note secured thereby. And this conclusion is accepted by this court as the law of this case. Nor do I wish to be understood as having any doubt about the soundness of the decision.

A mortgage upon real property in this state, whether considered as a conveyance of the same, giving the creditor an interest in or right to the same, or merely a contract giving him a lien thereon for his debt, and the power to enforce the payment thereof by the sale of the premises, is a contract affecting real property in the state, and dependent for its existence, maintenance, and enforcement upon the laws and tribunals thereof, and may be taxed here as any other interest in, right to, or power over land. And the mere fact that the instrument has been sent out of the state for the time being, for the purpose of avoiding taxation thereon or otherwise, is immaterial.

But the right to tax the mortgage may not give the state any direct power over the debt, when the same is actually held without the limits of the state. But indirectly it does. A sale of the mortgage, although it would not carry with it the debt, would separate them, and leave the latter without any security. A purchaser of the mortgaged premises from the mortgagor, who has or may purchase the mortgage when sold for taxes, would thus unite in himself the interest of both mortgagor and mortgagee, and hold the property discharged from the debt.

But counsel for the defendants claim that these debts are actually within the jurisdiction of the state for the purposes of taxation, on the ground that the plaintiff and its assignors in the transaction of their business here, out of which these notes and mortgages arose, maintained an agent in the state under the foreign-corporation act: Or. Laws, 617, secs. 7, 8.

As to any of the foreign corporations required by that act to appoint an agent to represent it within the state, before doing business here, it is clear to my mind that as to such business, and for the purposes of taxation, it is a domestic corporation, having a residence within the state. But in the case of the Oregon and Washington Trust and Investment Company v. Rathbun, 5 Saw. 32, this court held that a foreign corporation engaged in loaning its own money in this state was not within the purview of the act, as limited by its title, and therefore not required to appoint such agent before doing business here.

But admitting that the plaintiff was not required, while doing business in Oregon, to appoint and keep an agent here under the foreign-corporation act, nevertheless it appears to be a fact that the business out of which these notes and mortgages arose was done here through an agent, resident in Oregon. The money of the plaintiff was sent here to be loaned by this agent upon applications made and accepted here. And although the notes were made payable to the plaintiff in Dundee, and with the mortgages sent there for safe keeping, they are and have been returned here for payment, and the money received on them reloaned here.

It is altogether probable that the otherwise useless ceremony of making these notes payable in Dundee, and sending them there for custody until their maturity, and then returning them here for payment and collection, is a mere shift to avoid taxation thereon in Oregon.

In fact, it appears that the money was loaned in Oregon and the notes made here, with the understanding between the parties, that whatever their tenor, they should be paid and payable here. If the plaintiff was actually engaged in loaning money in Dundee, and a resident of Oregon should go or send there and procure a loan from it and give his note therefor, the case would be a different one, although the note was secured

by a mortgage on real property in Oregon. But it is plain to be seen that that is not this case, and that the plaintiff could never have done this volume of business here in that way. Therefore, availing itself of the comity of the state, it comes here, in the person of its authorized agent, with its money, loans and reloans it, and is so far, I think, a resident here for the purposes of taxation.

The maxim so much relied on by the plaintiffs—that personal property follows the person of the owner—is but a legal fiction, invented for useful purposes, and must yield whenever the purposes of convenience or justice make it necessary to ascertain the fact concerning the *situs* of such property. In cases of attachment and for the purposes of taxation it is constantly disregarded, as the following cases will show: Catlin v. Hull, 21 Vt. 158; The People v. Commissioners of Taxes, 23 N. Y. 225; People v. Home Ins. Co., 29 Cal. 533; Green v. Van Buskirk, 7 Wall. 150.

And the case of the State Tax on Foreign-held Bonds, 15 Wall. 300, cited and also much relied on by counsel for the plaintiff, only decides that a state law which comes between the foreign lender and the local borrower and compels the latter to pay a portion of the interest due the former on his debt, as taxes to the state, is void, because it impairs the obligation of the contract between the parties. And this same ruling could as well have been made on this ground, if the parties had both been citizens of the state seeking to impose the tax. The case was before the court on a writ of error to the judgment of the supreme court of the state of Pennsylvania, and this was the only federal question in the case, and therefore the only one determined by it.

But on the question of uniformity, I confess I am unable to find any ground on which this act can be harmonized with the constitution of the state, and upheld as a valid law. It is expressly confined to mortgages on land in only one county, and thereby admits what was conceded on the argument, and what the court may judicially know, that there are mortgages in this state on land in more than one county.

Section 1 of article 9 of the constitution of the state, already referred to, not only requires the legislative assembly to "provide by law for *uniform* and *equal* rate of assessment and taxation," but also to "prescribe such regulations"—make such laws—"as shall secure a just valuation for taxation of *all property, both real and personal,* excepting such only for municipal, educational, etc., purposes as may be specially excepted by by law." And section 32 of article 1, declares that "all taxation shall be *equal* and *uniform.*"

The rule on this subject prescribed by the constitution is mandatory, and the legislature in exercising the power of taxation must conform its action thereto. But the constitution must have a reasonable and practical construction in this respect. It does not require that a law on this subject shall have mathematical precision or secure in practice absolute equality and uniformity. But it must at least appear to have been enacted with a view to uniformity, and must contain provisions reasonably calculated to secure that end in practice.

But when an act not only fails to secure uniform taxation, but upon its face appears to have been passed with a contrary intent, there can be no question of its invalidity. For instance, no one would claim that an act taking mortgages in all the counties of the state excepting Yamhill, or one taxing mortgages in all the counties of the state except those in the Wallamet valley, was intended or calculated to produce "uniform"

taxation, or to secure "a just valuation for taxation" of "all property" not exempt therefrom by the constitution.

Now, there is no difference in principle between such an act and the one under consideration, and very little in the circumstances. The latter taxes mortgages on land in no more than one county, and exempts those on land in more than one county. The mortgage taxed and the mortgage not taxed and the property affected by them are in all essentials the same. The only difference between them is the purely adventitious and immaterial one, that in the one case the land is all in one county, and in the other is in two or more; as in the case of the railway mortgages.

Without admitting that there can be any classification of mortgages for taxation, under the constitution of the state, so as to produce a difference in the burden imposed on them, or the cost or convenience of discharging it, there is no ground to say that this discrimination between one and two county mortgages is the result of a *bona fide* or other attempts to so classify mortgages for the purpose of taxation. Classification for the purpose of state taxation can not be arbitrarily made, as by mere reference to the county in which the property is situated. For such purpose a mortgage upon an acre of land in Polk county is not distinguishable from one on an acre of land in Benton county; and a law providing for the assessment and taxation of one and not the other is wanting in the uniformity required by the constitution, and therefore void. This conclusion can not be made plainer by argument. If the injunctions of the constitution in this respect mean anything, they certainly prohibit this kind of unequal and discriminating legislation on the subject of taxation.

This being a suit between a foreign corporation and citizens of this state, the court has jurisdiction of the controversy on account of the citizenship of the parties, whether a federal question is involved in the controversy or not. The defendants are intending and attempting to sell and dispose of the notes and mortgages of the plaintiff respectively assessed by them for the non-payment of an illegal tax; and this being repeated from year to year, until the maturity and payment of the notes, the plaintiff may be compelled to maintain a corresponding number of actions at law to recover the amounts so collected, to prevent and avoid which an injunction will be allowed: Pomeroy's Eq. Jur., secs. 243–275.

But the act under which the defendants are proceeding to dispose of the plaintiff's property for taxes being void, such disposition constitutes a violation of section 1 of the fourteenth amendment to the constitution of the United States, which forbids a state "to deprive any person of life, liberty, or property without due process of law," and therefore this court has jurisdiction of the case, as one arising under said constitution, without reference to the citizenship of the parties thereto.

If the defendants, acting for and in the name of the state, are allowed to take the plaintiff's property for taxes assessed under a void law, the state would thereby deprive the plaintiff of such property "without due process of law," contrary to the constitution of the United States: The Railway Tax Case, 8 Saw. 251, 287.

The constitution of the state, art. 4, sec. 23, subd. 10, also prohibits the passage of "special or local laws" "for the assessment and collection of taxes for state, county, township, or road purposes."

In Manning v. Klippel, 9 Or. 367, it was held that an act providing for the compensation of the sheriffs and clerks of fourteen out of the twen-

ty-three counties of the state was a "local" law for the assessment and collection of taxes for county purposes, and therefore within this prohibition and void.

The terms "special" and "local" are not always convertible, though the former may include the latter. A special act is one that comes short of being general. The latter comprehends the genus, while the former is confined to the species. In Holland's Case, 4 Co. 76 a, cited in Smith's Commentaries, section 798, it is said, by way of illustration: "Spirituality is *genus;* bishopric, deanery, etc., are *species;*" and the author adds: "Hence acts which concern the whole spirituality in general are general acts. * * * A statute concerning leases made by bishops is a special act, because it concerns the bishops only, who are but a species of the spirituality."

An act providing for the assessment of mortgages generally is, so far, a general act. It comprehends the genus. But an act providing for the assessment of all mortgages for sums exceeding five hundred dollars, or not payable within one year from the date of their execution, is special. It comprehends only a species of mortgages. So an act providing for the assessment of mortgages on woodlands, plow-lands, or river-lands is special; and in my judgment, an act that taxes mortgages on land in no more than one county, to the exclusion of those on land in more than one, is in the same category. It does not comprehend the genus, mortgages, but only the species—one-county mortgages.

Without imputing to the legislature that passed this act any other purpose, in making this discrimination between one and two county mortgages, than a desire to avoid the supposed inconvenience of applying it to the latter, it is well to remember that special legislation in the imposition of taxes is sure, if unrestrained, to run into partiality, oppression, and injustice. To prevent this evil, this inhibition against special legislation was placed in the constitution.

It is not material to the decision of this application nor the case, except as to the loan in Marion county, to ascertain how far, if at all, this act is prospectively valid. It forbids any more two-county mortgages being made, but it can not, nor does not, attempt to annihilate or strike out of existence those made before its passage. Admitting that the legislature can not discriminate between mortgages on the ground of the locality of the property affected by them, it follows that so long as there are any two-county mortgages in existence in the state, an act taxing only one-county mortgages is open to the objection of want of uniformity.

In reaching this conclusion concerning the validity of this act, I have not been unmindful of the responsibility of declaring an act of the legislature void. But as was said by this court under similar circumstances, Or. & Wash. T. & I. Co. v. Rathbun, 5 Saw. 38: "In a plain case like this, it is as much the duty of the court to declare the act of the legislature invalid as to reform or set aside a contract for mistake or fraud. In so doing, it but upholds and obeys the supreme law—the constitution—to which both courts and legislatures are bound to conform their conduct."

Let the injunction issue as prayed for; the plaintiff first giving a bond with sufficient surety, to be approved by the master of this court, in a sum equal to the tax in question and twenty per centum thereon, conditioned that the plaintiff will pay all damages which the defendants or either of them may sustain by reason of such injunction, if the same shall be held wrongful, to be ascertained by a reference or otherwise, as this court may direct.

SUPREME COURT OF MONTANA.

WELLS ET AL. *v.* TAYLOR ET AL., Officers of Jefferson County.

Filed February, 1884.

ACT PROVIDING FOR SPECIAL ELECTION.—Where an act of the legislature providing for a special election on the question of the removal of a county seat designates that such election shall be conducted, and the votes cast thereat shall be counted and returned, by certain officers and boards named therein, but fails to state the individuals who shall constitute the same, it will be presumed that the legislature referred to the officers and boards of the same name existing under the general election laws.

DISQUALIFICATION OF ELECTION OFFICERS, EFFECT OF.—Where no question is raised as to the fairness of the vote and the honesty of the count, an election will be valid although the officers conducting the same were not duly sworn or chosen, and did not possess the qualifications requisite for their office.

BRIBERY OF VOTERS, WHAT IS.—An election to determine the removal of a county seat will not be invalidated by the fact that prior to the election certain inhabitants of the county presented an offer to the voters, in the form of a bond, conditioned for the building of certain county buildings at a designated place, provided a majority of the votes cast were in favor of changing the county seat to such place. Such an offer was not bribery.

REMOVAL OF COUNTY SEAT OF JEFFERSON COUNTY.—Where a majority of the votes cast on the election to determine the question whether the county seat of Jefferson county should be removed from Radersburg to Boulder city were in favor of such latter place, the officers of such county may make such removal, although the county commissioners failed to make the order contemplated by section 6 of the act of 1883, causing the books, records, papers, and effects of the county to be removed.

APPEAL from a judgment of the third judicial district court for Jefferson county, entered in favor of the defendants, on an application for a writ of mandate. The opinion states the facts.

Erastus D. Edgerton and *Chumasero & Chadwick*, for the petitioners.

W. F. Sanders and *E. W. Toole*, for the respondents.

WADE, C. J. This is an application filed in this court by Frank Wells, Henry B. Barkley, Edwin M. Bachelor, P. B. Clark, and Charles Furgerson, citizens of Radersburg, Jefferson county, for a writ of mandate against Joel M. D. Taylor, clerk and recorder, John McDermitt, sheriff, Edward McSorley, treasurer, and Davie G. Warner, probate judge, officers of said Jefferson county, residing, and exercising the functions of their respective offices at Boulder city, in said county, to compel said officers to return the books, records, archives, papers, and effects of their several offices to Radersburg, which place the petitioners aver is the legal county seat of Jefferson county, and to require said officers to reside in and hold their offices at said Radersburg.

The questions to be determined arise upon a demurrer to the application of petitioners, no writ having issued in pursuance of the prayer of the petitioners, and hence no answer having been filed by the respondents. A brief statement of the facts as they appear in the application will be necessary in order to present the questions to be decided. The legislative assembly of the territory at its thirteenth regular session, 1883, passed an act authorizing the citizens of Jefferson county to vote upon the question of removing the county seat of said county from Radersburg to Boulder city, and providing the notice to be given, and the day when such election should be held. The act further provided that the county commissioners should appoint judges and clerks of said election in the several election precincts as now established, who shall qualify as

other clerks and judges of election, and that said judges and clerks should receive, count, and make return of all legal ballots, "in the manner and at the time as is provided in this bill." Also that the canvassing board shall, within twenty days after such election, make an abstract of all the votes cast, and that the clerk of the board shall make out an abstract of the vote cast and deliver one copy thereof to the secretary of the territory and another to the clerk and recorder of the county; that if the vote is in favor of changing the county seat, the commissioners shall, within six months from the date of the election, cause the books, records, papers, and effects of the county to be removed to the place designated as the county seat, and that the several county officers thereafter shall hold and keep all county books, papers, and records, and their offices, at such new county seat.

The application of petitioners charges that this act of the legislative assembly is void, for the reason that it requires the county commissioners to appoint judges and clerks of said election in the several precincts, but did not provide the number or qualifications of such judges and clerks; and because the act provided that said judges and clerks should receive, count, and make return of all the legal ballots in the manner and at the time provided in the act, while the act provided neither manner nor time for receiving, counting, and making return of said ballots; and for the reason that said act did not provide for a canvassing board to canvass said returns.

The application further charges that the county commissioners, in pursuance of said act, appointed judges and clerks for the several precincts as then established, but that many of the persons so appointed failed, neglected, or refused to serve as such, whereupon other persons assumed to act as such judges and clerks, and counted the ballots, and made and signed the returns thereof.

The application specifies the particular precincts in which other persons than those appointed by the commissioners acted as judges and clerks of said election.

The application further charges that the chairman of the board of county commissioners, the clerk and recorder, and the probate judge of said county acted as a canvassing board in regard to said election, and made an abstract of the vote, and filed the same as provided in said act. Said application further charges that prior to said election there was presented an offer to the voters of said county, in the form of a bond in the penal sum of ten thousand dollars, conditioned that if a majority of the votes cast at said election were in favor of changing said county seat to Boulder city, and if it was so determined, then the principals in the bond agreed to furnish the county of Jefferson suitable buildings in Boulder city for a court-room, county offices, etc., free of any and all expense to said county for the period of five years, said principals covenanting and agreeing that the building for this purpose so to be provided should be of stone (giving the dimensions, and number and size of the different rooms), and properly furnished for the purposes aforesaid.

The application further alleges that the county commissioners made no order causing the removal of the books, records, etc., of said county from Radersburg to Boulder city, but that the county officers aforesaid, on or about the twelfth day of October, 1883, removed from Radersburg to Boulder city, taking with them the books, records, papers, and effects belonging to their respective offices, and are now exercising the func-

tions of their offices at the last-named place, and refuse to return their said offices and the records and effects belonging thereto to said Radersburg, to the inconvenience, damage, and expense of petitioners, which is specified by proper averment.

1. There is no allegation of fraud by the petitioners. An abstract of the vote of the county at the different precincts is attached to and made a part of the application, showing that a majority of the votes as cast were in favor of changing the county seat from Radersburg to Boulder city, and there is nothing whatever in the application showing or tending to show that any illegal or fraudulent votes were cast at said election. The purpose of this act of the legislative assembly was to give to the qualified electors of Jefferson county an opportunity to express their wishes upon the question of changing their county seat from Radersburg to Boulder city in said county. In pursuance of this purpose, an election was held at the time appointed in the act. We must take it for granted that there was not a fraudulent or illegal vote cast at the election, for the petitioners charge no fraud or illegality in that regard.

The vote, then, contained in the abstract attached to the application of petitioners for the writ is an honest expression of the electors upon the question submitted. But the petitioners say that the vote was not counted or canvassed by the proper officers, that no officers for that purpose were provided in the act, and therefore, though the vote is an honest and fair expression of the wishes of the electors of the county, that the act authorizing the vote and the election in pursuance thereof are void.

The act does not specify the number of judges that the commissioners shall appoint at each precinct, but does provide that the commissioners shall appoint the judges and clerks, who shall qualify as other judges and clerks of election, and it does not specify who shall compose the canvassing board, but it does require the canvassing board to make the abstract.

Who are the judges of elections? The general law specifies who they are, their number and qualifications, and how a vacancy shall be filled if any person appointed by the commissioners shall fail to serve, and in the absence of any allegations to the contrary, the commissioners having followed the general law as to the number of judges appointed, we must presume that in filling vacancies as to judges and clerks, the method prescribed by the general law was followed. In providing that the judges and clerks shall qualify as other judges and clerks of election, the special act refers to the general law, and it is not too much to presume that the phrase "the judges" in the special act means the same as "the judges" in the general act, and that in appointing judges under the special act the same number should be appointed as is provided in the general election law.

The canvassing board is a board provided by the general election law. It was already in existence when this special act became a law. It was not necessary that the special act specify of whom this board should be composed, for the general law had already made such specification. If the special act had provided that the board of county commissioners should make the abstract, it would not have been necessary to have named the persons of whom such board is composed. The general law speaks upon that subject. The board of commissioners and the canvassing board are each known to the general law, and either board being named in a special act is a sufficient designation of whom is intended.

It was competent for the legislature to put this service of making an abstract of the votes at this special election upon any board or officers known to the general law, or to designate any competent person for such service. The canvassing board is a board known to the law, and this language in the special act in question is a definite and certain reference to such board. It was not necessary that the special act create the canvassing board, for it was already in existence, and only had to be referred to by name in order to certainly designate the persons intended to perform the services named.

But if this special enactment had made no reference to the general election law, and had not provided how or in what manner the election should be held, or what officers should conduct the same, still if an election had been held in the manner provided by the general law, in the absence of fraud or illegal voting, and the election was a fair, honest expression of the qualified electors of the county upon the question submitted to them, such enactment would be legal, and such election valid.

When the law authorizes a particular act to be done but does not specify the manner of its doing, the act is well done if it follows the general law on the subject. Says Judge McCrary: "Where a statute authorizes an election to be held by a county, city, or township, for the purpose of determining a given question; and when such statute points out no mode for conducting such election, it has been held that it should be conducted in the manner prescribed by law for other elections by the same body:" McCrary's Law of Elect., 2d ed., 353; People v. Dutcher, 56 Ill. 144.

2. In election cases the great question is whether the voice of the majority has been honestly and fairly expressed. A qualified voter should not be disfranchised because a judge of the election or a clerk was not properly appointed, or because of some technical irregularity in the returns. The question is, Was there a fair vote and an honest count? If there was, the election is valid, though the officers conducting the same were not duly sworn or chosen, or did not possess the qualifications requisite for the office.

"In the courts of the country the ruling has been uniform, and the validity of the acts of officers of election who are such *de facto* only, so far as they affect third persons and the public, is nowhere questioned. The doctrine that whole communities of electors may be disfranchised for the time being, and a minority candidate forced into an office because one or more of the judges of election have not been duly sworn, or were not duly chosen, or do not possess all the qualifications requisite for the office, finds no support in the decisions of our judicial tribunals:" McCrary's Law of Elect., 98, sec. 79; People v. Cook, 8 N. Y. 69; Taylor v. Taylor, 10 Minn. 107; Burrit v. Bank of Washington, 11 Serg. & R. 414; Pritchell et al. v. The People, 1 Gilm. 529; People v. Ammons, 5 Id. 107; St. Louis Co. Court v. Sparks, 10 Mo. 117; Whipley v. McKeeve, 10 Cal. 352; People v. Cook, 14 Barb. 259; Greenleaf v. Low, 4 Denio, 168; Weeks v. Ellis, 2 Barb. 324; Keyser v. McKisson, 2 Rawle, 139; McGregor v. Balch, 14 Vt. 428; Hoffa v. Marten, 82 Pa. St. 297; Morris v. Vanlaningham, 11 Kan. 269; Disbon v. Smith, 10 Iowa, 219.

In the last-named case, the court say: "A more manifest fault is in the fact that neither the judges nor clerks of the election appear to have been sworn. In the case of each of these townships before named, the officers signed a form of oath; but there is no evidence of the oath having been

administered. It is urged that this defect entirely vitiates these returns; but the law is not so.

"Whilst it is the law that the canvassers can not adjudicate upon the sufficiency of returns, as we have held in the former case, where a case of this kind comes into a court of justice, such court or a jury trying it not only may, but it is their duty to, look behind the returns, and even behind the ballot-box in some cases. Thus another case on trial upon the facts, the court might receive evidence of those officers having been sworn. And this might be the course in the present cause. But the law goes yet further. Neither the election nor the particular returns would be vitiated and subject to rejection, if the above officers were not sworn. * * * The election, and not the return, is the foundation of the right:" 3 Mass. 230; 6 Wend. 486; 3 Hill (N. Y.), 43; 12 Wend. 481; 11 Id. 604; 19 Id. 143; 5 Cow. 269; 4 Id. 297; 7 Hill (N. Y.), 9; 20 Pick. 484; 25 Me. 507; 26 Id. 491; 2 Ind. 423.

And so we say that the *election*, and not the question as to whether the judges and clerks thereof were properly appointed, must determine whether this county seat was changed from Radersburg to Boulder city. If the election was fair and honest, and no illegal votes were cast, it is not of much consequence who counted the votes, provided they made an honest count and a correct abstract thereof.

In the case of the People v. Cook, *supra*, the court say: "It is the *election*, and not the certificate of the canvassers, that gives the right to the office. * * * The neglect of the inspectors or clerks to take any oath would not have vitiated the election. It might have subjected those officers to an indictment if the neglect was willful."

From these authorities it seems settled beyond question that mere irregularities that do not affect the general result will not vitiate an election. If the votes are legal and the voters qualified, mere irregularities in the appointment and qualification of the officers conducting the election will not have the effect to make the election void. It is not very material who counts or makes an abstract of legal votes. These are matters merely directory, unless the statute makes them mandatory. The voter is not to be disfranchised and the election held for naught because an officer not fully qualified has received or counted the votes. If the integrity of the election is not impeached, the provisions of the statute concerning the recording and receiving the legal votes cast, and the mode and manner of conducting the details of the election, are directory and not mandatory.

Election laws are enacted for the purpose of securing a legal vote and to give to qualified voters an opportunity to express their opinions. The provisions of the statute vital to this end are mandatory, and must be substantially complied with. The purpose is to secure to the voter a free, untrammeled vote, and a correct count and return thereof. Whatever is necessary to this end, and without which it can not be attained, must be performed.

Says Judge McCrary: "If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute must so hold. Whether the particular act in question goes to the merits or affects the result of the election or not, such a statute is imperative, and all consideration touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time

or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do and directory if they do not affect the actual merits of the election:" See Barnes v. Supervisors, 51 Miss. 305; Wheelock's Case, 82 Pa. St. 297.

"These provisions which affect the time and place of the election, and the legal qualifications of the electors, are generally of the substance of the election; while those touching the recording and return of the legal votes received, and the mode and manner of conducting the mere details of the election, are directory:" People v. Shermerhorn, 19 Barb. 540; McCrary's Law of Elect., secs. 126, 127.

3. The petitioners further rely upon the allegations of their application, that prior to the election there was presented an offer to the voters of the county in the form of a bond conditioned for the building a court-house at Boulder city, provided a majority of the votes cast at the election were in favor of changing the county seat of the county to that place. This offer was not bribery. A proposition of this kind looking to the public welfare, and for the benefit of all the people alike, contains no element of criminality or immorality. The thing offered is of a public nature, pertaining to the public and not to individuals, and the party to be influenced is a whole county, and in a manner to benefit every inhabitant thereof.

This is not the case of a candidate for public office, who in order to secure votes promises, in case he shall be elected, to donate a portion of his salary or other valuable thing to the county or state. This would simply be a proposition to purchase an office in consideration of personal services or money, or both. Such a proposition the law condemns as against sound policy, and as tending to corruption. A man who is so infirm in morals as to be willing to purchase an office would probably resort to corrupt practices in order to extort from the people the price paid.

Public buildings and places to transact the public business of the people are in every county a necessity. They are provided, and rightfully, by a tax upon the whole people, for the reason that all are benefited by their erection. But if during the pendency of an election to change a county seat, a man or company of men should erect at a certain place a court-house and county offices, in order to retain the county seat at such place, could such man or company be charged with bribery or the exercise of an undue influence upon the election? Reasonable men in casting their ballots look to the public interest and general welfare. A self-governing people have the right to do in a legal way whatever is not forbidden by the law or public policy for the public good. Philanthropy might erect a public building for the use of the people. Might the donor not give, and the people accept, without being guilty of a crime? And if such a gift were a court-house, and made during the pendency of an election to remove or change the county seat, is it possible that the people would be guilty of a crime, if in casting their ballots they took into consideration the public benefits to be derived from such gift?

The motive which prompts the gift is not material. If the donation promotes the public welfare, the people, in casting their ballots, have the right to consider it, whether the motive be good or bad. A whole people are not bribed by the bestowal of public benefits for the good of

all alike. The law proceeds upon the theory that a self-governing people are self-respecting, and that whole communities will not do any act that reflects upon their honor or integrity.

Says Woodward, J., speaking for the supreme court of Iowa, 10 Iowa, 220: "We do not think the giving facilities for public convenience to the whole county, such as furnishing a building for the courts and offices, and thus relieving the county from a burden of expense, amounts to bribery. Nor would the giving property, though not of that specific character, but yet adapted to reducing the expense of a change. If the people of a town desire a county seat located at such place, there is no wrong and no corruption in their offering and giving facilities to produce that result. Either in buildings or offices direct, for the use of the public, or in property or money to procure the facilities, they may offer to take away or to lessen the pecuniary burden which would come upon that public, the county, by the location, or by a change of location. And this can not be bribery. And it may be doubted whether such an act can become bribery when the offer is to the whole county, and upon a matter of county interest only. In a case like the present there is no duty upon the county from which it, or its citizens, may be induced to swerve. They may adopt which place they see fit, and it is offering additional inducements only to offer as above mentioned."

Says Lyon, J., for the supreme court of Wisconsin, 36 Wis. 225: "Reference should be made to the cases which have sustained the validity of bids or pecuniary offers to secure the location of public buildings at some particular place. We have no controversy with these cases here. The distinction between the election of public officers, to whom for the time being the exercise of the functions of sovereignty is intrusted, and the mere choice of a site for a public building, is quite apparent. The former involves, or may involve, the integrity of the government, and the preservation of the principles upon which it is founded; while the latter is only a matter of public convenience or pecuniary interest, involving no fundamental principles whatever."

4. Boulder city became the county seat of Jefferson county by virtue of the election. This result could not be changed or modified by reason of the county commissioners failing to make the order contemplated by section 6 of the act, causing the books, records, papers, and effects of the county to be removed to that place. The result of elections can not be defeated by the failure of officers to perform an act of this kind.

And Boulder city having become the county seat of the county by virtue of the election, it follows that the application for a writ of mandate, requiring the county officers, the respondents herein, to show cause why they should not remove their offices and records to Radersburg, is insufficient to warrant the issuance of the writ, and the demurrer thereto is sustained.

Judgment for respondents accordingly.

SUPREME COURT OF NEVADA.

LACHMAN ET AL. v. BARNETT ET AL.

Filed February 26, 1884.

THE OWNER OF AN EASEMENT OF WAY HAS NO RIGHT TO POSSESS THE LAND as such upon which it is imposed. He has a right merely to enjoy the way. The owner of the land burdened with the easement is, in law, in possession of the land. Consequently the mere exercise of the right of way, either by the owner thereof or his tenants, will not give him actual possession of the land upon which it is imposed.

THE OWNER OF SUCH EASEMENT IS NOT JUSTIFIED IN TAKING FORCIBLE POSSESSION of the land upon which it is imposed, from the fact that the owner of such land has obstructed his right of way,

REFUSAL TO ADMIT IMMATERIAL TESTIMONY, and striking out such testimony if already admitted, is not error.

APPEAL from a judgment of the seventh judicial district court for Washoe county, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

William Webster, for the appellants.

Thomas E. Haydon, for the respondents.

LEONARD, J. In the complaint herein it is alleged, that on and prior to March 25, 1879, and at all times since April 10, 1871, plaintiffs were and have been peaceably in the possession of the south twenty feet of lots 23 and 24, in block O, in the town of Reno, fronting twenty feet on the west line of Virginia street, and extending along the north line of the alley running easterly and westerly through said block fifty feet, together with the tenements, hereditaments, and appurtenances of said land; that on the twenty-fifth of March, 1879, while plaintiffs were peaceably in the actual possession of the west ten by twenty feet of the above-described land, defendants, without right of entry given by law, with strong hand did forcibly, wrongfully, and unlawfully make entry into said west ten by twenty feet of land and the tenements therein, and knock and tear down plaintiff's fence inclosing the same, and otherwise injure the rights and possessions of plaintiffs to said land and tenements, and ever since said wrongful entry of defendants they have forcibly, wrongfully, and unlawfully detained the possession of said west ten by twenty feet and the tenements therein.

In their sworn answer defendants specifically deny plaintiff's ownership or possession; deny that they entered without right given by law or forcibly, wrongfully, or unlawfully on the twenty-fifth of March, 1879, or at any other time, or that they knocked down the fences of plaintiffs inclosing said land, or that they forcibly, wrongfully, or unlawfully detain said land, or the west ten by twenty feet thereof, or the tenements thereon.

For affirmative defense, defendants allege that they own the fee and occupy the north eighty feet of said lots 23 and 24; that prior to April, 1871, they were the owners of the south twenty feet of said lots; that on or about April 8, 1871, defendant Thomas Barnett sold and conveyed said south twenty feet of said lots to George Becker (plaintiff's grantor), but reserved a right of way over said twenty feet so conveyed to the property owned by defendants, adjoining said twenty feet on the north; that said reservation was in writing, and con-

tained in the deed of conveyance to said Becker, and embraced a strip ten feet inside, on the rear of said twenty by fifty feet conveyed to Becker for alley-way purposes; that such right of way was reserved for the exclusive use and convenience of egress and ingress to their other property on lots 23 and 24; that said Becker by said deed was limited to the use of twenty by forty feet of the said twenty by fifty feet conveyed; that from the date of said conveyance defendants had the exclusive use of said west ten by twenty feet for alley-way purposes until March 25, 1879, when plaintiffs wrongfully and unlawfully entered upon said ten feet of alley, and commenced to inclose the same, and while said alley was in the possession and open for the use of defendants; that plaintiffs' obstructions were a nuisance, and after plaintiffs' refusal to remove the same defendants removed them, in order that they might have, as it was their exclusive right to have, the use of said alley-way at all times.

The statute provides that "no entry shall be made into the lands, tenements, or other possessions but in cases where entry is given by law; and in such case only in a peaceable manner, not with strong hand, nor with a multitude of people." "When such entry is forcibly made, or where the entry shall be made in a peaceable manner, and the possession shall be held by force against the person entitled to the possession, the person so forcibly put out or so forcibly holden out of possession shall be restored to such possession by action, to be commenced and prosecuted as in this act provided:" Com. Laws, secs. 41, 42.

"On the trial of any action of forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry and forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry, or was entitled to the possession at the time of the forcible detainer. The defendant may show, in his defense, that he or his ancestors, or those whose interest in such premises he claims, have been in the quiet possession thereof for the space of one whole year together, next before the commencement of said action, and that his interest therein is not ended or determined, and such showing shall be a bar to the action in all cases provided for in this act:" Comp. Laws, sec. 50.

Undoubtedly, under the statute, plaintiffs were bound to allege and prove that they were in the actual, peaceable possession of the west ten by twenty feet described, or some part thereof; that the defendants forcibly entered thereon and forcibly detained the same; or that defendants forcibly held possession which plaintiffs were entitled to enjoy, although the entry was peaceable.

The undisputed facts shown by the pleadings and evidence make it clear that at the time of defendants' entry plaintiffs were in the actual, peaceable possession of the entire property described in their complaint, including the west ten by twenty feet thereof.

Plaintiffs held the legal title to the land, and the only right that defendants claimed was an easement therein—the right of way over the west ten by twenty feet for alley-way purposes. This right they exercised, let us say, up to the time of the alleged obstruction of the passage-way by plaintiffs, and for many years prior thereto.

But as against plaintiffs, the mere enjoyment of this right, if such they had, did not give them possession of the land over which the easement of way existed, or oust plaintiffs therefrom.

"The ownership of an easement and that of the fee in the same estate are in different persons. Nor does the interest of the one affect that of the other, so but that each may have his proper remedy for an injury to his right, independent of the other. Thus, the owner of the fee may recover his seisin by a proper action in his own name; and the owner of the easement, if disturbed in the enjoyment of it, may sue for such disturbance in his own name. It has accordingly been held that the owner of the soil and freehold of the land over which a road is laid may have trespass against a stranger for acts of trespass done upon the land, as for cutting a tree, or digging up the soil, and may have ejectment against a stranger to recover the land if deprived of the possession of it by him. In other words, he has exclusive seisure and possession of the soil of the highway, subject only to the easement of the public. * * * And if the owner of the way shut it up and deny the owner of the land access to the same, the latter may have ejectment against him to regain the land covered by the way:" Washburne on Easements and Servitudes, 8, 9, 15, 259, 264, 265; Tyler on Ejectments, 41.

"When a highway is established, the owner of the land over which it is laid out is in possession, and the laying out of the road does not dispossess him; it only confers upon the public an easement or right to use the land for a specified purpose only, while for all other purposes the right of possession and the actual possession may remain as before. And it can make no difference in this respect whether this easement be imposed by law, for a public purpose, or whether it be created by the owner of the land for private use. * * * All these are burdens upon the land, and interfere with the owner's full use of it; but they do not operate as an ouster of the proprietor, nor to transfer his right to possession nor his interest in the soil to the public or to another. The public has a benefit in the land, but not the possession:" Read v. Leeds, 19 Conn. 187; and see Wood v. Truckee Turnpike Co., 24 Cal. 487; San Francisco v. Calderwood, 31 Cal. 589.

It being settled law that the owner of an easement like the one claimed by defendants has no right to possess the land as such upon which it is imposed, but a right merely to enjoy the way, and that the owner of the soil burdened with the easement is, in law, in possession of the land, it necessarily follows, as before stated, that the mere exercise of the right of way by defendants did not give them actual possession of any portion of the lots first described in plaintiffs' complaint.

At the trial defendants did not pretend that they had used or occupied the west ten by twenty feet except as a passage-way. They did not contradict plaintiffs' evidence to the effect that the latter were put in possession of the entire premises by Becker, their grantor, in April, 1871, and that plaintiffs and their tenants, until March 25, 1879, used all the west ten by twenty feet, with the exception of a passage-way about three feet wide, for storing wood, boxes, and bottles, and other purposes; or that this passage-way was used in common by plaintiffs and defendants. There can be no doubt that plaintiffs were peaceably in the actual possession of the land over which defendants claim an easement, on the twenty-fifth day of March, 1879, or that they were entitled to such possession at the time of the trial.

It will be noticed that, in their answer, defendants do not deny the alleged entry. They only deny that it was forcible, wrongful, or unlawful. Nor do they deny the allegation that ever since March 25, 1879,

they have detained the possession of the west t
the tenements thereon, from plaintiffs. They onl
tion that such detention has been forcible, wrongf

It is admitted, then, that defendants entered
were in the actual, peaceable, possession of plain
time of the trial, they detained the possession of th

They justify their entry and the detention, by all
right of way which plaintiffs obstructed, and th
neither the entry nor the detainer was forcible, wr
There is no proof or admission of the claim of a rig
but if there was, it would not be a justification of
forcible detainer. The statute is plain upon this
authorities support the statement just made. Und
entry into lands or tenements in the actual possess
strong hand or with a multitude of people, is forcible
statute was not to try titles, but to preserve the
violence.

At defendants' request the court instructed the j
found from the evidence that defendants, or either
down the fence constructed by plaintiffs, for the purpo
same from the passage-way which they claimed over the
and for that purpose only, and not for the purpose of
session of the lands over which they claim the passage
purpose of taking possession of any part of the fifty fee
the actual possession of plaintiffs at the time the fence w
and that defendants did not take the actual possession o
fifty by twenty feet, to the exclusion of plaintiffs, the
defendants." Under that instruction the jury must
defendants knocked down the fence for the purpose of t
session, and that they accomplished their purpose. Th
by the evidence and the allegations, denials, and ad
answer, in so finding.

It is true, Thomas Barnett, one of the defendants, tes
he knocked down the fence, he "used no more force than
that what he tried to do was to get the boards off for the p
ing the passage-way; that he did that and nothing more;"
evident that his object in removing the obstruction was
of taking and holding possession of the land. The ansv
and there was evidence supporting the same.

This action was commenced on the day of defendants' e
answer, filed four days thereafter, they deny that plaintiffs a
or have been in possession of the south twenty feet of l
They allege that their reservation of a right of way embrac
feet by twenty in the rear of the lots mentioned, for alley-w
and that such right was reserved for the exclusive use and co
defendants; that by the express provisions of their deed, t
Becker, was limited to the use of twenty by forty feet; that f
of their said conveyance they had had the exclusive use of
for alley-way purposes; that plaintiffs wrongfully and unlawf
upon said ten feet, and commenced to inclose the same, while
way was in the possession of and open for the use of defen
the fence built by plaintiffs was a nuisance, which defendants

order that they might have, as it was their exclusive right to have, use of said alley-way at all times.

In their amended answer defendants allege that since April, 1871, they have had the full use, and peaceable, exclusive, and lawful possession of the alley-way referred to, for the purpose of egress and ingress to and from their property on the north eighty feet of lots 23 and 24. Defendant Thomas Barnett testified that he gave one Henry, a tenant of plaintiffs, permission to put up a small kitchen in the north-west corner of west ten by twenty feet, used by defendants for an alley-way. He stated that he did not know that the passage-way had been at any time obstructed by plaintiffs, until March 25, 1879; that he had seen boards in the passage-way which he threw into the alley; that at one time plaintiffs piled some wood in the passage-way, which he removed by throwing it into the alley; that he told one of the plaintiffs, after knocking down the fence on the twenty-fifth of March, to take away his boards or should remove them out of the way, and that Lachman removed the and all the materials used in making the fence.

One of the plaintiffs testified that they made no use of the west ten twenty feet after March 25th; that they were deterred from using this lane or attempting to inclose it, by what occurred on that date; that they not try to rebuild the fence because they immediately brought the action, and thought it their duty to abide by the law; that he was not fighting man, and did not want to renew any cause for trouble or personal difficulty.

Without further analysis of the proceedings or evidence, it is sufficient to say that the jury were justified in finding both a forcible entry and forcible detainer. If it be true that defendants were entitled to unobstructed passage over the land in question, they should have adopted lawful methods for the enforcement of their rights. They were not justified in attempting to obtain them by forcible means: People v. Leonard, 11 Johns. 509; Mitchell v. Davis, 23 Cal. 384; Porter v. Cady, 7 How. Pr. 445; People v. Van Nostrand, 9 Wend. 53; Voll v. Hollis, 60 Cal. 573; Allen v. Tobias, 77 Ill. 171; Krevert v. Meyer, 24 Mo. 1; Harris v. Turner, 46 Mo. 439; Bartlett v. Draper, 23 Id. 408; 2 Bish. Cr. L., 7th ed., sec. 490.

If we are right thus far, the several assignments of error will be readily disposed of. The court did not err in excluding evidence tending to show that the tenants of defendants used the passage-way for the purpose of egress and ingress. Should it be conceded that such evidence was technically admissible, its exclusion could not have injured defendants; because the testimony all showed that they themselves, and their employees, so used it uninterruptedly until March 25, 1879; and if such use by them did not give them actual possession, it could have added nothing of value to their case to have shown in addition that their tenants used it in the same manner. In other words, proof of such use by defendants alone accomplished everything that undisputed evidence of use also by their tenants could have done.

It could not have strengthened defendants' case to have been allowed to show that their tenants made the same use of the alley-way that they did. But if the exercise of the right of way by defendants themselves did not give them actual possession, it can not be said that such use by their tenants gave it.

2. It was not error to exclude the testimony of witness Pechner

the effect that in 1871, while he was a tenant of defendants, he and his partner built a fence at the south end of the west ten by twenty feet, and put a gate therein, by the persuasion of defendants. It is said that this testimony was especially material for the purpose of showing the use and control by defendants of the passage-way in question. But it would not have tended to show anything of the kind. Nor would it have tended to show that the possession was not in plaintiffs, at the time of entry by defendants. Pechner claimed no interest in the land as such, or right of possession thereto, adverse to plaintiffs, in 1871, or afterwards; and evidence that he put up a fence at one end of the ground, for his own accommodation, would not show that plaintiffs were not in possession, or that defendants were, at the time of the entry.

3. The motion for nonsuit should have been granted, for reasons before stated.

4. It was not error to strike out the testimony of witness Jacobs to the effect that, several years before the trial, he heard one of the plaintiffs tell one Lipscomb that he wished witness "would remove certain wood from the alley belonging to the latter, as the defendants would object to its being there," and the same is true as to the testimony of witness Hamilton, to the effect that, "in 1871 or 1872, one of the plaintiffs told witness that he had concluded not to build a brick building, but would put up a frame, as he had to leave an alley-way for defendants and their tenants." The most that can be claimed for this testimony is, that it tended to show a right of way a long time prior to defendants' entry. It did not tend to show that defendants were, at that time, in possession of the land, or that plaintiffs were not. It was not relevant to any material issue in the case.

The judgment and order appealed from are affirmed.

SUPREME COURT OF NEW MEXICO.

UNITED STATES v. MONTE.

Filed February 6, 1884.

MURDER BY INDIAN—JURISDICTION OF UNITED STATES COURT OVER.—The United States branch of the district court has exclusive jurisdiction of a prosecution for the murder of a white person committed by a Mescalero Apache Indian on the Mescalero Apache Indian reservation. The indictment for such crime should be in the name of the United States.

APPEAL from a judgment of the district court, convicting the defendant of murder. The opinion states the facts.

No appearance for the appellant.

G. W. Prichard, United States attorney, for the United States.

BELL, J. The defendant in the court below, and the appellant here, was indicted, tried, and convicted in the district court for the third judicial district for the crime of murder, and the case has been brought into this court for review, upon a record which presents only one material exception, namely, to the decision of the court below, overruling a plea to its jurisdiction. The indictment was found in the name of the United States, and on the United States side of the district court—that is, the branch of the court sitting for the trial of causes arising under the constitution and laws of the United States throughout the whole district, as distinguished from causes having no reference to the laws of the United States, the venue for which is laid in the several counties composing the district.

From the facts presented to us by the record, it appears that the defendant is an uncivilized Mescalero Apache Indian; that the homicide was committed on the Mescalero Apache Indian reservation, in the third judicial district of this territory; and that the person killed was a white man, and not an Indian. We understand the defendant's position to be, that the United States have not exclusive jurisdiction of the case, and that therefore the prosecution should be in the name of the territory, and disposed of on the territorial side of the court, or be disposed of by the Indians themselves, to whose tribe the defendant belongs.

While the territorial district courts, for the purposes of United States cases, possess all the jurisdiction of circuit and district courts of the United States, still that jurisdiction is strictly statutory, either as regards the nature of the case or locality in which it arises. This applies to criminal as well as civil cases; and an indictment for murder committed within the territory lies in the name of the territory, and is to be tried in the territorial as distinguished from the United States side of the district court, unless the case falls within a statutory provision which would give the courts of the United States jurisdiction thereof.

The crime of murder is within the jurisdiction of the United States, when committed "within any place or district of country under the exclusive jurisdiction of the United States:" U. S. R. S., sec. 5339. And "the jurisdiction vested in the courts of the United States * * * shall be exclusive of the courts of the several states, of all crimes and offenses cognizable under the authority of the United States:" Id., sec. 711.

For the purposes of this case, the words "in places under the exclu-

sive jurisdiction or the United States" extend to and include the Indian country: U. S. R. S., sec. 2145. It has been held by the supreme court of the United States, at its last term (October, 1883), in Ex parte Crow Dog, that the term "Indian country" includes Indian reservations situated within the geographical limits of existing territories; that the United States has jurisdiction of the crime of murder committed within such reservations; and that an indictment for such offense is triable in the United States, as distinguished from the territorial, branch of the district court, for the judicial district of the territory within the boundaries of which the reservation in question is situated.

The decision of the supreme court referred to, set forth in an opinion by Mr. Justice Matthews, not yet appearing in the official reports, is of such interest and importance in connection with the administration of justice in the territories, that it seems advisable to quote at length the portion relating to the question now under consideration.

"The district courts of the territory of Dakota are invested with the same jurisdiction in all cases arising under the laws of the United States, as is vested in the circuit and district courts of the United States: R. S., secs. 1907–1910.

"The reservation of the Sioux Indians, lying within the exterior boundaries of the territory of Dakota, was defined by article 2 of the treaty concluded April 29, 1868, 15 Stat. 635, and by section 1839, revised statutes; it is excepted out of and constitutes no part of that territory. The object of this exception is stated to be to exclude the jurisdiction of any state or territorial government over Indians, within its exterior lines, without their consent, where their rights have been reserved and remain unextinguished by treaty. But the district courts of the territory having, by law, the jurisdiction of district and circuit courts of the United States, may, in that character, take cognizance of offenses against the laws of the United States, although committed within an Indian reservation, when the latter is situate within the space which is constituted by the authority of the territorial government the judicial district of such court. If the land reserved for the exclusive occupancy of Indians lies outside the exterior boundaries of any organized territorial government, it would require an act of congress to attach it to a judicial district, of which there are many instances, the latest being the act of January 6, 1883, by which a part of the Indian territory was attached to the district of Kansas, and a part to the northern district of Texas: 22 Stat. 400.

"In the present case the Sioux reservation is within the geographical limits of the territory of Dakota, and being excepted out of it only in respect to the territorial government, the district court of that territory, within the geographical boundaries of whose district it lies, may exercise jurisdiction under the laws of the United States over offenses made punishable by them committed within its limits: United States v. Dawson, 15 How. 467; United States v. Jackalow, 1 Black, 484; United States v. Rogers, 4 How. 567; United States v. Alberty, Hempst. 444, opinion of Mr. Justice Daniel; United States v. Starr, Id. 469; United States v. Ta-wau-ga-ca, or Town Maker, an Osage Indian, Id. 304.

"The district court has two district jurisdictions. As a territorial court it administers the local law of the territorial government; as invested by act of congress with jurisdiction to administer the laws of the United States, it has all the authority of circuit and district courts; so that, in in the former character, it may try a prisoner for murder committed in

the territory proper, under the local law, which requires the jury to determine whether the punishment shall be death or imprisonment for life: Laws of Dakota, 1883, c. 9; and in the other character, try another for a murder committed within the Indian reservation, under the law of the United States, which imposes, in case of conviction, the penalty of death.

"Section 2145 of the revised statutes extends the general laws of the United States as to the punishment of crimes committed in any place within their sole and exclusive jurisdiction, except the District of Columbia, to the Indian country, and it becomes necessary therefore to inquire whether the locality of the homicide, for which the prisoner was convicted of murder, is within that description.

"The first section of the Indian intercourse act of June 30, 1834, defines the Indian country as follows: 'That all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana or the territory of Arkansas, and also that part of the United States east of the Mississippi river not within any state to which the Indian title has not been extinguished, for the purposes of this act, be taken and be deemed to be the Indian country."

"Since the passage of that act great changes have taken place by the acquisition of new territory, by the creation of new states, and by the organization of territorial governments; and the revised statutes, while retaining the substance of many important provisions of the act of 1834, with amendments and additions since made, regulating intercourse with the Indian tribes, has nevertheless omitted all definition of what must now be taken to be 'the Indian country.' Nevertheless, although the section of the act of 1834 containing the definition of that date has been repealed, it is not to be regarded as if it never had been adopted, but may be referred to in connection with the provisions of its original context, which remain in force, and may be considered in connection with the changes which have taken place in our situation, with a view of determining from time to time what must be regarded as Indian country where it is spoken of in the statutes. It is an admitted rule in the interpretation of statutes that clauses which have been repealed may still be considered in construing the provisions that remain in force: Bramwell, L. J., in Attorney General v. Lamplough, L. R., 3 Ex. D., 223-227; Hardcastle on Statutory Law, 217; Savings Bank v. Collector, 3 Wall. 495-513; Commonwealth v. Bailey, 13 Allen, 541.

"This rule was applied in reference to the very question now under consideration in Bates v. Clark, 95 U. S. 204, decided at the October term, 1877. It was said in that case by Mr. Justice Miller, delivering the opinion of the court, that 'it follows from this that all the country described by the act of 1834 as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title, in the absence of any different provisions by treaty or by act of congress.'

"In our opinion, that definition now applies to all the country to which the Indian title has not been extinguished within the limits of the United States, even when not within a reservation expressly set apart for the exclusive occupancy of Indians, although much of it has been acquired since the passage of the act of 1834, and notwithstanding the formal definition in that act has been dropped from the statutes, excluding, however, any territory embraced within the exterior geographical limits of a state, not excepted from its jurisdiction by treaty or by statute, at

the time of its admission into the Union, but saving, even in respect to territory not thus excepted and actually in the exclusive occupancy of Indians, the authority of congress over it, under the constitutional power to regulate commerce with the Indian tribes, and under any treaty made in pursuance of it: United States v. McBratney, 104 U. S. 621.

"This definition, though not now expressed in the revised statutes, is implied in all those provisions, most of which were originally connected with it when first enacted, and which still refer to it. It would be otherwise impossible to explain these references or give effect to the most important provisions of existing legislation for the government of Indian country.

"It follows that the *locus in quo* of the alleged offense is within the Indian country, over which, territorially, the district court of the first judicial district of Dakota, sitting with the authority of a circuit court of the United States, had jurisdiction."

It is to be noticed also that the terms "Indian country" and "reservation" seem to be used indiscriminately and synonymously, in the statutes relating to the Indians, and that all laws regulating trade and intercourse with the Indian tribes were extended over the Indian tribes in the territory of New Mexico, by the act of the twenty-seventh of February, 1851, 9 U. S. Stats. 537.

The only limitation to the jurisdiction of territorial district courts, sitting as United States courts, over crimes committed on Indian reservations, is contained in section 2146 of the revised statutes of the United States, which is as follows: "The preceding section [section 2145, extending the jurisdiction of the United States to the Indian country] shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where by treaty stipulation the exclusive jurisdiction over such offense is or may be secured to the Indian tribes respectively."

The exception of crimes "committed by one Indian against the person of another Indian" does not apply to the present case, as the person killed by the defendant was a "white person," as it appears by the record—that is, was not an Indian. The exception of an offense committed by an Indian "who has been punished by the local laws of the tribe" is not urged in the present case, nor in anything cited or shown to support this exception.

There is therefore left for our consideration only the third exception, namely: "Cases where by treaty stipulation the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

The only treaty with the tribe in question—the Apaches—which can bear upon the point, was made at Santa Fé, on July 1, 1852, and is found in 10 Stat. 979.

Articles 1, 4, and 6 of this treaty are as follows: "Art. 1. Said nation or tribe of Indians, through their authorized chiefs aforesaid, do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."

"Art. 4. All said nation or tribe of Indians hereby bind themselves to refer all cases of aggression against themselves or their property and territory to the government of the United States for adjustment, and to con-

form in all things to the laws, rules, and regulations of said government in regard to the Indian tribes."

"Art. 6. Should any citizen of the United States, or any other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said states."

These are the only treaty stipulations in reference to the subject under consideration, and there is nothing in any of them tending to secure exclusive jurisdiction over any offense to the Indians themselves. This was a treaty made with the "whole Apache nation of Indians situate and living within the limits of the United States:" See preamble to treaty.

We are not aware that a stipulation can be found in any treaty with Indians giving them jurisdiction over an offense committed by one of their number against a white person. In all treaties of such a character which pretend to be complete, there are provisions to the effect that the Indian committing such an offense shall be delivered up by his fellow-Indians to the United States, to be tried and punished by its laws: See the treaty with the Sioux tribe, commented on in Ex parte Crow Dog, and with the Navajos, made at Fort Sumner, June 1, 1868, 15 Stat. 667.

Nor can it be supposed that the government would ever leave the punishment of a crime committed by an uncivilized Indian upon a white person to the exclusive jurisdiction of his fellow-Indians.

This exception, however, has lost all force as regards the future, as by the act of March 3, 1871, it is provided, "that no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power, with whom the United States may contract by treaty:" R. S., sec. 2079.

It is therefore our opinion that the United States branch of the district court had exclusive jurisdiction of the crime alleged in the indictment, and proved in the case, and that the judgment of the court below must be affirmed.

AXTELL, C. J., concurred.

WAGNER ET AL. v. ROMERO, Sheriff, etc., ET AL.

Filed February, 1884.

JUDGMENT ON A FORTHCOMING BOND.—In an action on a forthcoming bond given under section 13 of that portion of the Kearney code relating to attachments, an order which directs that the property attached shall be "forthwith delivered to the sheriff of San Miguel county, and that the same be sold and the proceeds of said sale be applied to the satisfaction of the judgment," is sufficiently definite both as to the time and place of delivery. If it were not so, the court has authority to amend such order at the same term by designating more definitely the time and place of delivery.

A DEFENDANT WHO APPEARS IN AN ATTACHMENT SUIT AND MAKES NO OBJECTION to the writ, can not, after judgment has been given against him, question the sufficiency or character of the writ.

A COPY OF A FORTHCOMING BOND IS ADMISSIBLE IN EVIDENCE upon proof of the loss of the original and the correctness of the copy.

AN ACTION ON A FORTHCOMING BOND MAY BE BROUGHT in the name of the sheriff, for the use and benefit of the real parties in interest, against the sureties on such bond, without joining their principal, and without showing that judgment has been obtained against the principal or that the plaintiff has exhausted his remedies against him.

APPEAL from a judgment of the first judicial district court for San Miguel county. The opinion states the facts.

D. P. Shield and *T. F. Conway*, for the appellants.

Breeden and *Waldo*, for the appellees.

BELL, J. This is an appeal from a judgment against the appellants here, and defendants in the court below, in an action brought against them on a forthcoming bond, given to the plaintiff as sheriff of San Miguel county, in an action commenced by attachment in the district court of that county. Various questions were raised upon the trial in the court below, but we shall only consider here such questions as have been urged by the counsel for the appellants in his brief, which has been submitted to the court.

The first error assigned is, that there was no order made at the time when the cause was tried as to when and where the property mentioned in the said bond should be delivered. It appears from the evidence of William Breeden, page 45 of record, that one or two days after the trial and judgment herein, he discovered that, following the entry of judgment, the proper order, in his opinion, designating the place for the return of the property, did not appear on the official record of the court; that he then called the attention of the court to the fact, and asked to have the record in that respect amended, and that the court granted the request; and that then and there, in the presence of the court, the following words were added to the record: "And that said property be delivered at Las Vegas, New Mexico, at the court-house of San Miguel county."

That portion of the record material to the question raised was, before amendment, as follows: "It is further considered, that the property attached in this cause be forthwith delivered to the sheriff of San Miguel county, and that the same be sold and the proceeds of said sale be applied to the satisfaction of this judgment." Following these words were the words quoted above, and added by the way of amendment.

The statute providing for the giving of a forthcoming bond is section 13 of that portion of the Kearney code relating to attachments and garnishments, and is as follows: "When property of the defendant, found in his possession, or in the hands of any other person, shall be attached, the defendant, or such other person, may retain possession thereof by giving bond and security, to the satisfaction of the officer executing the writ, to the officer or his successor, in double the value of the property attached, conditioned that the same shall be forthcoming when and where the court shall direct, and shall abide the judgment of the court:" Prince's Comp., p. 138.

We are of opinion that the judgment in the case at bar, and the order of the court before the amendment complained of, sufficiently complied with the provisions of the statute quoted. The order of the court was that the property attached in this cause be forthwith delivered to the sheriff of San Miguel county, and that the same be sold, and the proceeds of said sale be applied to the satisfaction of the judgment.

This order was sufficiently definite. The time when the delivery was to be made was "forthwith," and the "place where" was to the sheriff of San Miguel county. The sheriff of San Miguel county is a public officer, with an official residence within the county, and when an order is entered, directing property to be returned to the sheriff of San Miguel county, it must be held to mean that the property shall be returned to the sheriff at the official residence of that sheriff, within said county.

And even if this were not so, we are of opinion that the amendment of the order in the respect complained of, made in the presence and by the authority of the court, at the same term of the court at which the judgment was rendered, was proper, and the only criticism to be made upon it is, that in our judgment it would have been more regular to have had it appear upon the record that the amendment was made at a subsequent date, and upon motion of counsel. This, we think, would have been more regular and better practice. The defendants were in no way prejudiced by the amendment, and there is therefore no reason for disturbing the judgment on that account.

It is next urged that the writ of attachment, issued in the original action, in which the forthcoming bond was given, upon which this suit was brought, was void, for the reason that the writ was issued by the clerk of the probate court, and not by the clerk of the district court. That question can not be considered here. The defendants appeared in the action, made no objection to the writ, and judgment was obtained against them. It is too late now to question the character of the writ, though, in our judgment, it might well have been questioned in the original action.

The next alleged error is, that the forthcoming bond was not sufficiently proved upon the trial in the court below. From the record it appears, by the evidence of the clerk of the court, and of William Breeden, one of the attorneys in the case, that the original bond was properly filed in the clerk's office of the lower court, that a copy of it, examined by the clerk and William Breeden, was preserved among the papers of the plaintiff, and that when the case was called for trial the original bond could not be found, though the clerk made diligent search for it in his office, where it had been deposited. This evidence of the loss of the original bond, and evidence tending to show that the copy of the instrument produced in court was a correct copy, was in our opinion sufficient to warrant the admission of the copy in evidence at the trial.

It is urged that the copy of the bond introduced is not a copy of such a bond as is required by the statute, or such as the sheriff was authorized by the statute to take.

Section 18 of the Kearney code, already cited, is cited by the counsel in support of this position; but an examination of the bond, as it appears in the record, shows that its condition was in strict compliance with the requirements of this statute.

Two other questions were raised in the court below, which, though not urged by counsel in the brief submitted, we think worthy of consideration.

One is, that the action was not in the name of the proper plaintiff. As it already appears, the action was brought in the name of the sheriff, for the use and benefit of the real parties in interest. This course we think is fully authorized by section 2 of the practice act of 1880, which provides as follows: "An executor or administrator, a guardian, a trustee of an express trust, a party with whom or in whose name a contract is made for the benefit of another, or party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the suit is prosecuted." The sheriff in this case was clearly the proper party plaintiff, as the contract was made with him, "for the benefit of another."

It was also urged in the court below, that the action could not be maintained against the sureties on the bond without joining the principal, or

without showing that judgment had been obtained against the principal, and the plaintiff had exhausted his remedy against him. This point, in our judgment, was not well taken. By section 56 of the act of 1878, chapter 4, Prince's Comp. 122, it is provided: "All contracts which by the common law are joint only, shall be held and construed to be joint and several; and in all cases of joint obligations or assumptions by partners and others, suit may be brought and prosecuted against any one or more of the parties liable thereon; and when more than one person is joined as defendant in any such suit, such suit may be prosecuted and judgment rendered against any one or more of such defendants."

The instrument sued upon in the case at bar was a writing obligatory, and by its terms would appear to be joint only, but by the authority of this statute it must be considered to be joint and several; and it follows that the plaintiff herein had a right to bring his action against any one or more of the parties to the obligation.

We find no error in the record as presented, and the judgment below must be affirmed.

AXTELL, C. J., concurred.

ORR ET AL. *v.* HOPKINS.

Filed February, 1884.

JUDGMENT AGAINST SURETIES ON APPEAL.—Where the amount of a judgment rendered against an appellant is reduced by the appellate court, on a ground that was not raised in the lower court, and the judgment is affirmed as so reduced, the sureties on the appeal bond given under section 4 of Prince's statutes, page 242, are liable thereon.

APPEAL from a judgment of the district court for Bernalillo county, entered in favor of the plaintiffs. The facts are stated in the former opinion reported in 1 West Coast Rep. 157.

W. B. Childers, for the appellant.

Catron & Thornton, for the appellees.

BRISTOL, J. This case was argued and submitted at the last term. A decision was rendered during vacation, to the effect that the judgment below was in excess of the amount in which appellees were entitled to recover upon their declaration, the excess being in the amount of interest they were entitled to on the money demand sued on; that the excess of interest being a matter of exact computation, the appellees should have leave until the second Monday of January, 1884, to file a *remittitur* of such excess, and if done within that time the judgment below to be affirmed as to the residue, and on failure so to do, the judgment to be reversed and the cause remanded for a new trial.

The *remittitur* was filed within the time specified, but the judgment of this court has been delayed for the determination of the further question, whether its rendition should be against the appellant's sureties on his appeal bond, as well as against himself alone. The question is presented on the motion of the appellees that judgment be rendered as well against the sureties as the appellant. The sureties have appeared by counsel and resist the motion.

The provision of the statute in relation to this question is as follows: "In case of appeal in a civil suit, if the judgment of the appellate court be against the appellant, it shall be rendered against him and his sureties on the appeal bond:" Prince's Stat. 242, sec. 5.

The judgment of this court, under our previous ruling, must necessarily be rendered against the appellant; but it is claimed by counsel for the sureties, that inasmuch as the judgment appealed from has been modified by this court, the sureties are discharged from liability.

The statute in regard to appeal bonds in appeals to this court is as follows: "Upon the appeal being made, the district court shall make an order allowing the same; such allowance shall stay the execution, * * * when the appellant, or some responsible person for him, together with two sufficient securities, to be approved by the court during the same term at which the judgment or decision appealed from was rendered, enters into a recognizance to the adverse party, in a sum sufficient to secure the debt, damages, and costs recovered by such judgment or decision, together with the interest that may grow thereon, and the costs and damages which may be recovered in the supreme court, conditioned that the appellant shall prosecute his appeal with due diligence, to a decision in the supreme court, and that if the judgment or decision appealed from be affirmed or the appeal be dismissed, he will perform the judgment of the district court, *and that he will also pay the costs and damages that may be adjudged against him upon his appeal:*" Prince's Stat. 68, sec. 4.

The condition of the appeal bond in this case is in compliance with the above statute on the subject, and in case of an affirmance of the judgment or a dismissal of the appeal, it covers not only payment of the judgment appealed from, but also all damages and costs that shall be adjudged against the appellant by this court.

The precise point on which the *remittitur* was permitted to be filed in this court was not raised in the court below. It is true, however, that there were general objections and exceptions to all the proceedings, including all the evidence adduced on the trial; but it is quite evident, from an examination of the record, that the gist of the defense was that there was no evidence to sustain a judgment in any amount whatever, and this also is the substantial ground of the appeal.

Neither was this question raised by counsel in this court. It was raised for the first time by this court on its own motion, which no doubt it might do in the exercise of its discretion in the furtherance of justice—the statute against entertaining any exception not taken in the court below being directory and permissive only. On the case as submitted, either of these modes of final disposition was open to us.

Under the statute that "no exception shall be taken in an appeal to any proceeding in the district court except such as shall have been expressly decided in that court," Prince's Stat. 68, sec. 5, we might have affirmed the entire judgment on that ground.

That the question as to the excessive interest was not raised in the court below or in any manner alluded to by either party, and was not therefore specifically ruled on, 6 Wall. 225, or the excessive interest being a matter of exact computation, we might have given judgment for the proper amount in this court under the following provision of the statute: "The supreme court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the circuit court, *or give such other judgment as to them shall seem agreeable to law:*" Prince's Stat. 69, sec. 7.

Or we could, as was done in this case, give to the appellees their option to file a *remittitur* covering the excessive interest, and have the judgment affirmed as to the residue, ortherwise to submit to a reversal and trial *de novo*.

Neither of these modes of disposition can be considered as a reversal so as to discharge the securities on the appeal bond, except on failure to file the *remittitur*.

Had the point as to excessive interest been raised in the court below, and overruled and excepted to, the case no doubt would have been viewed from a different standpoint; but that specific question not having been raised or ruled upon, the appeal can not be considered as having been taken to correct that irregularity. It may be fairly presumed that had the point been raised the irregularity would have been promptly corrected in the court below. The cases of Rothgerber et al. v. Wanderly, 66 Ill. 390, and Chase v. Ries et al., 10 Cal. 517, are much relied on by the sureties in this appeal bond, as authority showing their exemption from liability, but in each of those cases the judgment appealed from was actually reversed and remanded to the court below, with instructions to enter a different judgment.

In the case at bar there is no such reversal and remanding for a different judgment. The judgment of this court, upon our previous ruling, should affirm the judgment below, after deducting therefrom the amount of the *remittitur* filed, as aforesaid, and that the appellees recover of the appellant and his securities named in his appeal bond the specified amount of such residue and their costs, and that they have execution therefor.

AXTELL, C. J., concurred.

TERRITORY, etc., *v.* DURAN ET AL.

Filed February, 1884.

DEAF AND DUMB WITNESS—COMPETENCY OF.—A deaf and dumb child, about nine years of age, who has no idea of the nature or sanctity of an oath, and who can not be made to understand questions asked him, is not competent as a witness.

APPEAL from a judgment of the district court for Grant county, convicting the defendants of murder. The opinion states the facts.

No appearance for the appellants.

William Breeden, for the territory.

BELL, J. The defendants in the court below, and appellants here, were indicted, tried, and convicted of the crime of murder in the first degree, at the July term of the district court for Grant county for 1883. The bill of exceptions is submitted to this court without argument. The defendants were indicted for the murder of a Chinaman by the name of Wy Poi, alleged to have been killed by them on the third day of February, 1883, in the evening of that day. Numerous exceptions were taken by counsel for the defendants in the court below, but it will be unnecessary for us to consider more than one of them.

The principal witness offered for the prosecution at the trial was a deaf and dumb child, who at the time of the commission of the offense was less than nine years of age, and at the time of the trial was but little more than nine years old. He was the only witness offered who, it was claimed, had been an eye-witness to the commission of the offense. Objection was made to his competency as a witness, both for the reason that he was so young a child, and that his physical infirmities were such as to make it impossible for him to intelligently narrate the occurrences which it was claimed he had witnessed.

It was also claimed that the child being wholly uneducated in the language of the deaf and dumb, it was not possible for him to understand such questions as might be put to him touching the transaction. These objections were all overruled by the presiding judge in the court below, and exceptions duly noted.

From the record it appears that the mother of the deaf and dumb boy, Luther Carey, was called and sworn to act as an interpreter for the child. She testified in substance, that he never had been educated in the deaf and dumb language, but that she could make herself understood to him by signs, and that generally she could understand him.

The court asked her this question: "Q. Ask him [the deaf and dumb boy] what will be done to him if he should tell an untruth as a witness here—if he should tell a lie while he is giving his testimony, what would be done to him?" Here the record shows Mrs. Carey made several signs and gestures to the deaf-mute with her hands. "A. I can not make him understand.

"Q. You say you can not make him understand? A. No, sir; I can not; he has the idea of the murder fixed in his mind, and he wants to tell that.

"Q. Can you convey to him an idea that he will be punished if he does not testify truly?" Here the witness again repeats the signs and gestures to the mute. "A. I can not make him understand me; he is telling how the murder was committed, and what he saw; he thinks he is wanted to tell what took place at the Chinaman's house that night."

It is very evident from the testimony of the mother and brother of the deaf-mute that their only knowledge of what he said to them was inferential, and based upon their familiarity with his signs and gestures, and only extended to the most ordinary every-day affairs of life; that no exact code of conversation existed between them, but that in a limited way they understood his gestures and pantomime in their reference to his every-day wants.

The court, however, admitted the testimony of the child, and in doing so used the following language: "This little boy has no education, yet I am inclined to believe that, notwithstanding the fact that the mother is unable to communicate to this little boy any questions tending to test his knowledge of an accountability to the Supreme Being, yet as a psychological fact, growing out of his mental condition, he would be incapable of communicating any evidence except such as he saw. He would be incapable of manufacturing or inventing a falsehood as to the material facts, unless he saw them. In my opinion, this would be a better test of the strength, or at least as good a test of the truth, as would be the belief of a man of mature age and clear understanding in his accountability to the Supreme Being." This, of course, breaks into the general rule of law as to the competency of witnesses; yet, all the facts in the case considered, I believe my view of the case to be the law, and that this case presents a well-grounded exception to the general rule. My opinion is, that the witness is competent; the very fact that ordinary ideas about things and events which he has not seen can not be communicated to him, is a better test of the credibility of what he is able to communicate by signs than would his mere belief in his accountability to the Supreme Being. The other class of ideas which he entertains would spring from the sensations of touch, taste, and smell. In this view of the case, I

believe it is impossible for the boy to entertain ideas in regard to passing events unless he had actually witnessed them."

The boy was then examined, and as interpreted by his mother, gave material testimony in the cause. We are of opinion that the admission of this testimony, under all the circumstances, was erroneous. As the learned judge in the court below said, the admission of such testimony broke into the general rule of law as to the competency of witnesses. It appears to us to transgress several well-settled rules; it was not shown that the child had any intelligent idea whatever of the nature or sanctity of an oath; on the contrary, it was shown by the testimony of his mother, that she could not explain to him its nature or the consequence of telling a falsehood while testifying as a witness. There is no case which we can find in the books in which a person was permitted to testify under such circumstances.

A case of such gravity as this would not, in our judgment, warrant the relaxation of the rule that there must be some sanction under which the oath is taken before the testimony should be properly admitted. Not only was it impossible to explain to him the nature of an oath, but it was quite as impossible on his subsequent examination to make him understand the questions which were put to him; for example, his mother was asked: "Q. Can you communicate with him now, so as to find out from him what he was doing there?"—Meaning at the place where the murder took place. "A. No, sir; I can not. Q. How are you able to state that he was there holding the horses? A. He marked it out as he did here. He placed himself holding horses near the Chinaman's house. Q. Explain where the horses were while the men were dismounted during this killing—ask the boy that. A. I can not explain it to him in that way. All that he can tell is, that the men were killed, and who they were, and who did the killing."

We are clearly of the opinion that such testimony should not have been permitted to go to a jury in any cause, and least of all in a capital case. The constitution of the United States and bill of rights provide, that in all criminal cases the accused has the right to be heard by himself and counsel, to demand the nature and cause of the accusation, and to meet the witnesses against him face to face. Of course this language means that the accused shall have the right to be confronted by the witnesses against him, under such circumstances as that their intelligence and truthfulness may be subjected to the test of thorough examination and cross-examination.

It is entirely evident in this cause that the counsel for the accused, or the accused themselves, could not by any possibility have intelligently tested either the recollection or the truthfulness of this deaf and dumb child, by reason of the inability of any one to fully interpret either their questions or his answers.

We are unable to concur in the view of the learned judge in the court below, that "as a psychological fact growing out of his mental condition, he would be incapable of communicating any evidence except such as he saw. He would be incapable of manufacturing or inventing falsehood as to material facts, because he could have no idea of the facts unless he saw them. * * * I believe it is impossible for the boy to entertain ideas in regard to events unless he had actually witnessed them." In other words, the presiding judge was of opinion that the boy could

not tell a lie, for the reason that he could only tell of such events as he had actually seen transpire.

This was an assumption unwarranted by the facts. We see no reason why the imagination of that boy could not have been so developed as to have invented or fabricated a story of occurrences which had never taken place. Is it to be said that because a person is deaf and dumb, that he wholly lacks imagination? We think not. Deaf and dumb persons have frequently, according to the experience of men, not only given evidence of strong imagination, but in several instances have been successful writers of fiction.

It is no answer to this view to say that this child was uneducated; it only makes it more difficult to say to what extent his imagination may have been developed, and may have acted.

We are therefore of opinion, for the reasons stated, that the court below erred in admitting the evidence of the deaf and dumb child, Luther Carey, as that of a competent witness.

We arrive at this conclusion with reluctance, as there is much reason to believe, from an examination of the record, that the defendants are guilty as charged. That fact, however, we can not consider here. "A court inquiring after the regularity of proceedings never asks whether or not the defendant is guilty. A guilty man, when the proceedings are irregular, has the same right to escape from the grasp of the law as an innocent one; on the other hand, an innocent man has no rights in this respect which a guilty man has not:" 1 Bishop's Cr. Proc., sec. 92. The same authority, in the following section, adds: "The result is, that one accused before the court has the same right to protest against the proceedings as to protest his innocence. And counsel who appear on his behalf have the same right, and are under the same obligation, to do the one as the other. * * * Human laws are meant merely to conserve the outward order of society, and a part of this order, not less essential than any other part, consists in pursuing the exact methods which the law has laid down in bringing criminals to justice:" Id., sec. 93.

It is of the highest importance, that in so grave a case as the one under consideration the exact methods which the law has laid down should be pursued with the greatest strictness.

For the reasons stated herein, the judgment of the court below must be reversed, and a new trial ordered.

AXTELL, C. J., concurred.

BRISTOL, J., dissenting. The appellants, Abel Duran and Aurelio Lora, were indicted jointly with Carlos Chaves for the crime of murder in the first degree. Chaves having been tried separately and convicted, Duran and Lora were afterwards, but at the same term, jointly tried, convicted, and sentenced to be executed. This case is here on appeal. This court having rendered its decision reversing the judgment and remanding the cause for a new trial, I dissent therefrom, for the reasons herein stated.

The learned judge, in rendering the opinion of this court, quoted only so much of the evidence relating to the competency of the deaf and dumb boy as a witness as relates to the inability of his mother as an interpreter of his gestures and signs to communicate to him any question that he could comprehend touching his understanding of the obligation of an oath or the consequences to him in case he should utter a falsehood.

The ruling of the court below in admitting the statements of the boy through his natural signs and gestures was not based on that part of the evidence at all, except so far as the fact of his immaturity in age, his inexperience, and the impossibility of communicating any but the simplest ideas to his mind, rather strengthened the moral certainty that he could communicate only what he had actually seen.

The murder was committed on Saturday evening about eight o'clock, as the evidence of other witnesses conclusively shows. Other evidence on the examination of the boy, on his *voir dire* and addressed to the court, was received from his mother as follows:

"By the court. Do you know whether this little boy made any communications to any one in regard to this murder before it was known in the community that the murder had been committed? Yes, sir; he did to me *that Saturday night.*

"By the court. Please explain that. A. He came into the house and came to the room where I was; the child was very much excited and commenced hallooing, 'Mam! mam!' and when I looked around at him he was excited. I knew that something uncommon had happened, and he commenced showing me that somebody was stabbed, and making signs of a throat being cut by drawing his hand across his throat. He then commenced beating himself with a stick, and showed that a shooting had been going on by pointing as though he had a gun. He drew his hand across the back of his head and fell over, and was very much excited all the while; there was a soldier in the house, and I says to the soldier, 'Do you know what the child means? Something has happened, and he is trying to tell me about it.' The soldier said he did not know without it was about a fight a couple of soldier had at the post a few days before. The soldier looked at the child and pointed to himself, trying to tell him that it was about the fuss at the post; but the little boy pushed the soldier away and pointed at Duran [one of defendants], who was sitting there on the end of the bench [the Careys, parents of the boy, kept a public house]. I said to Duran, 'What have you been doing? the boy is telling something on you.' The child made signs by putting his hands on the back of his head and showing that there were Chinamen by representing their long queues, and made signs that they would not put him in jail because they were Chinamen, and it made no difference. He then put the stick under his arms and commenced beating with both hands."

All this testimony objected to on behalf of defendants; objection overruled, and exception taken.

"By district attorney. When did you first hear of this murder? A. Not until next morning.

"Q. You say the child was very much excited that evening: was his conduct something unusual? A. Yes, sir; I knew something serious had happened, but of course I could not tell then what it was.

"Q. How did Duran act when the little boy pointed at him after he pushed the soldier aside? A. Duran just sat there on the end of the bench. He knew something had happened just as well as I did.

"Q. Did the little boy appear to be excited when he first came into the house? A. Yes, sir; he was very much excited. He called, 'Mam! mam!' two or three times, and then went on trying to show me what had happened. I tried to pay no attention to him several times, but he would keep on insisting that I should know what had happened. * * *

"By the court. Did not this little boy on the other trial [the trial of

Carlos Chaves, one of the three jointly indicted], in answer to the question put to you as interpreter, as to whether he knew the penalty he would incur if he told a falshood, say, in answer to that inquiry, that he would be burned up? A. Yes, sir; when I made signs to him about his God, then, and what would become of him if he told a lie, he understood me, and made signs that he would be burned up; but I can not make him understand that now."

At a previous stage of the examination the mother had testified that the boy was between nine and ten years of age; that he was uneducated; "he knows the alphabet, but he can not form words; he can spell 'dog' and 'cat' and 'boy,' and simple words like that; that is the extent of his education."

It was upon this evidence, addressed to the court and not to the jury, as to the mental condition of this deaf and dumb boy, and the time, facts, and circumstances of his first revelation to his mother of what he knew of the murder of the Chinaman, that the court below ruled as follows: "This little boy has no education. I am inclined to believe that, notwithstanding the fact that the mother is unable to communicate to him any question tending to test his knowledge of and accountability to the Supreme Being; yet as a psychological fact growing out of his mental condition, he would be incapable of communicating any events except such as he had seen. He would be incapable of manufacturing or inventing falsehoods as to material facts, because he could have no idea of the facts unless he saw them. In my opinion, this would be a better test of the truth, or at least as good a test of the truth as would be the belief of a man of mature age and clear understanding in his accountability to the Supreme Being. This course breaks into the general rule of law as to the competency of witnesses. Yet, all the facts in the case considered, I believe my view of the case to be law, and that this case presents a well-grounded exception to the general rule. My opinion is, that the witness is competent. The very fact that ordinary ideas about things and events which he has not seen can not be communicated to him, is a better test of the credibility of what he is able to communicate by signs than would his mere belief in his accountability to the Supreme Being. The other classes of ideas which he entertains would spring from the sensations of touch, taste, and smell. In this view of the case, I believe it to be impossible for the boy to maintain ideas in regard to passing events unless he had actually witnessed them." To this ruling exceptions were duly taken on behalf of the defendants, and constitute the ground of error on which this court has reversed the judgment.

The only evidence adduced on the trial in the lower court, whereby the defendants could be identified as having taken part in perpetrating the murder, is the evidence of this deaf and dumb boy. It can be seen from the record that to go to trial without this evidence must necessarily result in an acquittal.

No one can read the entire testimony adduced on the trial, and consider it carefully in connection with corroborating circumstances, without being profoundly impressed with the fact that what the boy was able clearly to communicate immediately after the murder, on the same evening it occurred, embracing the horrible details of the crime with wonderful accuracy and precision as to time, place, persons, specific acts, blows, shots, and attending circumstances, *was the truth*, with as high a degree of moral certainty as is possible to be attained from evidence.

The very fact that the boy was unable by signs to make his mother understand the facts as to the murder, and in a manner to identify the tragedy, was proof positive that if the boy had not actually witnessed it, and gazed upon it with his own eyes, it was a psychological impossibility for any one to have communicated to him the minute details of the crime, so as to enable him to describe them with such accuracy. Courts will always take judicial notice of the well-known and uniform laws of nature. It would not be necessary, for instance, if the fact became material on a trial, to prove that a body in the air, of a greater specific gravity than the air, and with no resistance to overcome except that of the air, would certainly descend to the earth.

There are laws governing the human mind that are as well known and uniform in their operation as is the law of gravitation. Every sound human mind is endowed with that wonderful faculty or power termed "consciousness," whereby the mind is enabled to look in upon itself and perceive its own successive sensations, perceptions, and emotions, as well as other mental phenomena and the order in which they occur. That sensation must precede perception, and that both must precede consciousness thereof are uniform laws of the human mind that are well known and understood in the common experiences of mankind.

The mind of this lad, uneducated in any deaf and dumb language whereby ideas as to unseen passing events could be communicated to him, was necessarily a blank as to any minute details respecting the same. This was a fact which under the clear and positive evidence as to his mental condition the court could take judicial notice of.

If there was any room for doubt from the examination of the boy on his *voir dire*, all doubt on the subject must have been removed by the facts and corroborating circumstances adduced on the trial. The second day after the murder, and before the boy had any opportunity to visit the place of the tragedy after its occurrence, in order to test his knowledge of the crime, signs were made to him to lead on the trail of the men who committed the deed he was trying to explain. He was put upon a horse; he took the lead; kept considerably in advance of the party following; struck the trail or tracks of the horses which the murderers rode, and followed it on a circuitous and out-of-the-way route—off from any road, through a brushy and unfrequented part of the country, to the place where the murder was committed. He led to the very house in which the three Chinamen had been killed. On looking in he expressed his astonishment, by signs and actions, at not finding the dead Chinamen. They had been taken out and buried in the mean time.

He was unable to make any intelligible statement as to the details of the tragedy by mere signs or gestures, but with paper and pencil he very readily drew a rude plat of the house and grounds and objects in the immediate vicinity, the roads to and from the place, and its location with reference to Fort Bayard, that was clear and intelligible.

On this plat he marked out the position of each of the defendants while in the act of killing the Chinamen, as also his own position holding the horses. He also designated on the plat the three Chinamen where they fell. With the aid of his plat he was able by signs and gestures to express very intelligently the manner the Chinamen were killed, and the part each defendant took in perpetrating the deed.

Each of the three defendants was so peculiarly marked that he could easily identify them by signs. One was distinctly pock-marked, another

had a very peculiar broken-down nose, and the other had a plain mark or line around his neck. The boy designated and identified him by making a circling motion around his own neck with his hand. It was evidently this motion, when the boy was trying to tell his mother what had happened on the night of the murder, that she mistook for a sign that some person's throat had been cut in the presence of the child. It would seem that after killing the Chinamen and secreting the plunder, the murderers abandoned the boy to get home, some two miles and a half distant, as best he could; he hastened home at once, and, under great excitement, endeavored by signs to tell his mother what had happened.

In the light of all the evidence, including the limited mental capacity of the child and his inability to receive or to communicate ideas as to passing events, except as they came to him through the sensation of sight, it was impossible for him to have imagined or fabricated the details of the tragedy with such wonderful accuracy and precision. The presence of the boy at the scene of the murder is reasonably accounted for from the evidence of other witnesses. The defendants and the boy with his parents lived in the same town. The defendants owned saddle-horses. The boy was with the defendants a great deal; was very fond of riding on horseback, and often rode with the defendants. They evidently supposed the boy could not be a witness, as he was speechless.

The books nowhere furnish a precedent like this. If the law of evidence in no way opens the door for testimony of this kind, then all I have to say is, that the law in this respect is certainly at fault, and the sooner it is changed, either by judicial precedent or by legislation, the better. The sole object of every judicial investigation upon evidence is to ascertain the truth as to the issue involved.

Being satisfied of the absolute truthfulness of this deaf and dumb boy's communications as to the details of the murder, and who committed it, it is my opinion, if he can not be considered competent as an ordinary witness because he can not be communicated with and made to understand the legal and technical obligations of an oath, then under the very extraordinary circumstances attending the case, his communications ought to have been considered as having been properly received as circumstantial evidence, proven by his mother, who understood them, in precisely the same manner as tracks or a trail leading to an identification of the murderers might have been proven and received as competent evidence, and that it would have been proper for this court to have established a precedent of that kind.

SUPREME COURT OF OREGON.

RICHARDS *v.* SNIDER ET AL.

Filed February 7, 1884.

SPECIFIC PERFORMANCE OF A WRITTEN CONTRACT FOR THE SALE OF LAND will be refused when the description of the land, in the light of surrounding circumstances, is not sufficient to enable the court to determine the precise tract of land intended to be disposed of.

COURTS WILL TAKE JUDICIAL NOTICE OF THE GENERAL SYSTEM OF SURVEYS adopted by the United States.

PAROL EVIDENCE IS ADMISSIBLE FOR THE IDENTIFICATION OF THE SUBJECT-MATTER of a contract for the sale of land where there is no uncertainty as to the intention of the parties on the face of the contract.

A VENDEE UNDER A CONTRACT FOR THE SALE OF LAND IS NOT GUILTY OF LACHES in not paying the purchase price when the same was not to become due and payable until the vendor had executed him a deed, if such deed has never been executed or tendered.

APPEAL from a judgment of the circuit court for Umatilla county, entered in favor of the defendants. The opinion states the facts.

Lucian Everts, for the appellant.

L. L. McArthur, for the respondents.

WATSON, C. J. This is a suit for specific performance. The contract sought to be enforced is in writing, and in the following form:

"This agreement made between D. A. Richards and William A. Snider, as a settlement of all matters of difference between them up to this date, witnesseth: That said Richards is to pay to said Snider the sum of fifty dollars, in gold coin, and said Snider is to execute and deliver to said Richards a good and sufficient deed or conveyance of lot 8, section 19, 4 N., 35 E., as soon as patent is received from United States, and said sum of fifty dollars to be then due and payable, or if patent is issued therefor to said Richards, he is to deduct from said fifty dollars whatever is paid to the United States for entrance money, and said Richards to be entitled to immediate possession of said lot 8, and both parties to do and perform every act necessary to carry out this arrangement and obtain title from the United States. D. A. RICHARDS.

"Dated March 21, 1873. W. A. SNIDER."

After setting out the agreement the complaint alleges that the meaning of the words and figures in said agreement, to wit, lot 8, in section 19, in township 4 north, of range 35 east, Willamette meridian, and that said land is situated in Umatilla county, state of Oregon. It further alleges that appellant received possession of the premises from Snider under said agreement, and continued in possession thereof until the respondent Crews made a forcible and wrongful entry thereon on or about August 20, 1882, and that during the time he held possession he made valuable improvements to the amount of one hundred dollars; that patent issued March 1, 1877, to Snider; that in October, 1882, Snider and his wife made Crews a deed to said premises for the expressed consideration of one thousand dollars; that Crews took said deed with full knowledge of appellant's rights under said agreement; that on October 14, 1882, appellant tendered Snider the amount due upon said contract, and demanded a deed for the land, and on the twenty-first day of the same month made a like tender and demand to Crews, but met with a refusal in both in-

stances; and that between the making of such agreement and issuance of the patent, Snider left said county and remained absent therefrom several years after the patent had issued, and had never tendered a deed for the property, or requested payment of the money due him under said contract.

The respondents demurred generally, and the circuit court sustained the demurrer and rendered a decree dismissing the suit.

The appeal is from this decree, The appellant does not claim there is any mistake in the written agreement. If it is not sufficient itself, in the light of the surrounding circumstances alleged in the complaint and admitted by the demurrer, to enable the court to determine the precise tract of land intended to be disposed of, then the appellant must fail, and the decree of the lower court must be affirmed. The only description of the premises in the agreement itself is: "Lot 8, section 19." We can only conjecture as to the signification of what follows. It is not, however, a case of patent ambiguity, even with the description thus limited. Lot 8, in section 9, is a definite and particular tract of land, under the general system of surveys adopted by the United States, and of which the courts will take judicial notice. The intention of the parties to the agreement to contract with reference to this particular tract, and no other, is equally certain.

There is no uncertainty as to this intention on the face of the written agreement. It is clearly a case admitting of the identification of the subject of the contract by proof of extrinsic facts: Dougherty v. Purdy, 18 Ill. 206; Wilson v. Smith, 50 Tex. 365; Clark v. Powers, 45 Id. 283.

And the facts admissible and effectual for this purpose, which are alleged, and in view of the stipulation for possession in the written agreement itself, should be held a sufficient identification: Purinton et al. v. N. Ill. R. R. Co., 46 Ill. 297; Parkhurst v. Van Courtland, 14 Johns. 15; S. C., 7 Am. Dec. 427.

There is no ground for importing laches to the appellant upon the allegations of the complaint in respect to the payment provided for in the agreement. It is expressly stipulated in the agreement itself that the fifty dollars is to be due and payable when Snider executes the deed, and the complaint alleges that he has never tendered one.

Some other considerations were suggested in the argument for the respondents, but it does not seem to us that they arise in the case. We can not infer that the contract in question relates to land which Snider was endeavoring to obtain title to, as a pre-emption or homestead claim. There is nothing in the complaint or the written contract suggesting such a thing. The inadequacy of price, which is also made a ground of objection, is not shown. The amount to be paid by the appellant seems to be the balance ascertained to be due upon a general settlement, including other matters besides the land.

We are satisfied it was error to sustain the demurrer, and the decree of the circuit court must therefore be reversed.

Decree reversed.

SUPREME COURT OF WASHINGTON TERRITORY.

HEYWOOD *v.* TERRITORY OF WASHINGTON.

Filed August 6, 1883.

THE STEALING AT THE SAME TIME OF TWO HORSES, the property of different persons, may be treated as but one offense and charged as such in an indictment.

AN OBJECTION TO AN INDICTMENT ON THE GROUND THAT MORE THAN ONE OFFENSE IS CHARGED therein comes too late if made after verdict.

INSTRUCTION AS TO OWNERSHIP.—Where an indictment charges a defendant with stealing a horse, the property of a person unknown, the court may instruct the jury that if the owner of such horse is now unknown, they might assume, in the absence of evidence to the contrary, that such owner was unknown to the grand jury finding the indictment.

ERROR to the district court. The opinion states the facts.

Judson & Israel, for the plaintiff in error.

C. M. McFadden, prosecuting attorney, for the defendant in error.

HOYT, J. The plaintiff in error herein was indicted by the grand jury for the crime of horse-stealing, and upon his plea of not guilty to said indictment, trial was had, and a verdict of guilty rendered, whereupon the said defendant entered a motion in arrest of judgment and for a new trial, on the ground that the said indictment charged more than one offense, and that the jury were misdirected by the court as to the law of the case, and to reverse the action of the court below in denying such motion. The case has been brought here for review upon the questions above stated. The indictment charged the defendant with stealing one horse, the property of one Mary, whose true name is to the jury unknown, and one horse, the property of one ——, whose name is to the jury unknown, and in our opinion charged but one offense; for while it is true that the taking of two horses, the property of different persons, might constitute two separate offenses, yet if they were taken at the same time the prosecution could elect to treat it as one transaction and charge it as a single offense; besides, an objection of this kind, in our opinion, comes too late after verdict.

The court instructed the jury that if they found from the evidence that the name of the owner of one or both of the horses is now unknown, they might then assume, in the absence of evidence to the contrary, that such name was likewise unknown to the grand jury finding the indictment, and thus find the allegation of ownership as to the horses charged to have been the property of one ——, whose name was to the jury unknown, as having been sufficiently established by the evidence, and the defendant conceives himself aggrieved by such instruction, but we think that upon the question of ownership such instruction was as favorable to the defendant as he could have asked, and that therefore the court committed no error to his prejudice in thus instructing the jury.

These are the only questions which have been argued by counsel, or that it is necessary for us to decide, and it follows from what has been said that the judgment and sentence was not erroneous, and should be affirmed, and it is so ordered.

GREENE, C. J., and WINGARD, J., concurred.

CALHOUN v. GILLILAND, Adm'r, etc.

Filed August 6, 1883.

AMENDMENT OF FINDINGS.—When trial is by the court, the court may at any time before judgment amend its findings of facts, notwithstanding a motion for a new trial has been made.

ERROR to the district court. The opinion states the facts.

C. H. Hanford, for the plaintiff in error.

McNaught & Haller, for the defendant in error.

WINGARD, J. This action was brought by the plaintiff to recover a balance claimed to be due to him from the defendant, on an account. The defendant answered by a general denial of all the allegations of the complaint as to the account, and then set up a counter-claim for wages earned by Robert Kennedy, deceased, and claimed a balance in his favor. The cause was, by stipulation, tried by the court, the evidence having been taken by a referee. The court having filed his findings of fact, giving a balance in favor of the defendant, a motion for a new trial was filed, upon which the court set aside his findings of fact, and replaced them by new findings, whereby a balance was found due to the defendant of less amount than was found before amendment. This is complained of by plaintiff in error; no new trial was granted, but the court only found a different amount to be due to the defendant, and which was less than the first amount found to be due to him, and therefore more favorable to the plaintiff. No authorities need be cited in support of this action of the court; it was not erroneous. The court did not find for the defendant an amount in excess of his counter-claim.

After a careful review of the testimony, we are not prepared to say that the court erred in its findings of fact.

The judgment of the court below is affirmed.

GREENE, C. J. When trial is by the court, the court can at any time before judgment amend its findings of fact.

So far as the finding of a balance in favor of the defendant is concerned, what the district court did was this: it so set off against each other the reciprocal demands of the parties as to effect in the fullest measure justice between them. In order to do justice, it was obliged, to some extent, to make application of payments where no application therefor had been made by either party. This action of the court was, we think, the proper and equitable course to pursue under the peculiar state of the pleadings.

HOYT, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 10,931.

EX PARTE MAKINNEY ON HABEAS CORPUS.

Filed March 8, 1884.

PAYMENT OF JURORS' FEES.—Where a plaintiff is ordered to pay the fees of the jury, the court has no authority, on the mere failure, neglect, or refusal of the plaintiff to comply with such order, to direct that the clerk issue a certificate to all of the jurors of the time and mileage to which each juror is entitled to pay, and that the same be paid out of the county treasury, as is provided in section 28 of the act of March 5, 1870.

APPLICATION for a writ of *habeas corpus*, before Thornton, J. The opinion states the facts.

J. M. Lesser, for the petitioner.

George W. Tyler, for the respondent.

THORNTON, J. Luke Lukes sued J. Bernheim and others in the superior court for the county of Santa Cruz, and on his demand a jury was called and impaneled. The trial of the cause proceeded for five days before the court and jury, and the jury, failing to render a verdict, was, on the nineteenth of October, 1883, discharged. The court entered an order that the plaintiff pay the jury fees, amounting to one hundred and twenty dollars, in said action, and that all proceedings be stayed in the action until the fees are paid by plaintiff. The court further directed in this order that if the fees above mentioned were not paid by plaintiff, the clerk issue a certificate to all of the jurors of the time and mileage to which each juror is entitled to pay, and that the same be paid out of the county treasury, as is provided in section 28 of "An act to regulate fees of office," etc., approved March 5, 1870: Stat. 1869–70, pp. 148, 177.

It further appears that the clerk, petitioner here, refused to obey this order, whereupon the court adjudged him guilty of contempt, and ordered that he be imprisoned until he comply with it. The petitioner Makinney applies to me to be discharged from this imprisonment.

I think that the court in making the order exceeded its power. Such order is only authorized under certain special circumstances, and when those circumstances do not exist, the court has no power to make it. The proceeding under the statute of 1870 in regard to jury fees is in its nature special, and is not within the general jurisdiction of the court. It does not appear that Lukes is without means and unable to pay this money. As the case is presented here, it is one of neglect or failure to pay by one who is ordered to pay. It may be that he had abundant means to pay, and willfully and obstinately refused to pay. Under these circumstances the court had no power to require the clerk to issue certificates as required in the order. It may be that if the court had exercised the powers it had a right to employ, directed a writ of execution to be issued on the order that the plaintiff pay, against the property of plaintiff, had had it placed in the hands of the sheriff, who had made a faithful and diligent effort to make the money and had failed, that the court might then order the clerk to issue such certificates; but certainly it had no power to make such order on the mere failure, or neglect, or refusal of the plaintiff to comply with the order by paying as required.

As the court was unauthorized by law to make the order as to the issuance of the certificates required by it, the imprisonment of the petitioner was without authority, and he must, therefore, be discharged, and it is so ordered.

No. 10,897.

PEOPLE, etc., v. MEIGGS WHARF COMPANY.

In Bank. Filed March 12, 1884.

THE SUPREME COURT HAS NO JURISDICTION OF AN APPEAL FROM A JUDGMENT of the superior court affirming a judgment of the police court adjudging the defendant guilty of a misdemeanor, and imposing on it a fine of fifty dollars.

APPEAL from a judgment of the superior court for the city and county of San Francisco, adjudging the defendant guilty of a misdemeanor. The opinion states the facts.

Doyle, Barber, Garber, and *Scripture*, for the appellant.

Attorney general, for the respondent.

By the COURT. This is a motion to dismiss an appeal by defendant from a judgment of the superior court affirming a judgment of the police court adjudging the defendant guilty of a misdemeanor, and imposing a fine of fifty dollars. The case is not "a criminal case prosecuted by indictment or information in a court of record:" Const., art. 6, sec. 4. This court has no jurisdiction.

The appeal is dismissed.

No. 10,900.

PEOPLE v. MAJORS.

Department One. Filed March 13, 1884.

NO APPEAL LIES, IN A PROSECUTION FOR MURDER, FROM AN ORDER DENYING A MOTION in arrest of judgment, or from a judgment entered upon a plea of former conviction.

MOTION FOR NEW TRIAL—APPEAL FROM ORDER DENYING.—A motion for a new trial can not be made in a prosecution for murder after a verdict in favor of the people rendered upon a plea of former conviction, and consequently no appeal lies from an order denying the same.

APPEAL from a judgment of the superior court for Santa Clara county, entered against the defendant upon a plea of former conviction, and from an order denying his motion in arrest of judgment, and from an order refusing him a new trial. The opinion states the facts. A former opinion was rendered in this case, which is reported in 1 West Coast Rep. 859.

J. B. Lamar, for the appellant.

J. H. Campbell, district attorney, for the respondent.

By the COURT. To an information filed August 27, 1883, charging the defendant with the murder of one Archibald McIntyre, in Santa Clara county, on the eleventh of March, 1883, defendant, without a plea of not guilty, pleaded a former judgment of conviction of the same offense. Upon the plea so interposed a trial was had and a verdict rendered for the people. Defendant then moved in arrest of judgment, and also made a motion for a new trial, both of which motions were denied by the court.

and thereupon judgment was given against him on the plea. He appeals from the judgment, from the order denying his motion in arrest of judgment, and also from the order refusing him a new trial.

It is clear that there is no authority for the appeal from the judgment, nor for that from the order denying the motion in arrest of judgment. Sections 1237 and 1259 of the penal code read:

"Sec. 1237. An appeal may be taken by the defendant: 1. From a final judgment of conviction; 2. From an order denying a motion for a new trial; 3. From an order made after judgment, affecting the substantial rights of the party."

"Sec. 1259. Upon an appeal taken by the defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment."

Section 1237 does not give an appeal from an order denying a motion in arrest of judgment. The appeal from the order is therefore without authority, and must be dismissed. So, too, with respect to the appeal from the judgment upon the plea of former conviction. It is obvious that such a judgment is not a "final judgment of conviction." It only determines that the defendant has not been previously convicted of the offense of which he now stands charged, leaving the question of his conviction or acquittal open, to be determined after a trial With respect to the appeal from the order denying defendant a new trial, the statute does not contemplate a motion for a new trial until all of the issues of fact have been tried. And inasmuch as the law did not authorize the motion for a new trial made by the appellant in the court below, it results that there can be no appeal from the order denying such a motion.

Appeals dismissed.

No. 10,927.

PEOPLE *v.* FORSYTHE.

In Bank. Filed March 13, 1884.

WHEN THE EVIDENCE IS CONFLICTING, an order denying a motion for a new trial will not be disturbed on the ground that the same is insufficient to justify the verdict.

A JUDGMENT CONVICTING THE DEFENDANT OF MANSLAUGHTER held supported by the evidence.

THE REFUSAL OF THE COURT TO PERMIT THE COUNSEL OF A PRISONER CHARGED WITH MURDER, on cross-examination of a witness for the prosecution, to question him in regard to the desperate character of the deceased, and as to what the witness had told the defendant of threats made by deceased against the defendant, is not error, when none of such matters were gone into on the direct examination.

AN INSTRUCTION IN REGARD TO THE FLIGHT OF A PERSON ACCUSED OF CRIME is justified, when it appears that the defendant was absent from his home soon after the commission of the crime, and that some three weeks afterwards he was arrested in another county.

PERMITTING COUNSEL IN HIS ARGUMENT TO READ TO THE JURY A PORTION OF AN OPINION OF THE SUPREME COURT is not error sufficient to warrant a reversal. Such practice, however, is not to be commended.

APPEAL from a judgment of the superior court for Humboldt county, entered upon a verdict convicting the defendant of manslaughter, and from an order denying him a new trial. The opinion states the facts.

Buck & McQuaid, for the appellant.

Attorney general, for the respondent.

SHARPSTEIN, J. Although the defendant pleaded not guilty to the

charge of murder, he did not attempt on the trial to controvert the fact that he actually killed the deceased. He endeavored then to prove that the homicide was committed in self-defense, and justifiable. He now claims that this was so clearly proven as to justify this court in reversing the judgment on the ground that the verdict of the jury, which was, guilty of manslaughter, was not justified by the evidence. One witness testified to having seen the defendant approach deceased from behind and strike him on the head with a club. Another who was near the scene of the homicide testified that he heard a noise which sounded to him like a blow; that he looked in the direction from which the noise came, and saw the deceased falling. Two other witnesses testified that they too heard the blow, and saw the deceased fall; and that they heard the defendant say that he intended to kill the deceased. These witnesses testify to having been within a few feet of the scene of the homicide when it was committed. Another wintess—a physician—testified that he was requested by defendant to examine the deceased and ascertain how badly he was hurt; and that he, witness, at that time asked defendant why he had done it, and that the latter replied, "Damn him! he sassed me." The fact that the death of deceased was caused by a blow struck by defendant with a club is not controverted. And we have referred to the testimony of these witnesses for the purpose of showing that none of them saw deceased do or say anything to defendant at the time of or immediately preceding the striking of the mortal blow which would justify or excuse it. The evidence of these witnesses tended to prove that deceased was quietly walking away from the barn where defendant was employed when the latter approached him from behind and dealt the mortal blow. We can not say that the jury might not have fairly inferred from the evidence of the prosecution that deceased was wholly unconscious of the fact of defendant's being on the premises while he, deceased, was there. There is no evidence that he saw defendant or inquired for him. He sought the proprietor of the barn, and was killed while in the act of leaving the premises, in a perfectly peaceable manner, according to the testimony of eye-witnesses.

"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable:" Pen. C., 1105.

We are unable to find any "proof on the part of the prosecution" which "tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." On the contrary, it tends to show the exact reverse.

If the defendant introduced evidence which tended to prove that the homicide was justifiable or excusable, it simply raised a conflict for the jury to determine, subject only to the power of the court below to grant a new trial. Under such circumstances, we can not, on the ground of insufficiency of the evidence to justify the verdict, disturb the order denying the motion for a new trial.

The exception to the ruling of the court in sustaining the objection of the district attorney to defendant's counsel questioning a witness for the prosecution on cross-examination in regard to the desperate character of the deceased, and as to what the witness had told defendant of threats made by deceased against defendant some time before the homicide. must

be overruled. None of these matters were gone into on the direct examination of the witness, and could be introduced by the defendant only for the purpose of proving circumstances of mitigation, or to justify or excuse the homicide. As to what occurred at the time and place of the homicide, the defendant's counsel appears to have had all the latitude he desired in his cross-examination of the witness.

There was evidence tending to prove that the defendant was absent from home soon after the homicide, and that some three weeks afterwards he was arrested in another county. This, we think, justified the court in giving the instruction it gave in regard to the flight of a person accused of crime. As we construe the instruction, it neither assumes the guilt nor flight of the defendant: People v. McDowell, 1 West Coast Rep. 478.

The district attorney was permitted, against the objection of defendant's attorneys, to read, while summing up to the jury, some portions of an opinion filed by this court in a late case. No case is cited, and we know of none, in which it has ever been held that doing so was error. Still we are not disposed to commend the practice.

Judgment and order affirmed.

MORRISON, C. J., and ROSS, MCKINSTRY, MYRICK, MCKEE, and THORNTON, JJ., concurred.

No. 9,088.

NISSEN *v.* BENDIXSEN.

Department Two. Filed March 14, 1884.

WHEN THE TRANSCRIPT DOES NOT SHOW THAT THE NOTICE OF APPEAL WAS SERVED upon the respondent's attorney, the appeal will not be dismissed when it appears from the certificate of the clerk of the court below that such service was made.

MOTION to dismiss an appeal from the superior court for Humboldt county. The opinion states the facts.

J. J. De Haven, for the motion.

S. M. Buck, contra.

By the COURT. The original transcript did not show that the notice of appeal was served on the plaintiff's attorney of record, and a motion to dismiss on that ground was made by said attorney. When the motion was called up the defendant's attorney suggested diminution of record, and asked and obtained leave to file a certificate of the clerk of the court below, showing that proof of service of said notice on plaintiff's said attorney of record is on file in the office of said clerk.

Motion to dismiss denied.

No. 10,914.

PEOPLE *v.* GRIDER.

Department Two. Filed March 14, 1884.

IN A PROSECUTION FOR LARCENY, WHEN THE TAKING OF THE PROPERTY IS ADMITTED, the intent with which the same was taken is a question for the jury.

APPEAL from a judgment of the superior court for Sonoma county, entered upon a verdict convicting the defendant of grand larceny, and from an order denying him a new trial. The opinion states the facts.

Henley & Oates, for the appellant.

Attorney general, for the respondent.

MYRICK, J. The information accused the defendant and one Donovan of the crime of grand larceny. That the defendant Grider took the money from the pocket of Carmody, when the latter was intoxicated, is admitted. The proposition of Grider was that certain persons engaged in a "game" were endeavoring to obtain the money by means of the game, and that he, Grider, took it as a friend of Carmody to protect it for him. On the other hand, the theory of the prosecution seems to have been that Grider took the money feloniously, with intent to steal it, making use of the other idea as a pretext, or as an afterthought. In that view, the rulings of the court and the instructions given were correct.

No error appearing, the judgment and order are affirmed.

THORNTON and SHARPSTEIN, JJ., concurred.

No. 10,925.

PEOPLE v. ROSS.

Department Two. Filed March 14, 1884.

RE-OPENING OF CASE.—After the testimony in a criminal case has closed, and the opening argument for the prosecution has begun, it is a matter of discretion with the court whether it shall allow the defendant to re-open his case, for the puropose of introducing evidence on his plea of once in jeopardy, as to which no evidence had been given.

IN A PROSECUTION FOR LARCENY, EVIDENCE of a fact which tends to connect the defendant with the taking of the property named in the information is competent.

APPEAL from a judgment of the superior court for Fresno county, entered upon a verdict convicting the defendant of grand larceny. The opinion states the facts.

Rhodes and *Merriam*, for the appellant.

Attorney general, for the respondent.

MYRICK, J. The information accused the defendant of the crime of grand larceny; and on being arraigned, the defendant pleaded not guilty, and once in jeopardy. At the trial, evidence was given for the prosecution and for the defense, but none of the evidence related to the plea of once in jeopardy. After the district attorney had begun his opening argument to the jury, and was about to close, defendant's attorneys asked that they be allowed to reopen their case for the purpose of introducing testimony on the plea of once in jeopardy, and the request was denied. No error appears; it was a matter of discretion.

The evidence regarding the cigarettes was competent, for the reason that it tended to connect the defendant with the taking of the property named in the information. For this reason, doubtless, the court admitted it, notwithstanding the obscure manner in which the district attorney stated its object.

There is no error in the record. Judgment affirmed.

THORNTON and SHARPSTEIN, JJ., concurred.

BOOK REVIEWS.

A TREATISE ON THE LAW OF PLEDGES, INCLUDING COLLATERAL SECURITIES. By LEONARD A. JONES. Boston: Houghton, Mifflin & Co. 1883.

In this volume the author continues the examination of that most important branch of the general law which relates to securities. His three former works, on Mortgages of Real Property, on Mortgages of Personal Property, and on Railroad and Other Corporate Securities, are well known to the profession in all parts of the country, and have placed him among the foremost of living legal text-writers. Pledges have heretofore been treated as simply a species of bailment, and in connection with a more general discussion of the doctrines concerning all bailments; and the rules as laid down in the professed treatises upon the law of bailments have been almost exclusively confined to pledges of tangible, material chattels. Even Judge Story's standard work, learned as it is, devotes only "three lines to the matter of pledges of corporate stocks." Of late years, however, from the immense expansion of the credit system in the transaction of the world's business, and from the universal practice of using bills of lading, warehouse receipts, stock certificates, and other written muniments of title, as the representatives of personal property or of funds, the law concerning pledges has developed many new features, and has called for the decision of many new questions, and the settlement of many new rules. As the author correctly says: "During the last half-century the law of pledges has assumed a new importance from its adaptation to such transactions as loans on negotiable paper, upon shares and bonds of corporations, upon bills of lading of railroad companies and other common carriers, and upon warehouse receipts." In short, the law concerning pledges has become, to a great extent, the law concerning "collateral securities."

Mr. Jones treats the subject from this point of view, and presents it in this broad and comprehensive manner. After fully describing the nature of a pledge, with its essential features and incidents, and considering the various parties who may be pledgors and pledgees, including married women, partners, and corporations, he devotes several chapters to an elaborate discussion of pledges of negotiable instruments, of non-negotiable things in action, such as mortgages, insurance policies, judgments, savings-bank books, land certificates, and the like, of corporate stocks, of bills of lading, of warehouse receipts, and of pledges by factors—which latter subject involves an examination of the legislation known as the

"factor's act." The remaining chapters treat of the rights, liabilities, and remedies of the parties under all circumstances, and with respect to every species of property—chattels or things in action—which may be pledged.

From our examination of this volume, we regard it as a most valuable contribution to our legal literature, and are confident that it will meet with a very favorable reception from the legal profession throughout the whole country, and from those classes of business men, like bankers and brokers, who are engaged in the loaning of money upon the pledge of commercial securities. Mr. Jones has remembered one fact which has apparently been overlooked by some writers, that a text-book, in order to be of practical benefit to the lawyer, should represent the law as it is, and not simply as it has been; and the further fact, that the rules of the common law have been more or less changed in many of the states by statute. No legal treatise can be of much practical value to the profession of the whole country which fails to take notice of the statutory legislation upon its subject-matter in the various states of the Union. Mr. Jones has recognized and fulfilled this requisite of a modern text-book. Whenever there is occasion, he constantly mentions and freely quotes the provisions applicable to the questions under examination, which are found in the civil codes of Louisiana, of California, and of Dakota, as well as the statutes of other states which have not professed to have adopted a complete system of codification. The book, in fact, embraces the doctrines and rules both of law and of equity, as modified or supplemented by statute, which belong to the general subject of pledges of chattels and of collateral securities, and which define the rights, liabilities, and remedies, at law and in equity, of all the parties who may be interested in a pledge, either as principals or as sureties.

A TREATISE ON NEW TRIAL AND APPEAL, AND OTHER PROCEEDINGS FOR REVIEW IN CIVIL CASES. By ROBERT Y. HAYNE. 2 vols. San Francisco: Sumner Whitney & Co. 1884.

This elaborate work, by a member of the San Francisco bar, deals with the modes of procedure in all matters of review prevailing in California, and is especially designed for the use of the profession in that state. Its comprehensive character and design can not be better stated than in the author's own language, contained in his preface: "The purpose of this treatise is to give an account of the modes in which the proceedings of courts of justice may be reviewed, and the practice in relation thereto. The ordinary proceedings for review are motions for new trial in the court which rendered the decision, and appeals to a higher court; and accordingly the main portion of the work is devoted to these two modes; viz., new trial and appeal. In addition to these it has been deemed advisable to give an account (much less extended) of what may be termed

the extraordinary modes of review; viz., writs of *certiorari*, prohibition, and *habeas corpus*, and actions in equity for relief against judgments. And to these have been added a chapter on the writ of *mandamus*, and a chapter on motions for relief against judgments by default."

The work is one of that increasing class of text-books which are necessarily confined to the treatment of some particular topic or branch of the law of a single state. The procedure in the review of judgments and other decisions differs so widely in different states, and is to such an extent based upon and regulated by minute statutory provisions in each state, that a treatise upon this subject, to be of any real practical value, must almost of necessity be confined to the system prevailing in a single state. This is most emphatically so in California. We believe that the whole system of review in this state, the modes of preparing and presenting cases on motions for new trial, and on appeal, in civil actions, is more cumbrous, involved, abounding in arbitrary and technical rules, burdened by what is popularly known as "red tape," than the methods adopted in most of the other states of the Union. This complicated system is not an essential feature of the reformed procedure, for it is not found in many other states which have adopted that procedure. We believe that a comparison of the California reports for the past ten years with those of New York, Ohio, Iowa, Wisconsin, and other code states during the same period, will show that a much larger proportion of cases have been decided in this state upon mere technical questions of form, not in any way involving the merits of the controversy, than have been so decided in those other commonwealths. This is not the fault of the courts, for their hands are tied. The fault lies in the system imposed on the courts by the legislature. It is a most grave mistake, in our opinion, to reduce all the minute, detailed rules of practice to the rigid, inflexible form of statutory enactment. The recent legal reform in England, while adopting all of the principles of our reformed procedure, and in some respects carrying those principles to greater length than we have done, has carefully avoided this mistake.

This very character of the procedure on review renders a treatise like the present one, which explains and describes the statutory methods in a clear, systematic, and exhaustive manner, a text-book of great practical value to the profession of California. The author's treatment of the subject is full, comprehensive, and minute; his discussion of the rules concerning new trials and appeals, which constitutes the main portion of the work, is thorough and complete. We doubt not that the book will be of great assistance to the bar of the state in their professional labors. At all events, it may suggest to any thoughtful lawyer that a system of procedure on the review of actions which has produced such a great number of decisions in *partially* settling its rules, and which already requires a treatise in two volumes for its elucidation, ought in the interests of justice to be amended and simplified.

NOTES.

THE supreme court of the United States has recently decided several cases involving grave questions of constitutional law. The most important of these is the legal-tender case of Juillari v. Greenman. The question presented by this case, as stated by Gray, J., delivering the opinion of the court, is, "Whether the notes of the United States, issued in time of war under an act of congress declaring them to be legal tender in payment of private debts, and afterwards in peace redeemed and paid for in gold coin at the treasury, and then reissued under the act of 1878, can, under the constitution of the United States, be a legal tender in payment for such debts."

"Congress," the court says, in conclusion, "as the legislature of a sovereign nation, being expressly empowered by the constitution to lay and collect taxes to pay debts and to provide for the common defense and general welfare of the United States, and to borrow money on the credit of the United States, and to coin money and regulate the value thereof, and of foreign coin, and being clearly authorized, as incidental to the exercise of these great powers, to issue bills of credit, to charter national banks, and to provide a national currency for the whole people in the form of coin, treasury notes, and national bank bills, and the power to make the notes of the government a legal tender in payment of private debts, being one of the powers belonging to the sovereignty of other civilized nations, and not expressly withheld from congress by the constitution, we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is an appropriate means, conducive and plainly adapted to the execution of undoubted powers of congress, and consistent with the letter and spirit of the constitution, and therefore within the meaning of that instrument, necessary and proper for the carrying into execution of the powers vested by the constitution in the government of the United States. Such being our conclusion in the matter of the law question, whether at any particular time in war or peace the exigency is such by reason of unusual and pressing demands on the resources of the government, or of the inadequacy of the supply of gold and silver coin to furnish the currency needed for uses of the government and of the people, it is, as a matter of fact, wise and expedient, to resort to this means, is a political question to be determined by congress when the question of exigency shall arise, and not a judicial question to be afterwards passed upon by the courts. It follows that the act of May 31, 1878, is constitutional and valid, and that the circuit court rightly held that the tender in treasury notes reissued and kept in circulation under that act was a tender of lawful money in payment of defendant's debt to the plaintiff. The judgment of the circuit court is affirmed."

Field, in a long opinion, dissents from the judgment of the court, and from all the arguments advanced in its support. "If there be anything," he says, "in the history of the constitution which can be established with moral certainty, it is that the framers of that instrument intended to prohibit the issue of legal-tender notes both by the general government and the states. The arguments presented by the court and by the advocates of legal tenders amounts to this: The object of borrowing is to raise funds. The annexing of the quality of legal tender to notes of the government will induce parties to take them, and funds will thereby be more readily loaned; but something may be said on annexing any other provision which would give to holders of notes some advantages,

as, for instance, the provisions that notes of the government should serve as a free ticket on public conveyances of the country, or give free ingress to places of amusements, or entitle them to a percentage from revenue of private corporations. The same consequence, ready acceptance of the notes, would follow, and yet no one would pretend that annexation of provisions of this kind, with respect to the property of others over which the borrower has no control, would be in any sense an appropriate measure to execute. There is no invasion by the government of the rights of the third party which may not thus be sanctioned under the pretense that its allowance will lead to the ready acceptance of the government's notes and produce the desired loans."

IN Hurtado v. The People of the State of California, in error to the supreme court of that state, the question involved was whether the provisions of the state constitution and the laws passed to carry the same into effect, authorizing prosecutions for felonies to be by information, after examination and commitment by a magistrate, without indictment by a grand jury, were constitutional. The plaintiff in error, after an examination before a committing magistrate, as provided by section 872 of the penal code of California, had been held to answer for the crime of murder. The district attorney thereupon filed an information against him, charging him with such crime. Upon this information, the plaintiff in error was tried, and convicted of murder in the first degree. Upon an appeal to the supreme court of the state the judgment of conviction was affirmed. Thereupon the trial court ordered the plaintiff in error should be brought before it, that a day for the execution of the judgment should be fixed. In pursuance of said order, plaintiff in error, with his counsel, appeared at the bar of the court, and thereupon the judge asked him if he had any legal reason to urge why said judgment should not be executed, and why an order should not then be made fixing the day for the execution of the same. Thereupon the plaintiff in error, by his counsel, objected to the execution of said judgment, and to any order which the court might make fixing a day for the execution of the same, upon the grounds, that the said plaintiff in error had been held to answer for the said crime of murder by the district attorney upon an information filed by him, and had been tried and illegally found guilty of the said crime, without any presentment or indictment of any grand or other jury, and that the judgment rendered upon the alleged verdict of the jury in such case was and is void, and if executed would deprive the plaintiff in error of his life or liberty without due process of law. The court overruled the said objections, and fixed the time for the execution of the sentence. From this latter judgment the plaintiff in error appealed to the supreme court of the state. That court affirmed the said judgment, to review which the present writ of error was allowed and has been prosecuted.

In delivering the opinion of the court, Matthews, J., said: "It is claimed on behalf of the prisoner that the conviction and sentence are void, on the ground that they are repugnant to that clause of the fourteenth article of amendment to the constitution of the United States, which is in these words: 'Nor shall any state deprive any person of life, liberty, or property without due process of law.' The proposition of law we are asked to affirm is that an indictment or presentment by a grand jury, as known to the common law of England, is essential to that 'due process of law,' when applied to prosecutions for felonies, which is secured and guaranteed by this provision of the constitution of the United States, and which accordingly it is forbidden to the states respectively to dispense with in the administration of criminal law."

This view the court refused to adopt, and after an elaborate investigation into the meaning of the phrase "due process of law," affirmed the judgment of the lower court.

WEST COAST REPORTER.

WHOLE No. 13. MARCH 27, 1884. VOL. II. No. 5.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

IN addition to the general doctrine thus stated and illustrated, the following special rules, applying to particular circumstances, have been the subject-matter of decision. If two persons successively appropriate water of a stream by means of their ditches, and a third person turns into the same stream, at a place higher up than the heads of both these ditches, additional water brought by means of his own ditch from another and different stream, without any intention of recapturing the same, the water thus discharged becomes *publici juris*, to all intents a part of the natural waters of the stream into which it is emptied; and it belongs to the two appropriators according to their priority of right—the one having made the prior appropriation is first entitled to the increased flow to the extent of his appropriation.[1]

A person who had located a mill site on a stream, and appropriated the water for the purposes of his mill, sold and conveyed all his interest in the water of the stream to the proprietor of a ditch above him; held, that he had not thereby lost his prior right to the water which still flowed down the stream after such sale, as against a third party who had appropriated the water below him subsequently to his original appropriation but before his said sale and conveyance.[2] In the case of Strait *v.* Brown,[3] the supreme court of Nevada decided a point which may be of much practical importance. Although no distinction, in general, exists between waters running under the surface in defined channels, and those running in such channels upon the surface; and although water percolating through the ground below the surface is not governed by the same rules which pertain to running streams; still, subsequent appropriators can not, as against the prior appropriator of the same stream, lawfully acquire rights to the waters of the *springs* which constitute the source of such stream, simply because the means through which the waters are conveyed from the springs to the stream are

[1] Davis v. Gale, 32 Cal. 26. [2] McDonald v. Askew, 29 Cal. 200. [3] 16 Nev. 317.

tions of streams and lakes situated within the public domain, or lands belonging to the United States, as that system has been built up by judicial decisions upon the foundation of local customs recognized and ratified by the legislation of Congress. It is plain, upon an examination and comparison of the special rules formulated in the preceding sections, that the system, in theory at least, furnishes all the possible protection for the rights of subsequent and successive claimants after it has once admitted that a party can, by prior appropriation, obtain a prior and exclusive right to the water of a stream or lake, limited and measured only, in its extent, by the actual needs of the particular purpose for which the appropriation is made. The system places an obstacle in the way of a prior appropriator's obtaining an exclusive control of the entire stream, no matter how large; and secures the rights of subsequent appropriators of the same stream; by requiring that a valid appropriation shall be made for some beneficial purpose, presently existing or contemplated; and by restricting the amount of water appropriated to the quantity needed for such purpose; and by forbidding any change or enlargement of the purpose, which should increase the quantity of water diverted under the prior appropriation, to the injury of subsequent claimants; and by subjecting the prior appropriation to the effects of an abandonment, by which all prior and exclusive rights once obtained would be lost. By these means, a party is, in theory at least, prohibited from acquiring the exclusive control of a stream or any part thereof, not for present and actual use, but for future, expected, and speculative profit or advantage; in other words, a party cannot obtain the monopoly of a stream, in anticipation of its future use and value to miners, farmers or manufacturers. While the theory thus appears to be admirable, the practical workings of the system may be attended with some difficulties, and they have certainly involved a great amount of litigation. When a prior appropriator has actually established himself on a stream, and is diverting its waters by ditches, an attempt to enforce the rights of a subsequent claimant may be difficult, and may require an expensive and protracted controversy. The prior appropriator is certainly placed in a position of great advantage in maintaining his own claims, even though unfounded and unlawful, against those who are seeking to enforce their subsequent and lawful rights to use the water of the stream. But the principal defect of the system, the one capable of working the greatest injustice, is inherent in the very theory itself, in its fundamental conception. This defect is, the total absence of any limit to the extent of a prior appropriation—to the amount of water which may be taken—except the needs of the purposes for which it is made. The prior appropriator, in order to carry out a purpose regarded by the law as beneficial, of great magnitude—such, for example, as an extensive system

of hydraulic mining or the irrigation of a large tract of farming lands, or, doubtless, the supply of a municipality—*may* divert and consume without returning to its natural channel, *the entire water* of a public stream, nor matter what may be its size, or length, or the natural wants of the country through which it flows. Furthermore, this appropriation may be made by a party who owns no land upon the banks of the stream, and for a purpose situated *at any distance* from the stream itself, far beyond the region to which the stream naturally belongs, and which would naturally receive its benefits. In this manner the *natural* benefits of a stream to the lands situated upon its bank throughout its entire length *may be* completely destroyed, and the natural rights of all persons who should afterwards settle and purchase lands adjoining the stream *may be* totally ignored, disregarded, and abrogated by such a prior appropriation.

This first branch of the discussion may be appropriately ended by the statement of an important point just decided by the supreme court of California, that, in the absence of all evidence, it will be presumed that a stream, at the time when its waters were appropriated, was a public stream, and all the lands on its banks were public lands of the United States. There had been several successive appropriations of a stream called Lytle Creek by different parties. The court say: "There is nothing in the pleadings or findings to indicate that when all the waters of Lytle Creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership. It must be presumed, therefore, that such lands were public lands of the United States, and the rights to the water of Lytle Creek acquired by prior appropriations were confirmed by the act of congress of 1866. The court found that the settlement on government land by defendant was made after the act of 1866 took effect. Any rights which he might acquire, therefore, from the government would be subject to the previously confirmed appropriations of the water."[12] This action was brought by a prior appropriator to restrain the defendant, a subsequent appropriator from an alleged unlawful diversion. It appeared that there were other distinct and separate appropriators who were not parties to the suit. The court made the following important ruling concerning the necessary parties under such circumstances: "In an action by an appropriator of the water of a certain stream to restrain a defendant from diverting the same, when the court finds that the plaintiff has a separate title to the use of *all* water for a certain length of time out of a longer period—(namely, 'for one hundred and thirty-two hours and nineteen minutes out of each and every three hundred and seventy-two hours')—and that other appropriators had a right to the use thereof, but fails to find as to the order in which the persons interested in these appropriations used the water, or as to

[12] Lytle Creek W. Co. v. Perdew, 1 West Coast Rep. 866 (decided February 12th, 1884).

the times when the period during which the plaintiff was entitled to the exclusive use would recur, no decree fixing the rights of the plaintiff or prohibiting the defendant from interfering therewith, can be rendered, unless all the other persons entitled to the use of the waters of the same stream, are before the court as parties to the action." The judgment entered in favor of the defendant was therefore reversed, and the cause was remanded, with direction that the court below should order all persons owning or claiming rights to the use of any of the water of said creek to be made parties to the action. *J. N. P.*

(TO BE CONTINUED.)

DISTRICT COURT, DISTRICT OF OREGON.

HEENRICH v. PULLMAN PALACE CAR COMPANY.

Filed March, 1884.

LIABILITY OF THE MASTER FOR THE ACT OF HIS SERVANT. A master is liable for the act of his servant when done within the scope or general course of his employment, although done contrary to the master's orders.

Action for injury to the person. The opinion states the facts.

Julius Moreland, for the plaintiff.

Charles B. Bellinger, for the defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of Minnesota, against the defendant, a corporation formed under the laws of Illinois, to recover $25,000 damages for an injury to her person, received while traveling as a passenger on a Pullman palace car, attached to a train on the Northern Pacific railway running from St. Paul to Portland, and caused, as alleged, by the negligent handling of a pistol by the porter in charge of said car while "in the discharge of his duty as such porter," and "while attending to the defendant's business," whereby the same fell on the car floor and was discharged—the ball entering the thigh of the plaintiff and inflicting a dangerous wound therein.

The answer of the defendant controverts the allegation of the plaintiff that the porter "was in the discharge of his duty" when he let the pistol fall; and also contains a plea in bar of the action—that the pistol mentioned in the complaint was the property of a passenger on said train, that said porter received it from the owner and was carrying it through the car at the request of said owner, and not otherwise, at the time of the discharge and wounding in the complaint mentioned; and that it is one of the defendant's rules and directions to all its car porters that they are not permitted to receive any package, baggage or article of luggage from passengers or to become custodians thereof, which rule and order was at the time of the taking and carrying of said pistol by said porter, well known to him; and that said porter in so receiving and carrying said pistol was acting in violation of the defendant's orders.

To this new matter the plaintiff demurs, for that it does not constitute a defense to the action.

A corporation is liable to the same extent as a natural person for an injury caused by its servant in the course of his employment. Moore v. Fitchburg Railway Company, 4 Gray, 465. Thayer v. Boston, 19 Pick., 511.

In Story on Agency (§ 452), it is laid down that a principal is "liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences and other malfeasances or misfeasances and omissions, although the principal did not authorize or justify, or participate in, or, indeed, know of such

misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, *respondeat superior*; and it is founded on public policy and convenience; for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent, as competent and fit to be trusted; and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of his agency."

In Ramsden *v.* Boston & Albany Ry Co., 104 Mass., 117, it was held that the corporation was liable to an action for an assault and battery, for the act of its conductor in wrongfully and unlawfully attempting to seize the parasol of a passenger for her fare. In delivering the opinion of the court, Mr. Justice Gray said: "If the act of the servant is within the general scope of his employment, the master is equally liable, whether the act is willful or merely negligent, or even if it is contrary to an express order of the master."

The Philadelphia & Reading Railway Co. *v.* Derby, 14 How., 294, a servant of the corporation ran an engine on its track contrary to its express order, and thereby caused a collision in which the defendant was injured; and it was held that the corporation was liable for the injury.

In delivering the opinion of the court Mr. Justice Grier said: "The rule of *respondeat superior*, or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment."

The authorities to this point might be multiplied indefinitely; but these are sufficient.

Tried by them, this defense is clearly bad. It is not alleged that the corporation commanded the porter to do the act which caused the injury to the plaintiff, and therefore if it was not done in the course of his employment it is not liable therefor. But if the act was done in the course of his employment, the corporation is liable to the plaintiff for the injury caused thereby, notwithstanding the order to the porter. The case, so far as appears, must turn on the issue made by the denial of the allegation that the porter was in the discharge of his duty or the course of his employment, at the time he let the pistol fall. And whether he was acting contrary to his employers' order or not, is altogether immaterial.

In Wharton on Negligence (§ 157) in discussing this subject the learned author says "that he who puts in operation an agency which he controls, while he receives its emoluments, is responsible

for the injuries it incidentally inflicts. Servants are in this sense machinery, and for the defects of his servants *within the scope of their employment*, the master is as much liable as for the defects of his machines."

And Cooley on Torts (539) says: "It is immaterial to the master's responsibility that the servant at the time was neglecting some rule of caution which the master had prescribed, or was exceeding his master's instructions, or was disregarding them in some particular, and that the injury which actually resulted is attributable to the servant's failure to observe the directions given him. In other words, it is not sufficient for the master to give proper directions; he must also see that they are obeyed."

On page 540 the learned author gives an apt illustration of the rule. A farm servant burned over the fallow when the wind was from the west, and thereby destroyed the adjoining premises on the east, although he had been directed on that very account, not to set out the fire unless the wind was in the west, and the master was responsible.

The cases cited by counsel are not in conflict with this conclusion. They are Wharton on Negligence, § 168, Tutler *v.* Voght, 13 Ill., 285, Oxford *v.* Peter, 38 Ill., 435, Foster *v.* the Essex bank, 17 Mass., 508, and Mali *v.* Lord, 39 N. Y., 381. They are only to the effect, as is said in Oxford *v.* Peter, that the master is not liable "for the willful or malicious acts of his servant, unless it is in furtherance of the business of the master."

The contention in these cases was not as to the rule of law, but the application of it—whether the act complained of was done in the furtherance of the business of the master, or rather in the course of the servant's employment.

Sometimes, this is a very nice question and difficult to determine; but the rule of law is I think undisputed—that were the servant is acting in the course of or within the scope of his employment, the master is liable for his acts of commission or omission as if they were his own; and this, notwithstanding the servant may have acted contrary to his master's orders.

Whether the act complained of in this case was within the scope of the porter's employment, on that occasion, will be ascertained from the evidence on the trial of the issue elsewhere made in the case.

The demurrer is sustained.

SUPREME COURT OF COLORADO.

CHAPMAN ET AL. *v.* POCOCK ET AL.

Filed February 29, 1884.

A JUDGMENT TAXING AND APPORTIONING THE COSTS OF A RECEIVER will not be disturbed when the only parties who could be affected by a re-taxation of costs are not before the appellate court.

ERROR to the district court for Lake county. The opinion states the facts.

R. D. Thompson and *W. H. Nash*, for the plaintiffs in error.

H. C. Dillon, for the defendants in error.

STONE, J. The only question brought up for review relates to the taxing of costs in the case. The plaintiffs were one of eight different sets of attaching creditors, who brought separate suits against the defendants in the district court of Lake county. Upon petition of all the plaintiff creditors a receiver was appointed by the court to take and dispose of the goods of the defendant firm for the benefit of the creditors. The goods when seized by the sheriff under the attachment writs were in the hands of a third party who intervened in the suits as prior claimants of the property. The suits were afterwards dismissed at the costs of the plaintiffs according to stipulation, the receiver was discharged, and all the property and proceeds in the hands of the receiver ordered to be paid and delivered to the intervenors.

A referee was appointed by the court to investigate the accounts and doings of the receiver and report his proper compensation, and upon a hearing had upon the report of the referee, and upon exceptions to the report of the receiver, the court approved the receiver's report, and taxed up the costs as follows: the clerk's and sheriff's fees were taxed to each party plaintiff, as the same were incurred by each severally, and the total amount of the fees, costs, and expenses of the receiver as approved by the court was divided into eight equal parts, and one-eighth of the whole taxed against each of the eight parties plaintiff.

At a succeeding term of the court and before another judge of said court, defendants moved for final judgment against the plaintiffs for the costs as theretofore allowed and taxed, when a cross motion was made by the plaintiffs in error herein, to retax the costs, so as to apportion the costs of the receiver in proportion to the respective amounts sued for by each party plaintiff, instead of taxing an equal portion to each.

The amounts of the several claims sued for varied from a few hundred to several thousand dollars, that of the plaintiffs in error being $328.80, and the largest of the others being $4,473.67, and it was claimed by plaintiffs in error to be inequitable that each

should be taxed a like amount of the compensation and costs of the receiver.

In respect to the amount of compensation and costs allowed the receiver, which appears to have swallowed up the most of the property that came into his hands, and in respect to the proportion of costs taxed to plaintiffs in error, which greatly exceeded the amount of their entire claim against the defendants, the case certainly presents features of hardship scarcely met with in litigation; but there is another feature of the case, a consideration of which precludes us from interfering to reverse the ruling and judgment of the court below complained of.

Since the property attached passed out of the hands of the defendants, and was adjudged by the court to go to the intervenor, the plaintiffs dismissing their suit at their own costs, it is evident that a re-taxation of the costs would not affect the defendants in the least. The only parties to be affected by such re-taxation of costs are the other plaintiffs, the co-plaintiffs of plaintiffs in error, and those parties not having been made parties to the action in this court are not before us. In this view it is unnecessary for us to pass upon the question whether, if such co-plaintiffs had been made parties to the *scire facias* herein, this court would be warranted upon the case presented by the record in reversing the ruling of the court below, and directing a re-taxation of the costs as prayed by the plaintiffs in error.

It is sufficient to say that the only parties to be affected adversely by the relief sought herein are not before us, and hence we cannot review the rulings and judgment of the court below in the absence of proper and necessary parties to the action therefor.

Judgment affirmed.

KING v. THE PEOPLE, ETC.

Filed February 29, 1884.

AN INDICTMENT FOR FORNICATION IS SUFFICIENT THAT CHARGES that the defendant and a certain woman "did then and there unlawfully live together in an open state of fornication."

EVIDENCE IN A PROSECUTION FOR FORNICATION REVIEWED and held to establish an overt act on the part of the defendant.

ERROR to the district court for Clear Creek county. The opinion states the facts.

By the COURT. The first assignment of error requires no argument from us; it is answered by the indictment itself.

The offense is charged jointly; the language is "that Theodore King * * * and one Martha Estes did, then and there, unlawfully live together in an open state of fornication." This is substantially the language of the statute. In Delaney v. The People, 10 Mich. 241, cited and relied on by counsel, the information charged that Thomas Delaney * * * "did lewdly and lascivi-

ously associate and cohabit with Mary Stewart." The Court held that Mary Stewart could not be convicted of the statutory offense upon this information, and hence Delaney could not; that the offense was made joint by statute, and each must not only join in the act or acts, but that both must do so "lewdly and laciviously," or neither could be convieted, and therefore the information must charge them jointly. This conclusion concerning the indictment or information is not uncontradicted. See Bishop on Stat. Crimes, sec. 708, and cases. But, as already observed, the objection, even if available in a proper case, is without foundation in the one before us.

The assignment based upon error in the admission of testimony is not well taken.

Counsel admit that "if there had been any evidence of any overt act of plaintiff in error in connection with Martha Estes," the evidence of which they complain was proper.

The witness Campbell testfiies as follows: "King told me after the indictment was found, that he did not see, as she was a public woman, why he should be prosecuted for sleeping with her any more than others were who went to the Row and slept with other women."

No testimony was offered contradicting this witness or questioning the foregoing statement made by him.

We are not advised of counsels' views as to what proof would be sufficient to establish "the overt act," as they term it; but, in our judgment, the court below and jury were not far astray in considering this undisputed evidence as ample to dispel any doubt upon the question.

These are the only objections we deem it necessary to notice.

The judgment will be affirmed.

Affirmed.

PEOPLE, EX REL. ATTORNEY GENERAL, *v.* CITY BANK OF LEADVILLE.

Filed February 29, 1884.

FORFEITURE OF CORPORATE FRANCHISE.—The franchise and charter of a banking corporation will be adjudged forfeited, and the corporation ousted of the same, when the corporation continues to carry on its business beyond the time limited by a condition in its charter, although such business is carried on solely for the purpose of closing up the affairs of the bank, in anticipation of a voluntary dissolution.

QUO WARRANTO. The opinion states the facts.

D. F. Urmy, Attorney General, and *L. S. Dixon*, for the plaintiff.

Marsh, Parsons & Walling, for the defendant.

STONE, J. In his information herein the relator, the attorney general of the state, represents that the respondent, the City Bank of Leadville, was incorporated on the 9th day of June, 1882, and organized as a banking corporation under and in pursuance of the provisions relating thereto contained in the act of the general

assembly of Colorado, entitled "An act to provide for the formation of corporations," approved March 14th, 1877, and thereby became a body corporate by the name aforesaid with a capital stock of $100,000, fifty per cent. of which was, upon such organization, paid into its treasury in cash, and a certificate to that effect, under the oaths of the president and cashier thereof, filed in the proper offices of the state and of the county of Lake, and that from that time until the filing of this information has continued to transact the business of such banking corporation; that by the terms of the statute aforesaid the respondent corporation was forbidden to continue the transaction of its business beyond the period of one year from and after the date of its creation and organization unless its entire capital stock was fully paid up in cash; that the residue of said capital stock, to wit: the sum of $50,000, was not so fully paid up at the expiration of one year as aforesaid, to wit: on the ninth day of June, 1883, nor has the same since been so paid up, but that on the contrary, the sum of $36,000 of said capital stock had been issued prior to the said last mentioned date, and not paid for in cash, and that no payment thereof has since been made, as by law required. The said relator therefore avers that the charter and franchise of the said respondent bank have become forfeit, and that for the space of more than seven months last past said respondent has exercised, and still continues to exercise the privileges and franchises of a banking corporation without warrant of law, and therefore has usurped, and still usurps, the same.

Wherefore, the relator prays the process of this court, that the respondent answer to the people of the state why its said franchise and charter should not be adjudged forfeit, and the respondent ousted of the same.

The answer of the respondent filed herein, denies that the said bank has, for and during the period alleged in the information, used or usurped the privileges and franchises of a banking corporation without warrant of law, for that, on the contrary, during said period, the acts and doings of said bank have been exercised for the sole purpose of closing up the affairs of said bank, and surrendering its charter.

After setting out a statement of the affairs and financial condition of the bank, together with some of the causes leading to the suspension of its business as a bank, the answer avers that on the sixteenth of January last past, for the purpose of lessening the expenses of winding up and settling the affairs of the bank, and being duly authorized thereto, the said bank, by its duly authorized officers, executed and delivered to D. H. Dougan a deed of assignment of all its property and assets, in trust, conditioned that the said Dougan should proceed at once to reduce the said assets and property to money, and apply the same to the payment of the debts of the bank; that the said Dougan duly accepted such assignment and trust, and took possession of the said property and assets, and holds the same for the purpose of said trust, and that "thereupon, then

and there, said bank closed its doors and thence hitherto the same have remained closed."

The answer concludes by praying for such judgment and decree of this court as will protect the interests of said bank and the stockholders thereof, and the interests of such as are prosecuting any suits now pending, or hereafter to be brought, against said respondent bank.

The answer in effect confesses the substantial charge alleged against it in the information, to wit: that its charter and franchises have become liable and subject to be declared forfeit and surrendered to the state.

Upon the pleadings, therefore, it only remains for this court to pronounce a judgment in accordance with the prayer of the relator, and properly conditioned with respect to the rights of parties in interest, as prayed by respondent, and as provided by law. The statute concerning the dissolution of corporations, General Laws, sections 307, 308 and 309, makes ample provisions in cases of such dissolution, for the mode and manner of settling up the affairs of the dissolved corporation, in view of the rights of parties in interest, and for the protection of such rights.

Neither the relator nor the respondent has asked for any specific judgment or decree, aside from that touching the forfeiture of the charter and franchise of the corporation.

The judgment of the court, therefore, is, that the charter and franchise of the said respondent, the City Bank of Leadville, heretofore doing business as a banking corporation at the city of Leadville, in the county of Lake and state of Colorado, be adjudged and held forfeit, and that the said corporation be denied and prohibited the further possession, use and exercise of any and all the rights, powers and privileges of the charter and franchises aforesaid; and that the said corporation be dissolved; and inasmuch as it appears from the answer of respondent herein, that the property, assets, and affairs of the said corporation are already in the possession and control of a trustee duly appointed and authorized to settle up the business concerns of the said corporation, and for that no other or different person has been prayed to be by the court appointed as trustee or officer for such purpose, the said trustee already appointed as aforesaid is at liberty to proceed in the proper discharge of his duties in the premises in the settlement of the business and winding up the affairs of said respondent corporation, in accordance with law and the statutes in such case applicable; and provided, further, that the prosecution or defense of actions heretofore brought by or against the said bank and pending at the time of the filing of this information, shall in no way be affected by this judgment or decree; but such cases may be prosecuted or defended in the name of the said banking corporation by the said trustee or assignee, appointed and authorized as aforesaid.

PEOPLE EX REL. ELLIOTT v. GREEN.

Filed February 29, 1884.

ATTORNEY AT LAW—MALCONDUCT IN HIS OFFICE—REMOVAL FROM THE BAR—It appearing that an attorney at law stopped a judge of a court as he was driving through the public street in company with his daughter, a young lady, and thereupon addressed abusive, insulting and threatening language to such judge concerning his judicial action in a certain cause, previously and then pending and undetermined in the court of which he was a judge, wherein the said attorney was counsel for one of the parties; and that he accused said judge of tyranny and oppression in said cause, and having procured its submission to a prejudiced judge for trial; and that he assailed said judge with vile epithets, and threatened to expose him by publishing the said accusations in the newspapers; and it further appearing that the said attorney refuses to retract, apologize for, withdraw, or modify these accusations, but on the contrary still justifies his conduct and insists that he has not violated any professional duty; and it further appearing that, upon an opportunity given him to substantiate his said charge by evidence, he has entirely failed to prove their truth. *Held*, that such acts constitute "malconduct in his office" for which the attorney should be removed from the bar, under the statute which provides "that the justices of the supreme court shall have power, at their discretion, to strike the name of any attorney or counsellor at law from the roll for malconduct in his office."

THE SAME—JURISDICTION OF THE COURT TO PUNISH ATTORNEYS AT LAW FOR THEIR MALCONDUCT IN OFFICE. It is not necessary, in such a case, that the indignity or insult to the judge should occur in open court, nor that it should constitute a statutory contempt of court, in order to confer on the supreme court jurisdiction to disbar therefor.

Proceeding before the supreme court to remove an attorney and counsellor at law from the bar. The opinion states the facts.

D. F. Urmy, Attorney-General, L. S. Dixon and *L. C. Rockwell*, for the relator.

B. F. Rice, B. F. Montgomery and *T. A. Green*, for the respondent.

BECK, C. J. The petition of the Hon. Victor A. Elliott judge of the district court of the second judicial district of this state, recently filed in this court, charges the respondent, Thomas A. Green, a duly licensed attorney at law, residing in the city of Denver, with malconduct in his office as an attorney.

It charges that the respondent halted the relator as he was driving through the street with his daughter, a young lady, and addressed abusive, insulting and threatening language to him concerning his judicial action in a certain cause, theretofore and still pending and undetermined in the district court of Arapahoe county, wherein said Green was counsel for the defendants. That he accused said judge with tyranny and oppression in said cause; that said relator had procurred its submission to a prejudiced judge for trial; and further that the respondent assailed the relator with vile epithets, and threatened to expose him by publishing the said accusations in the newspapers.

Upon the filing of the foregoing petition a rule was entered herein that the respondent be cited to appear and show cause why his name should not be stricken from the roll for malconduct in office.

The respondent appeared and answered the petition and a hearing has been had. The answer admits that the facts contained in the petition, descriptive of the respondent's alleged conduct, are substantially true as stated, but denies that he entertained the

motives therein charged against him, to-wit: that he intended thereby to embarrass, and intimidate the relator in the discharge of his official duties as judge of said courts, or to disgrace him as a judge.

There being no traverse of the substantial allegations of fact contained in the petition for the purpose of testing the intentions of the respondent, an issue was framed presenting the question whether the respondent's conduct and language to Judge Elliott upon the street constituted such malconduct in his office as an attorney-at-law as to warrant this court in striking his name from the roll.

Upon the hearing the respondent was permitted to introduce testimony in mitigation of the offense charged against him, the same matters to be considered in justification, if adjudged admissible, for that purpose. Testimony was likewise produced by the relator concerning the same matters of fact mentioned by the respondent's witnesses and, subsequently, the case was submitted to the court upon the briefs and arguments of counsel for the respective parties.

Upon a careful consideration and review of the whole case, we are of the opinion that the respondent's course has been unreasonable and unprofessional throughout. Reprehensible as his conduct has been, there is little doubt that a retraction of his acts and words at any time prior to the submission of the case for our judgment, accompanied by a proper apology to the district judge manifesting a disposition to make suitable reparation for the indignity offered him, would have caused a dismissal of this proceeding.

But the attitude and bearing of the respondent have been, as to the relator, wholly defiant. His position is, that he has done nothing wrong; that his conduct was justifiable, and that no occasion exists even for an apology on his part. He makes the further point that the offensive language complained of, having been addressed to Judge Elliott out of court, the same does not constitute a statutory contempt, and for that reason it does not warrant the respondent's disbarment. Such being his disposition and course in the matter, it only remains for us to declare the law applicable to the facts and circumstances of the case. The language of the statute upon the subject of striking an attorney from the roll is broad and plain. It is: "The justices of the supreme court, in open court shall have power at their discretion to strike the name of any attorney or counsellor at law from the roll for malconduct in his office." General Statutes, page 136, sec. 5.

The grave and delicate responsibility imposed upon this court by the statute is duly appreciated. The profession of an attorney is to him of the highest importance. It comprises his regular means of subsistence. No argument, therefore, is necessary to show that the power of striking from the roll should be most judiciously exercised. The case should be clearly made out to warrant a removal from the bar, and the removal should appear to be necessary, either to the maintenance of that degree of respect which is due to courts and judges, or to preserve the respectability of the legal profession itself. The power should never be arbitrarily exercised.

It may be remarked in this connection that the statute not only vests this court with a discretion which may be exercised, but by implication it enjoins a solemn duty upon the court, in a proper case must be exercised.

Said Chief Justice Marshall: "This discretion ought to be exercised with great moderation and judgment, but it *must* be exercised." Ex parte Burr, 9 Wheaton 529.

A proper regard for the integrity of our honored profession, and for the preservation of judicial authority, requires that indignities of this character to judges, on account of rulings made in court, be summarily dealt with. Inaction under such circumstances would be a warrant for the perpetration of a similar outrage, whenever an unreasonable or evil disposed lawyer might adjudge himself aggrieved by judicial action.

The necessary effect of an indecisive course in such a case would be to impair confidence and respect in judicial authority, and to embarrass the administration of justice.

The law has made ample provision for the correction of judicial errors, and law abiding attorneys avail themselves of such remedies when occasion requires. Those otherwise disposed must suffer the consequences of an injudicious course of action. Concerning the respondent's motives, we have his denial that his real motives were those attributed to him by the relator.

It is true that respondent assailed Judge Elliott upon the street with low epithets, interspersed with charges of corruption and tyranny, accompanied by threats of exposure through the newspapers, all on account of his official action in a cause still pending in the district court, and on account of a publication concerning the same which criticises the course pursued by the respondent. But Mr. Green says he did not intend thereby to embarrass or intimidate the judge in the discharge of his official duties, or to disgrace him as a judge.

We fail to discover anything in the case, however, which should except it from the operation of the usual rule for determining the motives by which human conduct is actuated, viz: That the natural and probable consequences of every act deliberately done were intended by its author.

The respondent was afforded an opportunity to prove on the hearing in mitigation of his alleged offense, the affimative allegations of his answer, that the district judge had treated him in an oppressive and tyrannical manner, that he had entrapped him into the submission of the Bosco-Smith case to a prejudiced and partial judge for trial, and that the relator caused the publication in the *Tribune* of a false and libelous account of the proceeding which occurred in court on presentation by the respondent of his protest against further action before Judge Rogers. He signally failed to sustain, upon the hearing, any one of these allegations.

His conduct is not palliated by the plea of sudden passion, suggested by his counsel, which was incited upon reading the newspaper article referred to, for in the first place said article was not

grossly false, as alleged, and the supposed wrong done the respondent by its publication was more fancied than real.

In the second place, Judge Elliott had distinctly informed him, before the respondent gave vent to the tirade of abuse charged, that he was in no manner responsible for its publication. However angry he may have been upon reading the article, therefore, Judge Elliott having wholly disclaimed its authorship, no pretext remained on that account for his insulting words, and although uttered under excitement, thus produced, his conduct was wholly inexcusable.

The right of lawyers, in common with other persons, to criticize in a legitimate manner the conduct and rulings of judicial officers, is recognized, but this right never extends to nor justifies indignities to such officers concerning proceedings in court, which indignities would properly be characterized as outrageous if perpetrated upon private citizens concerning other matters.

The respondent's objection to the jurisdiction of this court in the case is, in our judgment, not well taken. It is not necessary that the the indignity or insult to a judge should occur in open court, nor that it constitute a statutory contempt of court, in order to confer on this court, jurisdiction to disbar therefor. Bearing upon this proposition the views of Mr. Justice Field are in point, "the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves when then they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times, respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts. * * * Whatever may be thought in such a case of the power to punish for contempt, their can be no doubt of the existence of a power to strike the offending attorney from the roll." Bradley v. Fisher, 13 Wall. 335.

Chief Justice Sharswood of Pennsylvania, is equally positive upon this point. Says he: "No question can be made of the power of a court to strike a member of the bar from the roll for official misconduct in or out of court." Ex parte Steinman, 95 Pa. St. 220.

To the same effect are the views of Chief Justice English; "The power of the court to punish for contempt by fine and imprisonment is one thing, and its power to strike an attorney from the roll is another and distinct thing, though the misconduct for which an attorney may be disbarred may, in some instances, involve a contempt of court." Beene v. The State, 22 Arkansas, 151.

The status of the case then is, that the respondent has been guilty of conduct towards the relator, on account of the latter's judicial action in a cause pending in the district court, which warrants his disbarment, and he has produced no testimony which either justifies or mitigates his offense.

This showing is greatly to be regretted for the respondent is a man well advanced in years, an attorney of considerable practice and

experience, and one whose demeanor in other courts appears to have been polite and respectful. To this effect is the testimony of Judge Hallett of the United States district court, and of Ex-Judge Dawson, late judge of the superior court of Denver. We may add, also, that the respondent's deportment in this court has always been exemplary. It is probable, therefore, that his conduct, in the present instance, has been the result of passion, and of an unreasonable rather than a vicious disposition, when acting under excitement.

However this may be, his defiant attitude in this case, and his persistent attempt to justify conduct which is indefensible, leave us no alternative, in view of the law and the evidence, but to adjudge him guilty of malconduct in his office as an attorney. In consideration of his age and standing, however, we are disposed to deal as leniently with him as may be consistent with the maintenance of judicial and professional honor and independence in this state. Whether or not this leniency will be exercised, and how soon, must depend, to a great extent, on the respondent himself.

Section 7, chapter VI of the general statute, makes provision for restoring to the bar any attorney whose name may have been stricken from the roll by order of the supreme court, and the judgment of the court is that the name of the respondent, Thomas A. Green, be stricken from the roll of attorneys.

Rule made absolute.

PEOPLE EX REL. KELLOGG v. FLEMING ET ALS.

Filed February 29, 1884.

CONSTITUTIONAL LAW—TITLES OF STATUTES. Article V, Section 20, of the Constitution of Colorado—"No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title," etc.,—is mandatory, and contains the declaration of an essential condition to the validity of legislative enactments, and so much of any act as is not directly germane to the subject expressed in the title, is without force.

THE SAME—TITLE OF AN ACT NOT EXPRESSING ITS SUBJECT. A statute passed February 11th, 1883, is entitled, "An Act to amend Section 78 of Chapter C, of the General Laws of the State of Colorado, entitled, Towns and Cities and especially cities of the second class," and provides for the election of the mayor and other city officers of Leadville on certain days, prescribes their terms of office, and regulates their official duties. Chapter "C," of the General Laws is not entitled "Towns and Cities, and especially cities of the second class," nor is there any other chapter so entitled. Chapter "C," contains several subdivisions, and only one of them contains 78 sections. The section 78 only provides that the mayor of a city shall be the presiding officer of the city council, and that he may vote in case of a tie, but not otherwise. *Held*, that the subject-matter of the said act of February 11, 1883, was not expressed in its title, that no part of it was germane to the subject-matter of said Section 78 to which its title referred, and which it purported to amend, and that said act was therefore wholly void.

THE SAME—REPEALING CLAUSE. Said statute being void, its repealing clause which provides that "all acts and parts of acts inconsistent with this act are hereby repealed" is also inoperative and void.

THE SAME—STATUTE VOID FROM REPUGNANCY. It seems that a statute which provides, with respect to all of the city officials of a certain city, that they "shall be elected on the first Tuesday of April *in each and every year*, and that each of them shall hold his office for the term *of two years*, and until his successor is elected and qualified," is void from uncertainty and repugnancy.

Information in the nature of a quo warranto, to try the title of the respondents to certain public offices. The opinion states the facts.

N. F. Cleary for the relator.

BECK, C. J. An information in the nature of a *quo warranto* was filed in this Court in the name of The People, upon the relation of William Kellogg, district attorney of the fifth judicial district of this State, charging that the respondents are unlawfully holding certain city offices in the city of Leadville; that is to say: the said John D. Fleming is unlawfully holding the office of mayor; the said W. W. Officer is unlawfully holding the office of city clerk; the said H. F. Sale is unlawfully holding the office of city attorney; and the said Edward Cuddihee is unlawfully holding the office of city marshal.

Upon the filing of the information, a rule was entered requiring the respondents to appear upon a certain day, and show by what warrant or authority they and each of them hold their respective offices. Thereupon a citation issued which was personally served upon the said Officer, Sale and Cuddihee, but the said Fleming was not found.

In respect to those served with the citation, their default to appear and answer the rule herein entered against them, must be construed as an admission, that the matters of fact charged in the information are true.

The substance of the information is that said city officers are severally claiming to hold their respective offices for the term of two years from the sixteenth day of April, A. D. 1883, by virtue of an election held in said city, in pursuance of an act of the legislature, entitled, "An act to amend section 78 of chapter 'C' of the general laws of the State of Colorado, entitled: towns and cities, and especially cities of the second class," approved Feb. 11, 1883, and that said act is believed to be unconstitutional.

The first objection to the act of February 11, 1883, is that the subject of the act is not sufficiently expressed in its title. Sec. 21, Art. V, of the Constitution is as follows:

"No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title, but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed."

All the information to be derived from an inspection of the title of this act is that it was proposed to amend a certain section of chapter "C" of the general laws. There is a chapter of the general laws which is numbered "C," but it is not entitled "*Towns and cities*, and especially cities of the second class," nor is there any chapter in the volume so entitled.

Chapter "C" comprises three separate legislative acts, each bearing its appropriate legislative title, and the several sections of all

said acts bearing their original numbers in addition to the general number in the compilation.

The title given by the compiler to the whole chapter is "TOWNS AND CITIES."

The only act in this chapter which contains 78 sections, is entitled, "AN ACT IN RELATION TO MUNICIPAL CORPORATIONS."

Section 78 of the latter act is under the sub-division "Cities of the Second Class."

It is apparent that the title of the act in question is very defective in matters of description. But a more serious defect is, that the subject of the proposed legislation was not only not clearly expressed in the title, but was not expressed at all.

The history and purpose of the constitutional requirements referred to is readily ascertained by consulting the numerous adjudications by courts of last resort, upon similar provisions.

According to Judge Cooley, the provision was designed to prevent the joining in the same bill, subjects diverse in their natures, and having no necessary connection; also, to prevent the insertion of clauses in a bill, of which the title gives no intimation. People v. Mahaney, 13 Mich. 481.

Judge Gardiner of New York, says, the purpose was that neither the members of the legislature nor the public should be misled by the title. The Sun Mutual In. Co., v. The Mayor, 8 N. Y. 241.

Judge Cole of Wisconsin, says, the design and purpose of the provision was obviously to prevent the mischief of uniting together in the same bill various objects which had no necessary connection with each other, and in order to guard the legislature, and community affected by the law, against surprise and imposition. Durkee v. The City of Janesville et al., 26 Wis. 697.

In view of these citations it is plain, that the design of the constitutional provision, that no bill except general appropriation bills, should be passed containing more than one subject which should be clearly expressed in its title, was wholly disregarded by the legislature in the present instance.

The only information in respect to the subject and extent of the legislation proposed, obtainable from the title of the act of Feb. 11, 1883, was ,that it was proposed to amend said section 78. It is but rational to conclude from this notification that the proposed amendment would be germane to the subject-matter of the section to be amended. That section relates wholly to the *duties* and powers of mayors of cities of the second class. It is as follows: "Sec. "78. The mayor of cities of the second class shall be the presid-"ing officer of the city council and shall vote when there is a tie, "but not otherwise."

In point of fact, the subject-matter of the section is not amended at all, but re-enacted in substantially the same words. The amendments made were amendments to other portions of the act, entitled, "*An Act in relation to Municipal Corporations*," approved April 4, 1877, which act contains 104 sections, one of which is said section 78.

Other sections of said act make the mayor's term of office one year, and provide that the city clerk, city attorney and city marshal, shall be appointed by the city council.

This act attempts to change the mayor's term of office from one to two years, and makes the offices of city clerk, city attorney and city marshal, *elective* instead of *appointed*. It also assumes to legislate concerning the powers, duties, compensation, and term of office, of all the foregoing offices. As to each and all of said matters section 78 is silent, save only as to certain powers of the Mayor, and those are not changed by the amendment.

All the foregoing matters are mentioned, and provisions made concerning them in other sections of the former act, a circumstance which makes the title of the latter act still more misleading than it would otherwise be, for it gave no intimation of an intention to alter these other sections, which were really the only sections affected by the amendments.

To one familiar with the contents of chapter "C," or who should, upon hearing or reading the title of the bill to amend section 78, open the general laws and read said section, together with the rest of the chapter, the title of the proposed bill could not possibly convey the slightest intimation of the character of its amendments.

Indeed, the more intimate one's acquaintance with said chapter "C," the more he would be misled by said title, as to the character of the amendments proposed to be made to section 78.

The doctrine of this court is that sec. 20, art. V, of the constitution of this state contains a mandatory declaration of an essential condition to the validity of legislative enactments, and that so much of any act as is not directly germane to the subject expressed in the title, is without force. C. & G. Road Co. v. The People, 5 Colo. 40.

Now, what is the subject expressed in the title to this bill, and what is germane to this subject?

The subject expressed is: "An Act to amend Section 78 of chapter 'C.'"

Germane to this subject are those matters which relate to the subject-matter of the section. Matters relating wholly to other portions of chapter "C" and not mentioned in section 78, are foreign to the subject expressed, and quite as liable to mislead, as if no such matters were mentioned in the chapter.

Section 78 makes the mayor the presiding officer of the city council, and authorizes him to vote in case of a tie, but not otherwise. Under a pretense to amend this subject it was re-enacted but not amended, and most radical changes made in other portions of the chapter, and affecting subjects wholly foreign to those mentioned in that section.

Since then, the essential condition to the validity of legislative enactments required by the constitution has been ignored *in toto* by the legislature in the passage of the act of Feb. 11, 1883, no part thereof being germane to the subject expressed in the title, it becomes our duty to declare said act to be void.

Counsel for the relator also insists that it is *absurd, repugnant* and *void* upon another ground, viz: that in respect to all of the said city officers it provides that they shall be elected *on the first Tuesday of April in each and every year*, and that *each shall hold his office for the term of two years*, and until his successor is elected and qualified.

This would appear to be a proper case for the application of Lord Coke's doctrine (which received such sharp criticism from the English jurists): "that where an act of parliament is against common "rights, or reason, or judgment, or impossible to be performed, "the common law shall control it—adjudge it to be void." Potter's Dwarris on Stats. p. 76.

Certain it is that in this instance the rule that in construing a statute "full sense and meaning must be given to every clause and "provision," can not be complied with.

Mr. Dwarris cites as an instance of difficult construction "where *the design of the framers of a law can not be seen.*" Surely this must be a specimen of the class of legislation referred to. I venture the suggestion that a law which requires the mayor of a city to be elected on the first Tuesday of April in each and every year and that he shall hold his office for the term of two years, equals in obscurity of design any act of the British Parliament passed since the days of the *witena gemote* of the early Saxons.

But whether Lord Coke's rule should be applied and the statute held void as against common reason and impossible to be performed, or whether the more temperate doctrine of Sir William Blackstone is applicable, which avoids such a law only as to that portion thereof giving rise to absurd consequences, on the theory that they were not foreseen by its framers, it is unnecessary for us to decide, since we have already declared it void on another ground.

This ruling disposes of all questions respecting the effect of the several provisions of the act, except the repealing clause which provides that "All acts and parts of acts inconsistent with this act, are hereby repealed."

There are cases which hold that the repealing clause of an unconstitutional statute may stand and have effect notwithstanding the invalidity of the rest of the act. But there is another class of cases, apparently based on sounder reason, which hold that the repealing clause is to be understood as designed to repeal all conflicting provisions, in order that the new statute can have effect, and where the statute itself is held to be invalid, nothing can conflict with it, and therefore nothing is repealed. Cooley's Const. Lim., p. 222, and cases cited.

We adopt the latter view in the present case, and hold the repealing clause void.

In view of the facts, and the law arising thereon, we find as to the respondents cited to appear and answer the rule entered against them, that the election by virtue of which they claim their respective offices was void and of no effect, and that they have severally been guilty of intruding into the said offices. But as to the said

John D. Fleming, not having been served with process, his case is not before us, and no action concerning it is taken.

It is therefore ordered and adjudged that said W. W. Officer be and he is hereby ousted, and altogether excluded from the said office of county clerk; that the said H. T. Sale be, and he is hereby ousted and altogether excluded from the said office of city attorney; and that the said Edward Cuddihee be, and he is hereby ousted and altogether excluded from the said office of city marshal, of said city of Leadville, and that each of them be excluded from all the franchises, privileges and emoluments thereof.

KISKADDEN *v.* ALLEN

Filed February 29, 1884.

NEGOTIABLE PROMISSORY NOTE, WHAT IS. The following instrument, "$284. Denver, Colorado, January 12, 1882. On or before March 12, 1882, I promise to pay to the order of J. O. Allen, two hundred and eighty-four dollars, at the City National Bank, with interest ten per cent. per annum, value received. This note becomes due and payable when (if before March 12, 1882,) Allen, Burke & Co. shall dispose of a part or all their interest in the New York Hotel, or when the interest of M. C. Burke may be sold or disposed of." [Signed] "M. C. Burke," [and endorsed] "William Kiskadden"—is a negotiable promissory note. It is payable at a day certain, and not upon any contingency.

ENDORSEMENT BEFORE DELIVERY TO GIVE THE MAKER CREDIT. When a promissory note made payable to a particular person, or order, is first endorsed by a third person, such third person is held to be an original promisor, or a guarantor, or an endorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place.

THE SAME. If the endorser put his name on the back of such a note at the time it was made, before its delivery to the payee, or as surety for the maker and for his accommodation, to give him credit with the payee, or, if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note.

ASSIGNMENTS OF ERROR. The Court will not review points nor consider questions not clearly covered by the assignments of error on the record.

Appeal from the county court of Arapahoe county.

The opinion states all the facts.

J. H. Brown, for appellant.

Brown & Putnam, for appellee.

STONE, J. The action in the court below, was by appellee against appellant upon the following instrument, to wit:

"$284.00. DENVER, COLORADO, Jan. 12, 1882.

"On or before March 12, 1882, I promise to pay to the order of J. O. Allen two hundred and eighty-four dollars, at the City National Bank, with interest, ten per cent. per annum, value received. This note becomes due and payable when (if before March 12, 1882,) Allen, Burke & Co. shall dispose of a part or all their interest in the New York Hotel, or when the interest of M. C. Burke may be sold or disposed of.

[Signed] "M. C. BURKE.

[And endorsed] "WILLIAM KISKADDEN."

Appellee got judgment for $298.75, which judgment the appellant, Kiskadden, asks to have reviewed, on the grounds that:

First, The instrument sued on is not a promissory note;

Second, That there was no consideration for the signing by appellant;

Third, That appellant was discharged by merger of the contract in a prior judgment in favor of appellee against Burke; and,

Fourth, That appellant was merely a surety, and was discharged by the conduct of appellee.

Upon the first ground it is argued that the instrument is not payable at a time certain, and that is not payable at all events.

We think these objections are opposed to a fair construction of the instrument.

The body of the obligation is a definite promise to pay at a certain time; it is in the usual form of an ordinary promissory note. The words appended to the body of the note provide, that if the interest of Allen, Burke & Co., or that of Burke alone, in a certain hotel, shall be sold before the date of maturity of the note, then the note shall become due and payable upon the happening of the event of such sale. This was a contingency which might or might not happen; but whether it happened or not, the note by express terms became payable upon a certain day mentioned. This condition, therefore, if given the meaning it fairly imports, does not affect the character of the instrument as a promissory note. As to the objection of want of consideration, this is not well taken, since the testimony shows, without contradiction, that the defendant endorsed the note at the time it was made, and before delivering to the payee, and with the clear understanding that the note would not be accepted unless so signed by the defendant, and this court has held, that when a promissory note, made payable to a particular person, or order, as in this case, is first endorsed by a third person, such third person is held to be an original promissor, guarantor, or endorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place.

If he put his name on the back of the note at the time it was made, or as surety for the maker and for his accommodation, to give him credit with the payee, or, if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. Good v. Martin, 1 Colo. 165, and same case 2 Colo. 218.

Clearly then, as joint maker, the defendant was liable, even though he did not participate in the consideration for which the note was given, for in such case he is deemed to have adopted the consideration of his joint maker.

This being the case, we need not pass upon the special consideration, for which, as shown by the testimony, the defendant endorsed the note.

In respect to the third point, that the contract of the defendant was merged in the prior judgment of the plaintiff against Burke,

a point which is made by counsel for defendant, to rest conceded liability of the defendant as joint obligor, we say, that this point, even if there be anything in it, is no raised by specific assignment of error, and in accordanc settled practice, we will not undertake to review points covered by the assignments upon the record.

The other point made by counsel, that the defendant a surety on the note, and that the conduct of plaintiff release such liability, is unavailing. In support of the above passed upon, the counsel for defendant admits t ant was a joint maker of the note, and cites the case Martin *supra*, to the truth of this proposition.

If then the defendant, as joint maker, was an origin he could not at the same time be liable merely as suret

But if he had been liable only as surety, the cond tiff set up, to wit: that subsequent to the maturity plaintiff paid a sum of money to Burke, equal in amo this note, in settlement of a certain suit of Burke aga was not of that character which would of itself operat the supposed suretyship liability of defendant upon question.

The judgment of the court below is affirmed.

MOONEY *v.* PEOPLE.

Filed February 29, 1884.

A CHALLENGE OF A JUROR FOR CAUSE, ON THE GROUND THAT HE HAI which had tried a prisoner jointly indicted with the defendant, will no such facts appear in the record.

ERRONEOUSLY SUSTAINING A CHALLENGE OF A JUROR FOR CAUSE is gr

ERROR to the district court for Jefferson count states the facts.

F. A. Naylor for the plaintiff in error.

Attorney General for the defendant in error.

BECK, C. J. Plaintiff in error was indicted fc jointly with Enos C. Good and George Good by Jefferson county, at the November term, 1881, of of said county.

Upon his own motion plaintiff in error was av trial, which resulted in a verdict of guilty, upon tenced to a term of penal servitude in the state pe years.

Eight errors are assigned as having occurred first of which seems to be well taken.

It is as follows: "The court erred in sustaining the challenge to F. C. Kleinman who was called as a juror in the trial of said cause."

The juror challenged appears to have been on the regular panel, and to have served as a juror in a previous trial, but whether upon the trial of either of the co-defendants of plaintiff in error, does not appear from this record.

Upon his *voire dire* the juror answered that he had served upon "the other jury," and heard all the testimony, but had no opinion in this case. That he applied what he heard to the case on trial, and would have to hear some evidence before he could give an opinion in this case.

Upon these answers the district attorney challenged him for cause, and the challenge was sustained by the court, to which ruling the prisoner excepted.

In support of the ruling it is argued that the record shows the juror had served upon the preceding trial of Enos C. Good, who was jointly indicted with plaintiff in error, and for this reason he could not have been free from bias, or have been a suitable juror.

We fail to find anything in the answers of Kleinman which show him to be disqualified to try the accused.

As before stated, it does not appear from the record that the jury upon which he had previously served was empannelled in the trial of Enos C. Good, the co-defendant of plaintiff in error, nor is there anything in the record before us to show whether said Good was convicted or acquitted.

It appears that the regular panel of jurors was exhausted before the jury was complete, and that four talismen were summoned and sworn upon the jury. This brings the case within the rule announced in Stratton *v.* The People, 5 Colo. 276. It was there held that while the court may upon its own motion, or upon the application of a juror, exercise its discretion in the matters of excuse or exemption, and if a juror be excused for an insufficient cause it is not ground of reversal, yet the rule cannot be extended to a challenge for cause, and judgment thereon.

Every person charged with a felonious crime is entitled to a list of the jurors comprising the regular panel, previous to his arraignment. The advantages to the prisoner of this right are pointed out in the case cited, and the conclusion arrived at, that the prisoner has the right to object to the depletion of the regular panel on insufficient grounds.

This is the only error we observe in the record, but it is so palpable, that the judgment must be reversed, and the cause remanded for a new trial.

Judgment reversed.

RALPH ET AL. *v.* WEARY ET AL.

Filed February 29, 1884.

ERRORS IN THE ADMISSION OR REJECTION OF TESTIMONY, or in the giving or refusal of instructions, can not be considered on appeal, when no exceptions were taken during the trial.

A VERDICT OF THE JURY WILL NOT BE DISTURBED when the evidence is conflicting.

ERROR to the county court of Summet county. The opinion states the facts.

F. A. Hardenbrook, for the plaintiffs in error.

John A. Hall, for the defendants in error.

HELM, J. No objection was taken or exception preserved, by either party during the progress of the trial; we are, therefore, precluded from considering errors, if any were made, either in the admission or rejection of testimony, or in the giving or refusal of instructions.

But two witnesses were examined in the case, and there is no strong preponderance of proof upon the disputed points.

The testimony of Weary, who was sworn on behalf of plaintiffs below, establishes their right to recover from defendants the amount of the judgment.

Bergeman, who testified for defendants below, contradicts Weary in some important particulars. But the cause was tried by a jury, whose province it was to pass upon the weight of testimony and credibility of witnesses; they resolved the doubts arising from these conflicts in the evidence, in favor of plaintiffs, and a disturbance of their verdict by us would be unwarranted.

The judgment of the county court must be affirmed.

Affirmed.

SUPREME COURT OF IDAHO.

UNITED STATES *v.* HAILEY, Administrator, etc.

Filed September 13, 1882.

THE DISTRICT COURT OF A TERRITORY IS NOT A UNITED STATES DISTRICT OR CIRCUIT COURT. When the United States comes into court to enforce its rights, it must come in as any other suitor, and the proceedings in such action must be in accordance with local laws in force at the time in the state or territory where such action is pending.

IN PROSECUTING A CLAIM AGAINST AN ADMINISTRATOR, THE PROBATE LAWS IN FORCE where the action is pending must govern and determine the method of procedure.

A CLAIM IN FAVOR OF THE UNITED STATES AGAINST THE ESTATE OF A DECEASED PERSON must be presented for allowance before an action can be maintained thereon.

APPEAL from a judgment of the second judicial district court, entered in favor of the defendant. The opinion states the facts.

Wallace R. White, U. S. District Attorney for Idaho, for the appellant.

R. Z. Johnson and *Houston & Gray*, for the respondent.

MORGAN, C. J. In this case suit was brought January 24th, 1877, by the United States, upon the bond of Virgil S. Eggleston, upon which A. H. Robie was surety. The defendant A. H. Robie died some time previous to the November term of the district court for Ada county, 1878. At said term, at the suggestion of his death by attorneys for both parties, his administrator, John Hailey, was made a party to the suit, and appeared therein by his counsel.

On the 10th day of December, 1881, the cause came on for trial before the court and jury. The plaintiff having completed its evidence and rested, the defendant moved the court to direct the jury to find a verdict for the defendant on the ground, that the evidence does not show that the claim in suit has been presented to the administrator for allowance or rejection.

The motion was allowed by the court, and the jury, under the instructions of the court, rendered a verdict for the defendant.

The cause was brought by appeal to this court.

The only question in this case is, as to whether section 140, Revised Laws of Idaho, page 267, binds the United States the same as any other litigant.

The claim never having been presented to the administrator, the matter as to limitation of time does not come in question.

For the same reason, there is no question of laches on the part of the plaintiff; therefore, section 131 Revised Laws, page 265, has no bearing on the question at issue.

Section 955 Revised Laws of the United States, cited by counsel, directs in what manner administrators may become parties in the United States courts; the district court of the territory, not being such a court, it does not apply. United States v. Mays & Overholt, 1 Idaho, 763; Clinton v. Englebrecht, 13 Wall. 434; Hornbuckle v. Toombs, 18 Wall. 648.

Nor is there any question in this case as to the appearance of the administrator; he having voluntarily appeared both in person and by attorney.

Section 140 Revised Laws, before quoted, states: "If any action be pending against the testator or intestate at the time of his death, the plaintiff shall in like manner present his claim to the executor or administrator for allowance or rejection, authenticated as in other cases, and no recovery shall be had in the action unless proof be made of the presentation required by law."

In cases in the United States courts, the practice in all cases is regulated by the laws in force in the states or territories wherein such suit is pending. U. S. v. Mays & Overholt, *supra;* Clinton v. Englebrecht, 13 Wall., *supra;* Hornbuckle v. Tombs, 18 Wall., *supra;* Reynolds v. United States, 98 U. S. 154; U. S. v. Eggleston, 4 Law., C. C. 201 *et seq.;* McGill v. Armon, 11 Howard, 142.

The administrator is exclusively bound to account for all the assets which he receives, under and by virtue of his administration, to the court from which he derives his authority. Vaughn v. Northrup, 15 Peters, 6; Youly v. Lavander, 12 Wallace, 279, *et seq.*

When the United States is compelled to come into court to enforce its rights, it must come in as any other suitor. Mitchell v. United States, 9 Peters, 743.

And the proceedings in such action must be in accordance with local laws in force at the time in the state or territory where the suit is commenced.

In this case, the probate laws in this territory must govern and determine the method of procedure to obtain judgment. Peale v. Phipps, 4 How. 375; Williams v. Benedict, 8 How. 111; Bank of Tennessee v. Hora, 17 How. 157; Pullianor v. Osborn, ibid, 475-6.

A right of priority of payment on the part of the United States is not involved in this cause, and if it was, the right of the United States to priority given by law, is recognized by section 239. Probate Act, Revised Laws, Idaho.

Judgment of the court below must, therefore, be affirmed.

BUCK, J., having been of counsel for the appellant in the court below, did not sit at the hearing of this case.

SUPREME COURT OF MONTANA.

NORTHERN PACIFIC RAILROAD CO. *v.* CARLAND, Treasurer, Etc.

Filed February 26, 1884.

CONTROVERSY, WHEN ARISES UNDER ACT OF CONGRESS. A controversy which turns upon the existence, effect and operation of an act of congress, is an action arising under such act, and a suit brought to determine such controversy is properly commenced in the district court of the territory, sitting to hear and determine causes arising under the constitution and laws of the United States; and especially is this the case when the action is brought by or against a corporation chartered by an act of congress.

RIGHT OF WAY OF THE NORTHERN PACIFIC RAILROAD THROUGH THE PUBLIC LANDS IS AN EASEMENT therein, and such an interest in the land, that personal articles attached to the soil and annexed to the easement within the boundaries of the right of way become a part of the land, and therefore partake of and are included in the exemption from taxation that belongs to the right of way, and hence a tax levied upon "twenty miles of railroad" constructed upon, over or through such right of way, in the territories of the United States, is a tax levied upon property that is exempt from taxation, and therefore void.

THE ACT OF CONGRESS INCORPORATING THE NORTHERN PACIFIC RAILROAD IS A CONTRACT between the government and the incorporators and their successors, and it is not within the constitutional power of congress or of a territorial legislature to impair the obligations of this contract by the imposition of a tax upon such railroad's right of way.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS A LIMITATION upon the sovereignty of the States, and was adopted by the people of the United States to secure to the inhabitants of each state equal laws and equal protection of the laws without regard to race, color, or previous condition.

THIS LIMITATION APPLIES TO THE SUBJECT OF TAXATION, and forbids the states or territories from exempting property from taxation, except in those cases wherein the property is devoted to public uses in which all the people are equally benefitted.

CONGRESS MAY EXEMPT THE PROPERTY OF THE UNITED STATES FROM TAXATION. The government may dispose of its own property upon such terms and conditions as it deems proper, and congress is the sole judge as to how this property shall be disposed of.

CONGRESS HAD POWER TO CHARTER THE NORTHERN PACIFIC RAILROAD COMPANY; to grant to it public lands, and exempt its right of way through such lands from taxation.

THERE IS A CONSIDERATION FOR THE CONTRACT CONTAINED IN THE CHARTER incorporating the Northern Pacific Railroad Company, which consideration is found in the public benefits to be derived to the whole people of the United States by reason of the construction of such road.

WHEN RIGHTS HAVE BECOME VESTED UNDER A VALID CONTRACT, legislative authority cannot invalidate such contract or disturb such rights.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IS NOT A LIMITATION UPON THE POWER OF CONGRESS in the disposal of the property of the United States.

IN ORDER THAT A COUNTY ASSESSOR MAY HAVE JURISDICTION to assess property for taxation, he must follow the statute. An assessment made in a manner not authorized by statute, and not in substantial compliance with its provisions, is void and equivalent to no assessment at all.

AN ASSESSMENT THAT VALUES REAL AND PERSONAL PROPERTY IN A MASS, IS VOID.

AN ASSESSMENT SHOULD SHOW A PROPER DESCRIPTION OF THE PROPERTY, and the real estate and personal property should be separately and distinctly assessed and valued.

AN ASSESSMENT THAT IS IN SUCH A CONDITION THAT IT CANNOT BE EQUALIZED by the board of commissioners, sitting as a board of equalization, is void.

IN ASSESSING RAILROADS FOR TAXATION, the assessor must follow the provisions of the statute.

A TAX WILL NOT BE RESTRAINED UPON THE GROUND THAT IT IS IRREGULAR OR ERRONEOUS.

TO ENTITLE A PARTY TO RELIEF IN EQUITY AGAINST AN ILLEGAL TAX, he must bring his case under some acknowledged head of equity jurisdiction.

COURTS OF EQUITY WILL ENJOIN THE CASTING OF A CLOUD UPON A TITLE, in cases wherein the cloud itself, when cast, would be removed.

IF THE RECORD SHOWING THE VALUATION AND LEVY OF TAX IS COMPLETE on its face, such record creates a lien upon the real estate against which the tax is assessed, and is a cloud upon the title of the owner.

IF A TAX DEED IS MADE PRIMA FACIE EVIDENCE OF THE PURCHASER'S TITLE, and may be introduced in evidence, without showing the regularity of the proceedings up to the delivery of the deed, such deed is a cloud upon the title of the owner, and equity would interfere, when by the averments of the bill it appears that the property is exempt from taxation, or that the assessment was void.

IF THE ILLEGALITY OF THE TAX APPEARS UPON THE FACE of the proceedings, no cloud is cast upon the title.

EQUITY WILL ENJOIN THE COLLECTION OF A TAX LEVIED upon property that is exempt from taxation, to prevent a multiplicity of suits, and to afford a complete remedy.

EQUITY WILL INTERPOSE TO PREVENT THE DESTRUCTION OF A FRANCHISE.

A FRANCHISE IS PROPERTY, and in the case of a continuing injury to the same, courts of equity will prevent a repetition of the injury and protect the franchise.

ANY ENCROACHMENT UPON THE QUIET ENJOYMENT OF AN EASEMENT, whether created by grant or prescription, will be prevented by injunction.

EQUITY WILL INTERFERE to PROTECT RIGHTS WHEN it sufficiently appears that the evidence by which such rights can be established, is liable to be lost.

APPEAL from a judgment of the first judicial district court for Gallatin county, entered in favor of the defendant. The opinion states the facts.

Saunders & Cullen and *E. W. & J. K. Toole* for the appellant.

J. A. Johnston Attorney-General, and *Chumasero & Chadwick* for the respondent.

WADE, C. J. This is an action in the nature of a bill in equity to enjoin the collection of a tax, assessed by the assessor of Custer county, which the treasurer thereof, the defendant herein, is attempting to collect upon "twenty miles of railroad and rolling stock" of the plaintiff, situate in the said county of Custer and territory of Montana.

There was a demurrer to the complaint, which was sustained, and the plaintiff abiding its complaint, judgment was rendered for the defendant, from which plaintiff appeals.

The action was commenced in the district court of the first judicial district, at Bozeman, Gallatin county, sitting to hear and determine causes arising under the constitution and laws of the United States, and the complaint alleges the creation and corporate exist-

ence of the plaintiff, under an act of Congress of July 2, 1864, entitled, "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific coast, by the northern route."

The complaint, in substance, further alleges that by the terms of said act, plaintiff's right of way through the public lands, is two hundred feet in width on each side of said railroad, and in addition thereto, includes all necessary ground for station buildings, workshops, depots, machine-shops, switches, side tracks, turn-table and water stations, which right of way and necessary ground is exempt from taxation in the territories of the United States; that notwithstanding said exemption, the assessor aforesaid on the fifth day of September, 1881, without notice to plaintiff, or its authorized agent at Helena, in said territory, whose duties as to returning assessments of plaintiff's property for taxation in the territory, were those of the secretary or clerk named and mentioned in the territorial laws, did then and there value and assess the personal property of the plaintiff in said county for taxation at fifteen thousand five hundred dollars, and did assess, value and return as assessable valuation in said county "twenty miles of railroad and rolling-stock" at two hundred thousand dollars, to the commissioners of said county, who then and there, without the knowledge of plaintiff, or its agents in that behalf, approved of said valuation, and levied a tax thereon amounting to twenty-five mills on each dollar thereof, and thereby made it the duty of the treasurer of said county, to collect said tax; that the plaintiff paid the tax upon said $15,500 of personal property, and applied to the board of county commissioners of said county, at their December session, 1881, to remit the tax on twenty miles of railroad and rolling-stock, so valued by said assessor at $200,000, which the board refused to do, and neglected to make any record of said application; that the plaintiff before the commencement of this action, appraised at its true value, the rolling-stock and twenty miles of road, and has tendered to the defendant the taxes thereon, amounting to the sum of $440, and brings the money into court; that the assessment and levy of said tax upon said twenty miles of said road, valued at $180,000, is evidenced by a record in the hands of the defendant, which tax he is proceeding to collect, and the same is a lien upon the real property of the plaintiff in said county; that unless the defendant is enjoined, he will levy upon and sell the personal property and real estate of the plaintiff for said tax, and that for the wrong thus impending, there is no plain, speedy or adequate remedy at law, but that the injury so threatened is and will be and remain irreparable; that Custer county is largely indebted, to wit: in the sum of more than $100,000, and has no money in its treasury applicable to pay any claim of plaintiff against the county if it should pay said tax and sue the county and recover a judgment for the same; that the taxes collected in said county are applicable by law to the payment of the necessary current expenses and interest upon warrants and the

bonded indebtedness of the county, which warrants and bonds are payable in the order in which they were issued; that the warrants of said county are worth but eighty cents on the dollar, and subject to long delays in their payment, in consequence of the large indebtedness aforesaid. Wherefore, a judgment at law for the taxes so to be paid by plaintiff or collected, if the treasurer should collect the same, would be wholly inadequate as a remedy to plaintiff; that the railroad so assessed is the right of way and fixtures thereon, mentioned in the act of Congress, and thereby exempt from taxation in the territory of Montana and other territories of the United States, the said twenty miles of railroad being on what was, July 2, 1864, the public domain of the United States; that said assessment, valuation and return of the assessor, was made upon a blank form in his hands, which, when returned, showed that an assessment had been made by him on the fifth day of September, 1881, on "twenty miles of railroad and rolling-stock" in said county, which said return has been lost, and the evidence whether the said $215,500, so assessed is on real or personal property, right of way, or rolling-stock of plaintiff, does not appear on the books of the treasurer, or the archives of the county, and the proof thereof, which must be produced from other sources, is liable to be lost, and the plaintiff by the reason of the death of its witnesses may be unable hereafter to prove the assessment upon its right of way, which it is now able to do; that the assessment of plaintiff's right of way is and was fraudulent, and that any assessment thereof without notice to its general agent is and was fraudulent and void, and because of said exemption, the assessment thereof was beyond the authority and jurisdiction of the assessor. Wherefore, plaintiff prays judgment that the claim of defendant to recover or collect said taxes, remaining unpaid, be declared invalid, and that he and his agents and successors in office be enjoined from collecting the same.

Upon this state of fact and allegation the following questions arise for determination:

1. Was the action commenced in the proper court?
2. What is included in the right of way, which by the terms of the act is exempt from taxation?
3. Was it within the constitutional power of congress to so exempt said property from taxation?
4. If the property was subject to taxation, was the tax assessed and levied as our statute requires?
5. In what cases and under what circumstances will the collection of taxes be enjoined?

(1.) Our district courts, sitting to hear and determine causes arising under the constitution and laws of the United States, have the same jurisdiction as the circuit and district courts of the United States. Our organic act provides, section nine, "And each of said district courts shall have and exercise the same jurisdiction, in all cases arising under the constitution and laws of the United States, as is vested in the district and circuit courts of the United States,

and the first six days of each term of said courts, or so much thereof as shall be necessary shall be appropriated to the trial of causes arising under the said constitution and laws."

When does an action arise under an act of congress? Judge Deady in Hughes *v.* the Northern Pacific Railroad Company, WEST COAST REPORTER, No. 1, p. 24, answers this question and says: "A controversy which turns upon the existence, effect and operation of an act of Congress, arises under such act, and a suit brought to determine the same, is a case arising under such act within the meaning of the statute."

The supreme court of the United States in Osborn, *et al v.* the United States Bank, 9 Wheat., p. 16, decides that a suit brought by or against a corporation created by act of congress, is necessarially a case arising under the laws of the United States, and therefore within the jurisdiction of the circuit court. By section one of the act of congress of March 3d, 1875, 18 U. S. Stat., p. 470, jurisdiction is conferred upon the circuit court in all cases arising under the laws of the United States as follows: "That the circuit court of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum of five hundred dollars, and arising under the constitution and laws of the United States."

Says Judge Deady in Hughes *v.* N. P. R. R. Co., *supra*: "The effect of this legislation, under the ruling in Osborn *v.* United States Bank, *supra*, is equivalent to a special clause in the charter of the Northern Pacific, authorizing it to sue and be sued in the circuit courts in all cases. To the same effect see Fisk *v.* W. P. R. R., 6 Blatch., 365."

If this suit would have been properly commenced in the circuit court of the United States, then it is properly commenced in a court having like jurisdiction to that of the circuit court, and such is the jurisdiction of our territorial district courts, when sitting to hear and determine causes arising under the constitution and laws of the United States.

(2.) Section second of the act incorporating plaintiff provides as follows: "That the right of way through the public lands be, and the same is hereby granted to said 'Northern Pacific Railroad Company,' its successors and assigns, for the construction of a railroad and telegraph line as proposed. * * * Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations; and the right of way shall be exempt from taxation within the territories of the United States." 13 U. S. Stat. 367.

Whatever interest the plaintiff acquired in the lands described in its right of way, is an interest evidenced by a grant. The United States being the owner of the public lands in the territories, and

having the right to dispose of the same, declared "that the right of way through the public lands be and the same is hereby granted to the Northern Pacific Railroad Company, its successors and assigns," and the purpose of the grant is "for the construction of a railroad and telegraph line" over and through the right of way so given and granted to the company. The right in the company is vested and exclusive. It is an easement in the lands described in the right of way. It is a freehold interest in the soil having all the properties of reality. If it belonged to an individual it would descend to his heirs, and can only be conveyed by deed. Within the boundaries of this right of way, as described in the grant, personal property used in constructing and operating the road, attached to the soil and annexed to easement, becomes a part of the real estate of the company.

A right of way over or through the land is an easement, and an easement is an interest in the soil, such an interest, as that, when personal property is attached to it, becomes a part of the realty. These propositions seem to be in harmony with the authorities.

In the case of the appeal of the N. B. & M. R. R. Co. 32 Cal. 500, Judge Sawyer, speaking for the supreme court of California, has determined what passed by the grant of right of way to a railroad company, and in reviewing the authorities in an able opinion says: "Under the act of April 16, 1861 (Stat. 1861, p. 193), the appellant acquired the right of way whereon to construct and lay down a railway track within the corporate limits of the city and county of San Francisco, and to run horse cars thereon through certain designated streets, embracing the whole of that portion of Kearney street proposed to be widened, and extending in each direction a considerable distance beyond. It was authorized to lay down a track for its cars to run upon, and to receive five cents fare from each passenger for any distance carried in said cars. This right of way is, at least, an easement in said said street. So much is admitted by appellants' counsel. But an easement is property, recognized as such by law, and one of the kind in question, very valuable property. It is an incorporeal hereditament, but it is still a tenement and an interest in the land." "An easement always implies an interest in the land over which it is to be enjoyed. A license carries no such interest. The interest of an easement may be a freehold or a chattel one, according to its duration:" Washb. Eas. 5, par. 5. "An easement must be an interest in or over the soil:" Per Cresswell, J. in Rowbotham v. Wilson, 8 Ellis & B. 157. "A right of way is an assignable property. It is a real or chattel interest, according to the terms of its duration, and the former is well known in the law as that sort of real property belonging to the class of incorporeal hereditaments:" *Ex parte* Cowburn, 1 Cow. 570; Heaton v. Ferris, 1 John. 146. It is real property, and it is created by grant. An easement is an estate or interest in land within the statute of frauds, requiring contracts affecting real property to be in writing. Wolfe v. Frost, 4 Sand. ch. 89; Foster v. Browning, 4

R. I. 51. By act of parliament, 10 Anne, certain parties were "authorized and empowered, at their proper costs and charges, to make the river Avon, from the city of Bath down to and within the Millpool or Wearpool, below Harmon Mills and Wear, not exceeding one hundred and fifty yards, navigable, useful, and passable for boats, lighters and other vessels," and to take certain tolls from those navigating the said portion of said river: Buckeridge v. Ingram, 2 Ves. Jr. 654. The interest of the parties in the soil of that portion of the river is but an easement, similar to that acquired by the appellant in this case. Yet shares in the improvement were held to be real estate and subject to dower. The master of the rolls, cititing Lord Coke, says: "And according to that passage, every hereditament which in any degree arises out of land, affects the same, or is exercisable within the same, has all the properties that belong to real estate. * * * When we come to try the question by the test of that definition, it would be strange to say the right of making all these cuts and erections, and receiving certain tolls, payable by all persons and goods navigating that part of the river, does not savor of realty. It not only does, but it partakes of it. It is not the soil which I hold would hardly pass to the grantee, but it is a right arising out of the soil. The land itself includes every profit that can be made out of land. Therefore, this act cannot be construed to have taken out of the proprietors and given to the corporation the soil; but it has given them the right in and over the soil, and certain rights arising in and out of the soil. * * * I have no difficulty in saying that whenever a perpetual inheritance is granted, which arises out of lands, or is in any degree connected with—or, as it is emphatically expressed by Lord Coke, exercisable within it—it is that sort of property the law denominates real, and cannot pass by a will without three witnesses:" *Id.* 633. Having determined the interest to be real estate, he held the shares subject to dower.

"The whole estate of the Chesapeake and Ohio canal company, at least so far as it consists of the canal itself, and its necessary buildings and the fixtures attached to them, must, according to the common law, be regarded as realty:" Beimly's Case, 2 Bland, ch. 145. When a party conveys land bordering on a navigable river upon which a ferry is established, but excepts therefrom his right to hold and maintain the ferry, the ferry right does not pass, and it is real estate, "and subject to the laws which govern realty:" Bowman v. Wathen, 2 McLean, 385-388. "The statute of Indiana recognizes the right of proprietors of land on the margin of the river, and to none others can ferry rights be granted, and it is supposed that this limits the right to the grantee of the soil. But this construction cannot be sustained. By the statute nothing more could have been intended than to rescue from violation the right of the riparian proprietor. This right is appurtenant to the soil; but he may convey it, and still retain the fee in the land. And by such conveyance the grantee holds the right which the statute was

designed to protect. He has the use of the soil for a ferry landing, and for ferry ways, so far as the public accommodation is concerned, as fully and completely as could be exercised by the grantee of the soil; but for no other purpose has he a right to enter upon the soil. Now, it must be presumed that the right thus possessed is as much within the policy of the statute, as if it were a fee simple in the soil. Indeed, it is within the letter of the statute, for the grantee of such a right may in the strictest sense, be considered for all the purposes of the ferry, 'the proprietor of the land on the margin of the river.' This right, as before remarked, is real estate. It descends to heirs as such, is subject to dower, and to all the incidents of real property:" *Id.* 389, 390.

The statutes of Rhode Island provide that "the assessors of taxes in the several towns, in assessing taxes for real estate, may assess the same either upon the owners of the real estate, or upon the persons who hold or occupy the same:" Prov. Gas Co v. Thurbur, 2 R. I. 21. Under this provision, the Providence Gas company was was assessed for its gas pipes in the streets of the city, valued as real estate at fifty thousand dollars. The gas pipes having been permanently attached to the soil, and united to the easement of the company in the land, were held to become a part of the realty, and to be properly taxed as real estate. The court say: "If these pipes had been laid in the land of an individual by parol license, they would not become fixtures thereby. But if the owner had granted by deed the right of the fee to lay pipes through his land, they would be fixtures, because the annexation would be under legal title. * * * What, then, is the nature of the right which plaintiffs take under their charter? We think, when exercised, it is an easement—an incorporeal hereditament—like the right of a railroad company, to build and occupy their road, or a canal company their canal, under the provisions in their charter which grant the power to take the land upon rendering compensation to the owners. * * * But the tax has not been assessed upon the plaintiffs as occupants of the land by their pipes, but upon their pipes as real estate. And these pipes being annexed to the freehold, and the gas company having an easement in fee, or a right so to annex and use them, we think they are fixtures, and rightfully assessed as real estate:" *Id.* 26. So, also, the Providence and Worcester railroad company owned "in fee an easement in certain real estate in said town, said estate, so owned by said company, being the location, sleepers, rails and bridges, etc. of the P. & W. railroad," lying within the limits of the charter. Under the same act this property was assessed as real estate, and the question was whether it was liable to be assessed. The Court say: "We have no doubt the easement of the plaintiffs, and their rails, sleepers, bridges, etc., are real estate and subject to taxation within the decision of the court in the case of the Providence Gas Co. v. Thurbur, unless exempted by section 28:" Prov. & W. R. R. Co. v. Wright, 2 R. I. 462.

So in New York, under the general statutes requiring "all real estate and personal property" to be assessed for taxation at its full and true value, land occupied by the road, the superstructure and other fixtures, are taxable as real estate in all respects like other lands: Alb. and Sch. R. R. Co. v. Osborn, 12 Barb. 225, and West Stockbridge R. R. Co. v. Town of Cannan, 16 Ind. 247. The same is true of Illinois: Land & Mor. R. R. Co. v. County of Morgan, 14 Ill. 166.

"A turnpike has but an easement in the soil, yet it has an estate, a property in it, which can no more be taken for the use of the railroad without compensation than the interest in the soil held by the owner in fee. When a railroad crosses a turnpike, compensation must be made to the turnpike company. In a case of assessment for damages resulting from the crossing of a turnpike by a railroad, Mr. Justice Harris speaks of the interest of the former as real estate. He says: "So far as the railroad company had occasion to take the real estate of the turnpike company, so far were they bound to make compensation:" Troy & B. R. Co. v. North Tpk Co., 16. Barb. 106 "So a railroad company which exclusively uses the road by cars propelled by steam, cannot appropriate a public highway as a part of its road, without making compensation to the owner of the fee of the land upon which the highway is located. This is imposing a new burden upon it beyond the easement already acquired by the public. A new estate is to be carved out, which can only be acquired by the railroad company by contract with the owner of the fee, or by condemnation and payment of compensation under the right of eminent domain: Williams v. N. Y. C. R. Co., 16 N. Y. 100; Mahon v. N. Y. C. R. Co., 24 N. Y. 569; Wager v. Troy Un. R. Co., 25 N. Y. 526; Waterloo v. Aub. R. R. Co., 3 Hill. 569: In the first case the court says: "The right of the public in a highway is an easement, and one that is vested in the whole public. Is not the right of a railroad company, if it has a right to construct its track upon the road, also an easement? This cannot be denied, nor that the latter easement is enjoyed, not by the public at large, but by a corporation, because it will not be pretended that every man would have a right to go and lay down the timbers and his iron rails, and make a railroad upon a highway. Here, then, are two easements; one vested in the public, and the other in the railroad company. These easements are property, and that of the railroad company is valuable:" 16 N. Y. 108. And it is property that must be acquired by purchase—by contract with the owners of the fee, or by making compensation in the mode prescribed by law in the exercise of the right of eminent domain. The sovereign power has no authority to convey it as a part of the franchise. By virtue of its franchise it may be endowed by the sovereign power with capacity to acquire the easement, hold property and exercise the functions with which it is endowed; but it is beyond the power of the government itself to endow it with the easements—confer upon it the property—the interest or estate in the

lands not owned or controlled by the sovereign power. That interest is property—as distinct from the franchise, and must come through purchase and payment of the consideration like any other property. So also in a recent case in New York, in which the power of the corporate authorities of New York city, to authorize certain parties to construct a street railroad in Broadway, the character and interests of street railroad companies was involved. In speaking of the resolution authorizing the parties to construct the road, the court say: "Before its acceptance (if valid), it became a contract between two parties, binding each to the observance of all its provisions. It was something more than a mere executory contract between the parties. *It amounted also to an immediate grant of an interest, and it would seem a freehold interest, in the soil of the street to the defendants. The rails when laid, would become a part of the real estate, and the exclusive right to maintain them perpetually is vested in the defendants, their successors and assigns.* * * * The title to the rails when permanently attached to the land, and such right in the land as may be requisite for their perpetual maintenance, are therefore granted to the defendants by the resolution. The exclusive use of the rails, when laid for the purpose for which they were designed, would also, I think, belong to the defendants. Other people might drive across them, and to some extent along them, with ordinary carriages, but they would have no right to run cars upon them for their own convenience or profit. Any use which the public could have of them, not exercised through the defendants' franchise, would depend upon the fact that the rails would not entirely exclude from the ground they might occupy, the character of a public street: Milhan v. Sharp, 27 N. Y. 620. The resolution is therefore void, for the reasons that it purports to create a franchise which the common council had no power to create—*to vest in the defendants an exclusive interest in the streets which the common council had no power to convey;* and to divest the corporation of the exclusive control over the street which has been given to it as a trust for the use of the public, and which it is not authorized to relinquish."

Judge Sawyer's conclusions from these cases are that the appellant, who, under the act of April 17, 1861, had acquired "the right of way whereon to construct and lay down a railway track within the corporate limits of the city and county of San Francisco, and to run horse-cars thereon," through certain designated streets, thereby acquired "*An interest in the soil in Kearney street; that it consists in the location of the road in the street, its right to lay down rails and attach them to the soil, and to run cars over them for profit; its right to the exclusive use of them and the streets, so far as is necessary for the purpose in the mode prescribed; that this interest is property—an interest in the land—and that it is real estate, and the rails thus laid down, attached to the soil and annexed to the easement, become themselves a part of the land—of the estate of the company—and that in those states where no special provision is made for taxing this species of property in*

a different mode, it is assessed as real estate in the same manner, and upon the same principles as land—as if the company owned the land itself upon which the track is laid to the extent of its interest in it. It is as immovably established upon a particular portion of the earth as the lot occupied by stores fronting on the same street, and the estate in the one can be no more enjoyed away and apart from its fixed locality, than the estate in the other; and the right of the street railroad company to the exclusive control and enjoyment of its estate in the soil of the street to the full extent of that estate, is as perfect as the right of the lessee or owner of the lot fronting on the same street to control and enjoy its estate. The several estates are substantially of the same kind, and are of equal dignity before the law, but one is larger, more extensive than the other. Practically, they differ only in the quantity of interest, not in quality."

The following cases have been decided since the decision of Judge Sawyer:

In the case of The People v. Cassity, 46 N. Y. 46, says Folger, J.: "The property assessed in this case is the track of the relators, consisting of its stringers, ties and rails. This track is laid down in the public highway, and the relators have or claim no interest in the lands of the highway, save a right to use the same, save for the passage of their teams and vehicles to and fro over the track. This right they claim and doubtless have, and it includes the right to the constant and exclusive, and for the extent of their chartered existence, the lasting use of the soil for the support of their track. It is an easement: Williams v. N. Y. C. R. R. Co., 16 N. Y. 97; Craig v. R. and B. R. R. Co., 39, N. Y. 404. And this is an interest in the land over which it is enjoyed: Wash. on Easements 6. It gives them the right of the exclusive possession as from time to time they shall need to use any part of it.

By the statutes is relation to assessments and taxation, 1 R. S. 360, secs. 1 and 2, all lands within this state, whether owned by individuals or corporations, shall be liable to taxation. The term land shall be construed to include the land itself and all the buildings and all other articles erected upon or affixed to the same, and the terms 'real estate' and 'real property,' shall be construed as having the same meaning as the term 'land,' thus defined. "We are not inclined to give to the terms of the statute a construction so narrow as that required by the position of the relators. That would be to hold that buildings and fixtures are not included in the term 'land,' except as insperable, in consideration of the ownership thereof, from the ownership of the fee; and that no right or interest in land less than the fee thereof, would, for the purpose of assessment, be deemed to fall within the meaning of 'land,' as set forth in the statute. The statute means, for this purpose, to make two general divisions of property: one all lands, another all personal estates; and then to be more definite, it declares by land, is meant the earth itself, and also all buildings and other articles erected upon and affixed to the same. We do not think that when build-

ings or other articles are erected upon or affixed to the earth, they are not, in view of the statute, land, unless held and owned in connection with the ownership in fee of the soil. We are of the opinion that the statute means that such an interest in real estate as will protect the erection or affixing thereon and possession of buildings and fixtures will bring those building and fixtures within the term 'lands,' and hold them to an assessment as the lands of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures. The defendants were right then, in considering the tract of relators as land, and liable to assessment as such: see the People v. Beardsley, 52 Barb. 105, since affirmed in this court."

In the case of the City of New Haven v. F. H. & W. R. R. Co. Carpenter, J., speaking for the supreme court of Connecticut says: "This action is brought to recover the amount of benefits assessed upon the defendant for its proportional part of the expense incurred in paving a portion of Chapel street in New Haven, in and through which the defendants railroad track is laid. The defense is first, that the defendant is not liable to assessment. * * * The defendants property consists of rails, sleepers, ties and spikes, so laid into and attached to the soil, in the street where the improvement was made, as to become a part of the realty. That property, so situated, is real estate, has been repeatedly decided: Prov. Gas. Co. v. Thurbur, 2 R. I. 21; City of Chicago v. Bear, 41 Ill. 306: Appeal North Beach and M. R. R. Co. 32 Cal. 500; Farmers Loan and Trust Co. v. Hendrickson, 25 Barb. 494. We entertain no doubt that this ought to be regarded as real estate, and as such, liable to assessment, like any other real estate, especially benfitted, unless there is something in the charter showing that the legislature did not intend that this species of property should be assessed."

The decisions and the reasonings thereof, and analogies of the law, seem to conclusively establish the proposition of the right of way granted to the plaintiffs, is for all the purposes of this case, real estate, having all the properties that would attach to a grant of land itself. If this be true, and this right of way is land, or an easement in land, which implies an interest therein: 1 Wash. R. P. 543, to such an extent that personal property attached to the soil and annexed to the easement becomes a part of the land itself, then the other important consequences follow: "Whatever is affixed to the soil belongs thereto." *Quicquid plantatur solo solo cedit*: Broom Leg. Max. 299. Land, according to Lork Coke, includes not only the ground or soil, but everything which is attached to the earth, whether by the course of nature, as trees, herbage and water, or by the hand of man, as houses or other buildings; and which has an indefinite extent upwards as well as downwards, so as to include everything terrestrial under or over it: Co. Litt. 4a; 3 Kent Com. 509; 2 Black Com. 18. Whatever is built on the soil is an accessary of the soil: Bouv. Inst. sec. 1571.

It follows from these propositions that the road bed, the rails fastened to it, station buildings, workshops, depots, machine shops,

etc., constructed over, upon or through the right of way granted to the plaintiffs, and attached to the soil, and annexed to the easement, become a part of the real estate of the railroad company. Says Washburn: 1 Wash. R. P. 3: "Thus the road bed, the rails fastened to it, and the buildings at the depots of railroads, are real property." Caton, C. J., speaking for the supreme court of Illinois, says: "We are of opinion that the rolling stock, rails, ties, chairs, spikes, and all other material brought upon the ground of the company incumbered by the mortgage, and designed to be attached to the realty, should be considered as a part of the realty, and incumbered by the mortgage as such."

There is another principle that ought to give some light on this question. "It is a general rule that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantors own power extends an authority to do all that is necessary to accomplish the principal object." "It is a well known and reasonable rule in construeing a grant, that when anything is granted, all the means to attain it, and all the fruits and effects of it, are granted also:" C. J. Shaw in Babcock v. Western R. R. Co., 9 Met. 555.

Here is a grant of the right of way through the public lands "for the construction of a railroad and telegraph." Such a grant carries with it the right to the exclusive possession of the lands described for the purpose aforesaid; to make excavations, cuts and fills in the soil or ground; to construct a road-bed of suitable width and grade; to lay ties and rails thereon; and to erect upon the lands described as and included in the right of way, all buildings, shops, water stations, depots, &c., necessary and suitable to be used in constructing or operating such railroad. This right necessarily implies property in the ground itself. This property is real estate, and the title to it is a legislative grant. By virtue of this grant, the railroad company acquired the same interest in the land as if it had received a deed of the land for the purpose of constructing and operating a railroad.

The provisions contained in section 2 of the act incorporating plaintiff, declaring that "the right of way shall be exempt from taxation within the territories of the United States," therefore carries with it and exempts from taxation within the territories, the road-bed, the ties and rails thereto attached and all the station buildings, workshops, etc., necessary for the construction and for operating said railroad, and the assessment for taxation and levy of tax thereon of "twenty miles of railroad" in the county of Custer, as mentioned and described in the complaint, which description must include the road-bed, ties and rails and all necessary buildings attached to the soil and annexed to the easement of the right of way, was unauthorized and is illegal and void.

(3.) But if the property was subject to taxation, was the tax assessed and levied as our statute requires?

As to the taxation of railroads, the statute of the territory provides as follows (sect. 1007, Rev. S., p. 618): "The property of

corporations or companies constructing bridges, canals, ditches, flumes, railways, plank roads, grading roads, turnpike roads, telegraph lines, and similar improvements, shall be assessed to each corporation or company, and their interests are to be taxed in this territory, in the county or localities in which such bridges, railways, etc., may be in, and to the extent of such improvements as may be found in the county or counties in which the same may be situated, and to this end the assessor is directed to require the secretary or clerk, or whatever officer of corresponding duties there may be, to render upon oath a list of the number of miles and value of such improvements as may be, in each separate county through which the same may be constructed or in which the same may be situated."

Section 1013 provides that the assessor's list shall contain: *First*, the *land* and a description thereof; and, *second*, the *personal property*; and section 1015, that the assessor shall make out and deliver to the county clerk an assessment roll containing the names of the persons and bodies in whose names property has been listed, *with the several species of property and the value as hereinbefore indicated*—that is, as indicated in section 1013.

The allegations of the complaint as to the assessment of this property are as follows: "That on the fifth day of September, 1881, it (the plaintiff) had certain personal property and twenty miles of its said road provided in said act to be built, then and there constructed and lying in said county, and then had its principal office and headquarters in the city of St. Paul, in the state of Minnesota, and a general agent at Helena, Montana, whose duties as to the return, valuation and assessment of its property for taxation corresponded with and were those of the secretary or clerk named and mentioned in the law of the territory, and who might have been applied to by the assessor of said county, and required to list its property liable to taxation, but its said general agent was not so applied to, to list its taxable or other property in said county by said assessor for taxation for that year, nor was any person so applied to by said assessor, whose duties were equivalent to or corresponded with those of the secretary or clerk in the law of the territory mentioned, but the assessor of said county, on the fifth day of September, 1881, without authority of law did, himself, then and there assume and pretend to make a list of the property of this plaintiff in said county, and value the same for the purpose of taxation for that year, and did then and there value the personal property of the plaintiff for taxation at fifteen thousand five hundred dollars, and did assess, value and return as assessable valuation in said county, "twenty miles of railroad and rolling stock at two hundred thousand dollars, to the commissioners without notice thereof to the company."

Section 1011 of the statute provides that the assessor shall assess and value all property required by the law to be assessed and valued, and between the first day of February and the tenth day of September in each year, shall demand of each taxpayer in his

district, a list as hereinafter provided, of his, her, or their property; and if such list be not rendered under oath, at the time such demand be made, the assessor shall proceed to list and assess the property of such taxpayer according to his best knowledge and information.

A legal assessment is the foundation of a legal tax. The assessor derives his authority from the statute, and in order to give him jurisdiction to act, or to clothe his official acts with any potency or efficacy, the provisions of the statute must be particularly followed. Says Judge Cooley: "Of the necessity of an assessment no question can be made. Taxes by valuation cannot be apportioned without it. Moreover, it is the first step in the proceedings against individual subjects of taxation, and is the foundation of all which follow it. Without an assessment they have no support, and are nullities. It is, therefore, not only indispensable, but in making it the provisions of the statute under which it is to be made must be observed with particularity. * * * As the course is unquestionably prescribed in order that it should be followed, and as without it the citizen is substantially without any protection from unequal and unjust demands, the necessity for a strict compliance with all important requirements is manifest:" Cooley on Taxation, 259–260. "If the officers were to be at liberty to disregard important provisions of the statute in this initiatory step (making the assessment), the chief protection which the law has intended for individuals in tax cases would be removed:" *Id.* 260.

Under these provisions of our statute, it is the first duty of the assessor to demand a list of the property from the taxpayer, or the person whose property is to be assessed. This is the first and important step towards assessing his property for taxation. If the list is not furnished on said demand, then, and not until then, has the assessor the right himself to make a list and value the property. The demand is a condition precedent to the right of the assessor to act in the premises. That, and the neglect or refusal of the person having taxable property, alone, gives to the assessor the right to make the list himself. If this were not so, the sovereign power of taxation becomes an arbitrary exaction, subject to the caprices of a single individual, without the knowledge and behind the back of the person most interested, and whose property is to be taken for the public uses.

Therefore it is, that our statute has wisely provided, that the person having taxable property, shall have the right to list the same for taxation. The assessor has no right or jurisdiction to make the list, until the taxpayer, or person having property subject to taxation, has neglected or refused to make it.

These provisions of the statute are applicable to the assessment of railroads or railroad property for taxation. By section 1007 of the statute, the assessor is directed to require the secretary or clerk, or whatever officer of corresponding duties there may be, to render, under oath, a list of the number of miles and value of such im-

provements as may be in each separate county through which the same may be constructed, or in which the same may be situate. The right to assess railroads, and the manner in which the assessment shall be made, depend upon this statute. The assessor, in order to make a valid assessment of railroad property, must, as in other cases, substantially follow the terms of the statute. By the allegations of the complaint, the assessor, before listing and assessing the property in question made no requisition upon the secretary or clerk of the plaintiff for a list of its property under oath or otherwise, but without notice to plaintiff, and upon his own motion and knowledge of its value, made the list and assessment upon "twenty miles of railroad and rolling-stock" at "two hundred thousand dollars." If any regard at all is to be had to the statute providing for the assessment of railroads, certainly this assessment is no assessment and wholly invalid. The object of the statute is to require the value of railroads and the number of miles in each county, to be made on the oath of some one who is supposed to know whereof he speaks, and until the officer or person designated has had an opportunity to make this list on oath, and has failed or refused so to do, the assessor has no right to list and value the property. How it would be if the railroad company should neglect or refuse to make this list under the oath of the proper person, it is not necessary to decide, as no such question arises. By the allegations of the complaint, there was an officer of the plaintiff in the territory whose duties correspond to those of the clerk or secretary, mentioned in the statute, and who would have made the required list on application.

There is another question arising upon this assessment. By virtue of sections 1013 and 1015 of the statute, the list and return of the assessor shall contain a separate and distinct description and valuation of the real and personal property. These two sections, taken together, require the separate listing and separate valuation of the personal and real property and forbid that the real and personal property be lumped together and assessed in a mass. The reasons for these provisions of the statute are obvious. Unless the real and personal property are separately and distinctly described and valued, it would be impossible for the board of equalization to properly equalize the taxes.

If rolling-stock is to be taken as personal property, then in the assessment of "twenty miles of railroad and rolling-stock," there was an unwarranted lumping together and valuation of real and personal property. It is the right of the taxpayer that his personal and real property be separately listed and valued, and he has the right to be heard before the proper tribunal as to the correctness or propriety of such list and valuation. His right so to be heard and to notice of the proceedings, is a constitutional right: Cooley Tax. 266. And his right to list his property for taxation or notice thereof, is of the same nature. The assessment and levy of taxes is the exercise of sovereign power. It is taking private property

for public uses—a necessary power in every well regulated government, but its exercise must be limited and controlled by law, and this law must be substantially observed in order to confer jurisdiction upon the persons administering it. No person is required or can be compelled to pay taxes which have not been assessed and levied in pursuance of law.

"Defects in the conditions to a statutory authority cannot be aided by the courts; if they have not been observed, the courts cannot dispense with them, and thus bring into existence a power which the statute only permits when the conditions have been fully complied with. A statutory power must be executed according to the statutory directions, and presumptively, any other execution is opposed to the legislative will:" Cooley on Taxation, p. 324.

(4.) Was it in the constitutional power of congress so to exempt said property from taxation?

This question must be considered in view of some further provisions of the act incorporating plaintiff. The United States retains a certain interest in the road while it is being constructed, and after it is completed. Section 11 of the act incorporating the company provides as follows: "That said Northern Pacific railroad, or any part thereof, shall be a post route and a military road, subject to the use of the United States, for postal, military, naval, and all other government service, and also subject to such regulations as congress may impose restricting the charges for such government transportation."

The government therefore retains the right to use the road for any and all government purposes, and the power is left in the government to have such use upon such terms as it may dictate.

The Northern Pacific railroad when completed, thus became an instrumentality of the government for carrying on its important operations. It was decided in the celebrated case of McCullough v. The State of Maryland, 4 Wheat. 316, that such an instrumentality may not be taxed by the state governments, for the reason that as the power to tax implies the power to destroy, therefore if the states retained authority to tax the instrumentalities by which the national government was carried on, they had the power to destroy the national government, and to make its existence dependent upon the will of the states.

The states retain no such authority. If they did, they are supreme; whereas, the people of the United States have declared that the constitution, and the laws made in pnrsuance thereof, shall be the supreme law of the land. Since the decision in the case of McCullough v. The State of Maryland, *supra*, in 1819, and that of Osborne v. The Bank of the United States, 9 Wheat. 867, in 1824, it has been the settled doctrine of the supreme court of the United States. Says Chief Justice Chase: Van Allen v. The Assessors, 3 Wall. p. 591, that congress may constitutionally organize agencies for carrying into effect the national powers granted by the constitution; that these agencies may be organized by the voluntary association of

individuals, sanctioned by congress; that congress may give such agencies, so organized, corporate unity, permanence and efficacy; and that such agencies in their being, capital, franchises and operations, are not subject to the taxing power of the states, have ever been regarded, since those decisions, as the settled doctrine of this court. The reason for this doctrine is stated by Chief Justice Marshall, in his opinion in the case of McCullough v. The State of Maryland, *supra*, as follows: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance, in conferring on one government, a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied."

This doctrine has been limited by subsequent decisions, and the limitation is stated by Miller, J., in the case of National Bank v. Commonwealth, 9 Wall. 353, as follows: "But the doctrine has its foundation alone in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the states. * * * The principle we are discussing has its limitations; a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the federal government are only exempted from state legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they were designed to serve the government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the states. * * * It is only when the state law incapacitates these agencies from discharging their duties to the government, that it becomes unconstitutional."

Therefore, it conclusively appears that the federal government had the right to incorporate the Northern Pacific Railroad Company; to grant to it the right of way through the public lands; to make such road an instrument of the government for carrying on its legitimate and constitutional operations; and to exempt said right of way from state or other taxation; provided such taxation would destroy or incapacitate such instrumentality for the purpose for which it was created.

Whether the tax levied against the plaintiff on its right of way through the public lands would do this or not does not appear, but the government had the right and authority to so exempt such right of way from taxation, in consideration that the road when constructed should be subject to the use of the government for the purposes named in the act of incorporation. The act of incorporation is a contract, and the exemption of the right of way from taxation is founded on a valid consideration. This contract cannot be impaired either by state or national legislation.

In 1853 the legislature of the state of North Carolina chartered the Wilmington and Raleigh Railroad Company. One section of the charter contained the following provision: "*And the property of said company and the shares therein shall be exempt from any public charge or tax whatsoever.*" With this charter in force, the franchise and rolling stock of the company were assessed, under a subsequent law and pursuant to it, for taxation by the state. In deciding the case Justice Davis: 13 Wall. 226, Wilmington Railroad Co. vs. Reid says: "It has been so often decided by this court that a charter of incorporation granted by a state creates a contract between the state and the corporators, which the state cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. It is true that when a corporation claims an exemption from taxation, it must show that the power to tax has clearly been relinquished by the state, and if there be a reasonable doubt about this having been done, that doubt must be solved in favor of the state. If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it, the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests. * * * There is no difficulty whatever in the case. The general assembly of North Carolina told the Wilmington and Weldon Railroad Company, in language which no one can misunderstand, that if they would complete the work of internal improvement, for which they were incorporated, their property and the shares of their stockholders should be forever exempt from taxation. * * * It is needless to argue the point further. It is clear that the legislation in controversy did impair the obligation of the contract, which the general assembly of North Carolina made with the plaintiff in error," and for this reason the judgment of the supreme court of the state was reversed.

In the case of Neustadt v. The Illinois C. R. R. Co.: 31 Ill. 484, Justice Breese speaking for the supreme court of the state of Illinois, said: "In consideration of the understanding of the company to construct a great thoroughfare, which should involve the expenditure of millions and which was an experiment, and seven per cent. of the gross amount of its receipts, or income to be paid to the state, the company was relieved from the payment of all other than state taxes, to be assessed as provided in this section (of the charter.) The language is plain and explicit: 'The said corporation is hereby exempted from all taxation of every kind, except as herein provided for.' This being the contract between the state and the corporation, no city or town authority can impose a tax for municipal purposes, on the property of the company, which may be within their limits:" Ill. R. R. Co. v. County of McLean, 17 Ill. 291.

And so it may be said that the government of the United States told the Northern Pacific Railroad company, in language which no

one can misunderstand, that if they would construct and complete their great work of internal improvement, which was an experiment involving the expenditure of millions of money, the right of way for said railroad through the public lands in the territories, should be exempt from taxation. The exemption from taxation formed a part of the consideration for the undertaking and contract on the part of the company. This contract cannot be impaired by national legislation. Much less by an act of a territorial legislature, which owes its existence to its organic act given by congress. As well might such territorial legislature undertake to repeal the organic act which called it into being as a territory.

One of the purposes of the government in incorporating the Northern Pacific Railroad Company and granting to it certain of the public lands, and the right of way through the same, was to promote the public interest and welfare, and to secure to the government at all times the use and benefits of the road for postal, military and other purposes. Section 20 of the act of incorporation is as follows: "That the better to accomplish the object of this act, namely, to promote the public interest and welfare, by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military and other purposes. Congress may, at any time, having due regard for the rights of said Northern Pacific Railroad Company, add to, alter or repeal this act."

The purpose and object of the government in incorporating the plaintiff was to promote the public interest and welfare, by securing the construction of a railroad, extending from the Great Lakes to the Pacific Ocean, and to accomplish this purpose it had the right to contract with any company and to grant to such company rights and privileges sufficient to carry out and consummate the purpose aforesaid.

But it is contended by counsel for respondent that the provision of section two of the act incorporating plaintiff, exempting the right of way from taxation, is forbidden by article one of the fourteenth amendment to the constitution, which provides that no state shall "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

This article is a limitation on the power of the states, and was intended to secure to all the people of a state, without regard to race, color or previous condition, the benefit and protection of equal laws. It was adopted to secure to the then lately emancipated race, all the rights and protection of citizens. It forbids to the states the power to enact laws making any discrimination as to the rights of the citizens, and places all the inhabitants of the state on an absolute equality before the law. This equality is not disturbed by exempting certain property for public uses, from taxation, when the general public receive the benefits of such exemption.

Justice Field, in expounding the fourteenth amendment to the constitution, says: "Until the adoption of the fourteenth amendment, there was no restraint to be found in the constitution of the United States against the exercise of such power (arbitrary taxation) by the states. In many particulars the states were previously limited; their sovereignty was a restricted one. They could not declare war, nor make treaties of peace. They could not enter into compacts with each other. They could not pass a bill of attainder, nor an *ex post facto* law, nor a law impairing the obligation of contracts. They could not interfere with the exercise of the powers, nor obstruct the laws of the federal government. But in many other particulars the power of the states was supreme, subject to no control by the constitution of the United States. The original amendments were only limitations upon the federal government, and did not affect the states. Among the power held by the states, was the power of taxation. When not interfering with any power, or purpose or agent of the government, there was no limitation upon its exercise, except as restrained by their own constitutions. The states might impose taxes upon any property within their jurisdiction, and, as said in *The Delaware Tax Case*, (18 Wall. 231), the manner in which its value was assessed, and the rate of taxation, however arbitrary or capricious, were mere matters of legislative discretion; and it was not for the court to suggest, in any case, that a more equitable mode of assessment or rate of taxation might be adopted, than the one prescribed by the legislature of the state."

"The first section of the fourteenth amendment places a limitation upon all the powers of the state, including, among others, that of taxation. After stating that all persons born or naturalized in the United States, are subject to the jurisdiction thereof, are citizens of the United States, and of the State in which they reside, it declares that 'no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person (dropping the designation citizen) of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The amendment was adopted soon after the close of the civil war, and undoubtedly had its origin in a purpose to secure the newly made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them, it is universal in its application, extending its protective force over all men of every race and color, within the jurisdiction of the states throughout the broad domain of the republic. A constitutional provision is not to be restricted in its application because designed originally to prevent an existing wrong. Such a restricted interpretation was urged in the *Dartmouth College case*, to prevent the application of the provision prohibiting legislation by states impairing the obligations of contracts to the charter of the college, it being contended that the

charter was not such a contract as the prohibition contemplated. Chief Justice Marshall however, after observing it was more than possible that the preservation of rights of that description was not particularly in view of the framers of the constitution when that clause was introduced said: "It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go further and to say that, had this particular case been suggested, the language would have so been varied as to exclude it, or it would have been made a special exception. The case being within the words of the rule, must be within its operation likewise; unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making it an exception:" 4 Wheat. 494. All history shows that a particular grievance suffered by an individual or class, from a defective or oppressive law, or the absence of any law touching the matter, is often the occasion and cause for enactments, constitutional or legislative, general in their character, designed to cover cases not merely of the same, but of all cases of a similar nature. The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race, by special legislation directed against them, moved the framers of the amendment to place in the fundamental law of the nation, provisions not merely for the security of those citizens, but to insure to all men, at all times and at all places, due process of law and the equal protection of the laws. Oppression of the person and spoliation of property by any state were thus forbidden, and equality was secured to all men. * * * With the adoption of the amendment the power of the states to oppress any one, under any pretense, or in any form was forever ended; and henceforth all persons within their jurisdiction could claim equal protection under the laws. And by equal protection is meant equal security to any one in his private rights—in his rights to life, to liberty, to property, and to the pursuit of happiness. It implies not only that the means which the law affords for such security shall be equally accessible to him, but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances. This protection attends every one every where, whatever be his position in society, or his association with others, either for profit, improvement, or pleasure. It does not leave him because of any social or official position which he may hold, nor because he may belong to a political body, or to a religious society or be a member of a commercial, manufacturing or transportation company. It is the shield which the arm of our blessed government holds at all times over every one, man, woman and child, in all its broad domain, wherever they may go, and in whatever relation they may be placed. No state—such is the sovereign command of the whole people of the United States—no state shall touch the life, the liberty, or the property of any person, however humble

his lot or exalted his station, without due process of law; and no state, even with due process of law, shall deny to any one within its jurisdiction, the equal protection of the laws.

Unequal taxation, so far as it can be prevented, is therefore, with other unequal burdens, prohibited by the amendment. * * * The fact to which counsel allude, that certain property is often exempt from taxation by the states, does not at all militate against this view of the operation of the fourteenth amendment in forbidding the imposition of unequal burdens. Undoubtedly since the adoption of the fourteenth amendment the power of exemption is much more restricted than formerly, but that it may be extended to property used for objects of a public nature is not questioned—that is, where the property is used for the promotion of the public well being, and not for any private end. Thus, property used for public instruction, for schools, colleges and universities, which are open to all applicants on similar conditions, may properly be exempted. The public benefit is the equivalent to the state for the tax which would otherwise be exacted. If buildings used as churches for public worship, are also sometimes exempted, it must be because, apart from religious considerations, churches are regarded as institutions established to inculcate principles of sound morality, leading citizens to a more ready obedience to the laws. Whatever the exemption, it can only be sustained for the public service or benefits received. The equality of protection, which the fourteenth amendment declares that no state shall deny to any one, is not thus involved." (Pamph. opinion p. 27.)

From this able consideration of the object, scope and purpose of the fourteenth amendment by this able judge, it clearly appears that it was designed as a limitation on the power of the states; that unequal taxation by the states, so far as it can be prevented, with other unequal burdens, is prohibited; that property may be exempted by the states from taxation without evading the provisions of the amendment, when the public benefit to be derived from such exemptions is equivalent to the tax that would otherwise be exacted; and that such exemption can only be sustained where the property exempted is used for the promotion of the public well being. And so if it were true that the plaintiff had been incorporated by the territory of Montana, and the right of way through its public lands exempted from taxation, considering the purpose for which the contract of incorporation was made, and the consideration for such exemption, viz: to promote the public welfare, and to secure the use of the road at all times for public purposes, such exemption from taxation would not have come within the prohibitions of the fourteenth amendment.

But even if such exemption from taxation were prohibited to the states and territories, there is nothing in the amendment or in the constitution that limits the power of the federal government in disposing of its own property upon such terms and conditions as it thinks best. On the contrary, the constitution gives to congress the

full power to dispose of the property of the United States without limitation.

For like reasons, if the limitations of the amendment operated upon the power of congress, still this exemption from taxation would not thereby be forbidden under the provisions of the act incorporating plaintiffs, the government derives a public benefit from the road. It retains the right to use the road for certain public purposes, and makes it a great national highway for the benefit and well-being of the people. The public benefit to be derived from the road was thought by congress to be equivalent to the tax which otherwise would have been exacted. Congress had the right to judge of this matter, and to dispose of the property of the government as it thought best for the public good.

Says Judge Field: "Congress can undoubtedly exempt any agencies it may employ for services to the general government from such taxation as will, in its judgment, impede or promote their performance": *Id.* 11. The benefits to accrue to the government by reason of the construction of the Northern Pacific railroad were deemed by congress sufficient, not only to exempt the right of way from taxation, but to justify a grant of the public lands. The contract—the act incorporating the company—is founded upon a mutual consideration, and cannot be impaired. Certainly, after rights have become vested, after the contract has been performed, after the road has been constructed, upon the terms and conditions imposed in the contract of incorporation, and both parties are reaping the benefits of such contract, it is not within the competency of national, state or territorial legislation to nullify or make inoperative any of the terms of such contract. Legislation cannot disturb vested rights. It would be just as rational to hold that the land grant is within the prohibition of the fourteenth amendment, as that the exemption from taxation is inhibited thereby, for the act of incorporation grants the odd sections of land for forty miles on either side of the line of the road, to the company without any compensation whatever, other than that to be received by the government from the construction of the road, while for other public lands, it charges, and receives, a compensation for a grant of title.

It is within the constitutional power of Congress to exempt property from taxation: Ill. C. R. R. Co. *v.* The County of McLean, 17 Ill. 291; Matheny v. Golden, 5 Ohio, 361; State of Ohio v. Com. Bank of Cin., 7 Ohio, 125; State of New Jersey v. Wilson, 7 Cranch, 164; Gordon v. Appeal Tax Court, 10 How. 133; Osborn v. Humphrey, 7 Conn. 355; The State of New Jersey v. Brannin, 3 Zab. 485; P & W. R. v. Maryland, 10 How. 393; Prov. Bank v. Billings, 4 Pet. 514; State Bank of Ohio v. Knoop, 16 How. 396; Osborn *et al.* v. Bank of the United States, 9 Wheat. 738.

A State law imposing a tax upon property exempt from taxation, by virtue of a valid act of congress, is unconstitutional and void: Osborn v. Bank of U. S., *supra.*

Briefly, the situation is this: The United States owns the public lands and has the right to dispose of them at its will. In order to bring about the construction of a railroad from Lake Superior to Puget Sound, which it might use for certain public and national purposes—to strengthen the government and to facilitate its operations—to promote the happiness and prosperity of the people—to consolidate the Union, and to invigorate and strengthen the nation, it enters into a contract whereby it agrees to give certain of the public lands, and to exempt the right of way through such lands in the territories from taxation, in consideration that a road be constructed upon the terms and conditions named in the contract. The government had the right to make such a contract. It had the unlimited right to dispose of its own property. The provision exempting the right of way from taxation was no more illegal than was the grant of lands to the company. Both the exemption and the grant were for the same purpose, viz.: to aid in the construction of the road. A territorial legislature cannot defeat this solemn obligation. It cannot repeal an act of congress. It cannot take upon itself the attributes of sovereignty, and interfere with the disposal of property that does not belong to it. Our organic act, Sec. 6, forbids the territorial legislature passing any law interfering with the primary disposal of the soil.

The national government is supreme, within the limits of the constitution. When it speaks its voice is sovereign in those cases in which the people, "in order to form a more perfect union," and to found a nation, surrendered their sovereignty. Taxation is the exercise of sovereign power. Taxation for national purposes is exercised by national authority, and for state purposes and property it is exercised by state authority. Each is supreme within its proper jurisdiction. "That the power of taxation is one of vital importance; that it is retained by the states; that it is not abridged by the grant of similar power to the government of the Union; that it is to be concurrently exercised by the two governments, are truths which have never been denied. But such is the paramount character of the constitution, that its capacity to withdraw any subject from the action of even this power, is admitted. The states are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded—if it may restrain a state from the exercise of its taxing power on imports and exports—the same paramount character would seem to restrain a state from such other exercise of this power as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union. A law absolutely repugnant to another, as entirely repeals that other, as if express terms of repeal were used:" C. J. Marshall in McCulloch v. Maryland, *supra*; Weston v. Charleston, 2 Pet. 466; Osborn v. Bank of the United States, *supra*.

It follows, therefore, that the exemption of plaintiff's right of way through the public lands in the territories from taxation, was the

exercise by congress of a constitutional power, and that the levy and assessment of a tax upon "twenty miles of railroad," in Custer county, by the authority thereof, by virtue of a territorial law, was without authority, and is void; and this leads us to the next inquiry, viz.:

(5.) Has a court of equity, jurisdiction to enjoin the collection of a tax that has been assessed and levied upon property exempt from taxation, or, in other words, in what cases and under what circumstances will the collection of taxes be enjoined?

The collection of taxes is necessary to carry on the operations of government, and therefore, the right to levy and assess taxes for that purpose, is elemental and sovereign. No government can exist without this right, and writs of injunction and other obstructions to the collection of taxes are always refused by the courts, except in certain defined cases. Says Benning, J., in Eve v. State, 21 Geo. 50: "How can a government calculate with any certainty upon the revenues, if the collection of taxes was subject to be arrested in every instance in which a taxpayer or tax collector could make out a *prima facie*—a technical case for arresting such collection? Far better it is to let an individual pay the government what it demands of him, at the time of the demand, as he will be certain of getting it back with interest, after more or less delay, if it was not due."

Therefore it is the settled doctrine of the law, that in order to entitle a person to equitable relief against an illegal tax, he must, by his bill, bring his case under some acknowledged head of equity jurisdiction. There must be allegations which show his remedy at law is inadequate. It is not sufficient that he make it appear that the tax is illegal merely. He must go further, and allege special circumstances bringing his case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or cast a cloud upon the title to his real estate. Says Judge Cooley: "To entitle a party to relief in equity, against an alleged tax, he must, by his bill, bring the case under some acknowledged head of equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, can not, of themselves, furnish any ground for equitable relief. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident, or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the law can give, and these, in proper cases, may be affirmed in courts of equity": Cooley on Taxation, 536. Says Mr. Justice Field in Dows v. City of Chicago: 11 Wall. 109: "Assuming the tax to be illegal and void, we do not think any ground is presented by the bill justifying the interference of a court of equity to enjoin its collection. The illegality of the tax, and the threatened sale of the shares for its payment, con-

stitute of themselves, alone, no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction, before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied, should be interfered with as little as possible. * * * No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen, whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

Says Mr. Justice Hunt in Hamerwinkle v. Georgetown, 15 Wall. 584: "It has been the settled law of this country for a great many years that an injunction bill to restrain the collection of a tax on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud—that it creates a cloud upon the title; that there is apprehension of a multiplicity of suits, or some cause presenting a case of equity jurisdiction. This was decided as early as the days of Chancellor Kent, in Mowers v. Snedley, 6 John, ch. 28, and has been so held from that time onward."

The complaint herein alleges as the special circumstances whereby the equitable interposition of the court is invoked, that Custer county is insolvent; that if plaintiff should pay the tax and recover a judgment therefor against the county, it would be paid in county warrants, worth but eighty cents on the dollar, and therefore, that the remedy at law is inadequate; that the assessment, valuation and return of the assessor was made upon a blank form, which, when returned by the assessor, showed an assessment of $200,000, made by him on "twenty miles of railroad and rolling stock;" that the blank so certified and returned to the board of county commissioner has been lost, and the evidence whether the sum so addressed is on real or personal estate, right of way or rolling stock of plaintiff, does not appear upon the books of the county treasurer, nor since the loss of the assessment blank so filled out by the assessor, does it appear on any record or any archives of the county, and the proof thereof, which must be produced from other sources, is liable to be lost, and the plaintiff, by reason of the death of witnesses, may be unable hereafter, to prove the assessment upon its right of way, which it is now able to do; that notwithstanding the illegality of the valuation, assessment and levy of taxes thereon, the defendant has a record thereof, and threatens to proceed, and is proceeding to collect said tax, and the same stands on the books of the defendant, the treasurer of said county, and in his hands, is a lien upon the real estate of the

plaintiff in said county, and is a cloud upon plaintiff's title thereto, and unless enjoined, the defendant will levy upon and sell the personal and real property of the plaintiff, for the tax so assessed and returned.

The plaintiff abiding its complaint, after demurrer sustained, the allegations thereof are taken as true, and so it must be taken as a fact, that the assessment and the assessors return, showing the property assessed, is lost, but the valuation and levy were transferred in the aggregate, to the books of the treasurer, and a record made, showing the amount of the tax to be paid, which tax is a lien upon the plaintiff's real estate; and that this valuation and tax was assessed and levied upon plaintiff's right of way, which fact the plaintiff is now ready to make appear, but the evidence thereof may be lost. The record of the valuation and tax on the treasurer's books is therefore perfect, and the lien created thereby complete. There is nothing appearing of record to show that such valuation and assessment was made upon property not subject to taxation, or that the same was not assessed in the manner provided by law.

Our statute (Sec. 1001 Rev. Stat. 616) provides as follows: "Every tax levied under the provisions of this chapter is hereby made a lien against any and all the property assessed, and such lien shall attach at the time of such assessment, and shall not be satisfied or removed until such taxes are paid."

A lien upon real estate appearing of record, with nothing of record to show but the same may be enforced, and requiring evidence *aliunde* to defeat it, is a cloud on the title of such real estate.

The defendant, unless enjoined, will enforce this lien, sell the real estate, and deliver to the purchaser a deed for the property so sold.

Our statute further provides (Sec. 205, p. 442 Rev. Stat.): "Every conveyance, or other instrument, conveying or affecting real estate, which shall be acknowledged, or proved and certified as hereinafter prescribed, may, together with the certificate or acknowledgment of proof, be read in evidence without further proof."

This statute seems to do away with the common law doctrine, that the recitals in a tax deed are not evidence against the owner of the property, but must be proved by evidence *aliunde*, and to make the tax deed *prima facie* evidence of title. If the statute has this effect, then a party claiming under a tax deed, only need to introduce the deed in evidence to make out his case. The production of the deed would be *prima facie* proof that the property described in it was subject to taxation, and that the valuation, assessment and levy was made in pursuance of the statute. That the assessment and levy was not made according to law, or that the property was exempt from taxation, would have to be proved by the adverse party, in order to defeat the claimant's tax title. Such a deed, then, would be a cloud upon the title, and a court of equity, in a proper case, would interfere, by injunction, to prevent such a cloud being cast.

Says Sawyer, J., in Huntington v. C. P. R. R. Co. 2 Sawyer, 514: "The court will enjoin the casting of a cloud upon the title in cases wherein the cloud when cast would be removed."

In the case of Banking Co. v. Mayor of Jersey City, 2 Beas. 228, the chancellor says: "But again, the court has jurisdiction for the purpose of preventing the delivery of deeds which will be clouds upon the complainant's title. These deeds will not be void upon their face. The land is *prima facie* liable to taxation. The record is perfect. The defendants can make the necessary proof to enable them to recover the land. The defense against the validity of the deeds depends upon matters outside the record. The complainants ought not to have their title put in jeopardy by making the issue just when defendants choose."

In Van Doren v. The Mayor of New York, 9 Page, 389, Chancellor Kent said: "Where the claim of the adverse party to the land is valid upon the face of the instrument, or proceedings sought to be set aside, or where the defendant has procured and put upon record a deed obtained from the camplainant by fraud, or upon a usurious consideration, which requires the establishment of extrinsic facts to show the supposed conveyance to be inoperative and void, a court of equity may interfere and set it aside as a cloud upon the real title of the land."

If the tax deed is presumptive evidence of a good title in the purchaser, and may be introduced in evidence, without first establishing the regularity and legality of the proceedings, up to the time of the execution of the deed, then such deed creates a cloud upon the title which a court of equity may interfere to set aside; or in a case where the record is perfect and complete, showing neither the illegality of the tax or irregularity of the assessment, valuation or levy of the same, equity will interpose and enjoin the execution of the deed, where the bill, by proper averments, shows the tax or the proceedings to be void. Judge Cooley clearly states the law, referring to numerous decisions, as follows: "If the alleged tax has no semblance of legality; if, upon the face of the proceedings, it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law, is at once appraised of the illegality, the tax, it would seem, could neither constitute an incumbrance nor an apparent defect of title; and, therefore, in law, could constitute no cloud. If this be so, the jurisdiction which is exercised by courts of equity, to relieve parties by removing clouds upon their titles, could not attach in such a case. When, however, the illegality or fatal defect does not appear on the face of the record, but must be shown by evidence *aliunde*, so that the record would make out a *prima facie* right in one who should become purchaser, and the evidence to rebut this case may possibly be lost, or may be unavoidable from death of witnesses or other cause, or when a deed given on a sale of the lands for the tax, would, by statute, be presumptive evidence of a good title in the purchaser, so that the purchaser might rely upon that for a recovery of the lands

until the irregularities were shown, the courts of equity regard the case as coming within the ordinary jurisdiction, and have extended relief on the ground that a cloud on the title existed or was imminent." Taxation, 542–3.

The allegations of the complaint show that the assessment upon which the tax herein was levied, is lost, and that there is nothing of record by which it appears that said tax was assessed and levied upon plaintiff's right of way through the public lands. Therefore there is nothing of record showing that the tax is illegal and void, and by comparing the record with the law, the illegality of the tax does not appear. Such illegality, by the averments of the complaint, must be shown by evidence *aliunde*, which the plaintiff is now ready to make appear, but that the evidence thereof is liable to be lost. The books of the treasurer show the valuation and the tax. This record in his hands is complete. The illegality of the tax does not therein appear, so that the tax thereby evidenced is, by the statute of the territory, a lien upon plaintiff's real estate, and the record would make a *prima facie* right in one who should become a purchaser thereof for said tax.

The averments of the complaint that the plaintiff is now able to show that the tax was levied upon property exempt from taxation; that the assessment was not made in the manner provided by law; and that the evidence whereby this may be shown is, by the death of witnesses, liable to be lost, are sufficient to bring the case within the acknowledged jurisdiction of a court of equity. (Cooley on Taxation, 543.)

The averment that Custer county is unable to pay its debts, except in warrants worth eighty cents on the dollar, conclusively shows that plaintiff's remedy at law is inadequate. If the plaintiff should pay the tax and recover a judgment for the amount of the same against the county, such judgment would be paid in warrants drawn upon the county, which are worth but eighty cents on the dollar, thereby causing a loss to plaintiff of twenty cents on each dollar of the amount paid as taxes. A court of equity will interfere, when by reason of the insolvency of the defendant, an irreparable injury is threatened to the plaintiff.

Equity will interfere to enjoin the collection of a tax levied upon property exempt from execution: See Board of Commissioners v. Templeton, 51 Ind. 266; Commissioners v. McClintock, 36 Ind., 325; Commissioners v. Markle, 46 Ind. 96; Lafayette v. Cox, 5 Ind. 38; Koffman v. Knightly, 25 Ind. 509; Nave v. King, 27 Ind., 356, 475; Harney v. Indianapolis R. R., 32 Ind. 244; Merrill v. Plainfield, 45 N. H. 126; Webster v. Town of Harwinton, 32 Conn. 131; Tewett v. Town of Sharon, 33 Conn. 105; Pettyman v. Supervisors, 19 Ill. 406; Clark v. Same, 27 Ill. 305; Taylor v. Thompson, 42 Ill. 9; Cleyhorn v. Postlewait, 43 Ill. 428; Veiley v. Thompson, 44 Ill. 9; Allison v. Louisville R. R. Co., 9 Bush. 247; Hooper v. Ely, 46 Mo. 505; Newmeyer et al. v. M. & M. R. R. Co., 52 Mo. 81; Williams v. Pinney, 25 Ia. 436; Hanson v. Vernon, 27 Ia. 28;

Zorger v. Tp. of Rapids, 36 Ia. 175. The authority of the supreme court of the United States v. The Bank of the United States, *supra*, seems to be conclusive upon that question for this court. In that case the officers of the state of Ohio, under a law of that state, levied a tax upon a branch bank of the United States at Chillicothe. It was held that the property was exempt from taxation, and its collection enjoined.

A franchise is property. It is the office of an injunction to protect property from destruction. The right to construct a railroad through the public lands, and the exemption of its right of way from taxation in the territories, is a franchise. It is a right based upon and growing out of a contract. It is property, and valuable property. But it is such property that taxation might destroy. The right of way through this territory is about eight hundred miles in length. If this property is exempt from taxation, an annual tax thereon at the rate claimed in the complaint, might cripple, if it did not destroy the franchise. The plaintiff in the construction of its road had the right to rely upon the terms of its contract with the government. The imposition of a tax upon its right of way is an invasion of its contract, and such a violation thereof as the constitution prohibits and as equity will enjoin.

Says Chief Justice Marshall, in Osborn v. U. S. Bank, *supra*: "The appellants admit that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such cases as this. But although the precise case may never have occurred, if the same principle applies, the same remedy ought to be afforded. The interference of the court in this class of cases has been most frequent to restrain a person from violating an exclusive privilege by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the court rather strengthened than weakened. Had the privilege of the bank been exclusive, the argument admits that any other person or company might have been enjoined, according to regular course of the court of chancery, from using or exercising the same business. Why would such person or company have been enjoined? To prevent a permanent injury from being done to the party entitled to the franchise or privilege; which injury appellants say cannot be estimated in damages. It requires no argument to prove that the injury is greater, if the whole privilege be destroyed, than if it be divided; and so far as respects the estimate of damages, although precise accuracy may not be attained, yet a reasonable calculation may be made of the amount of the injury, so as to satisfy the court and jury. It will not be pretended in such a case, an action of law could not be maintained, or that the materials do not exist on which a verdict might be founded and a judgment rendered. But in this and many other cases of continuing injuries, as in the case of repeated ejectments, a court of chancery will interpose. The injury done by denying to the bank the

exercise of its franchise in the state of Ohio, is as difficult to calculate as the injury done by participating in an exclusive privilege. The single act of levying the tax, in the first instance, is the cause of an action at law; but that affords a remedy only for the single act, and is not equal to the remedy in chancery, which prevents its repetition, and protects the privilege:" See M. & B. Co. v. Jersey City, 1 Beas. 227; P. & H. R. R. Co. v. Jersey City, 1 Stock. ch. 434.

And so if the property is exempt from taxation and an action at law, would, in a single instance, afford relief against a tax unlawfully levied thereon. Yet the relief is inadequate, and is not equal to the remedy in equity, which interferes to prevent future taxes and a multiplicity of suits, and protects the franchise from invasion and destruction.

From this consideration of the case our conclusions are as follows, viz:

1. That this action being a controversy which turns upon the existence, effect and operation of an act of congress, is an action arising under such act, and a suit brought to determine such controversy is properly commenced in the district court of the territory, sitting to hear and determine causes arising under the constitution and laws of the United States; and especially in this the case when the action is brought by or against a corporation chartered by an act of congress.

2. Plaintiff's right of way through the public lands is an easement therein, and such an interest in the land that personal articles attached to the soil and annexed to the easement within the boundaries of the right of way become a part of the land, and therefore partake of and are included in the exemption from taxation that belongs to the right of way, and hence that a tax levied upon "twenty miles of railroad" constructed upon, over or through plaintiff's right of way, in the territories of the United States, is a tax levied upon property that is exempt from taxation, and therefore void.

3. That the act of Congress incorporating plaintiff is a contract between the government and the incorporators and their successors, and that it is not within the constitutional power of Congress or of a territorial legislature to impair the obligations of this contract, which would be done by the imposition of a tax upon plaintiff's right of way by the authority of Congress or the territorial legislature.

4. That the fourteenth amendment to the constitution of the United States is a limitation upon the sovereignty of the states, and was adopted by the people of the United States to secure to the inhabitants of each state equal laws and equal protection of the laws without regard to race, color, or previous condition.

5. That this limitation applies to the subject of taxation, and forbids the states or territories from exempting property from taxation, except in those cases wherein the property is devoted to public uses in which all the people are equally benefitted.

6. That it is within the constitutional power of Congress to exempt the property of the United States from taxation. The government may dispose of its own property upon such terms and conditions as it deems proper, and Congress is the sole judge as to how this property shall be disposed of.

7. It was competent for Congress to charter the Northern Pacific Railroad Company; to grant to it public lands, and exempt its right of way through such lands from taxation.

8. There is a consideration for the contract contained in the charter incorporating the Northern Pacific Railroad Company, which consideration is found in the public benefits to be derived to the whole people of the United States by reason of the construction of such road.

9. When rights have become vested under a valid contract, legislative authority cannot invalidate such contract or disturb such rights.

10. The fourteenth amendment to the constitution is not a limitation upon the power of Congress in the disposal of the property of the United States.

11. In order that a county assessor may have jurisdiction to assess property for taxation, he must follow the statute.

12. An assessment made in a manner not authorized by statute, and not in substantial compliance with its provisions, is void and equivalent to no assessment at all.

13. An assessment that values real and personal property in a mass, is void.

14. An assessment should show a proper description of the property, and the real estate and personal property should be separately and distinctly assessed and valued.

15. An assessment that is in such a condition that it cannot be equalized by the board of commissioners, sitting as a board of equalization, is void.

16. In assessing railroads for taxation, the assessor must follow the provisions of the statute.

17. A tax will not be restrained upon the grounds that it is irregular or erroneous.

18. To entitle a party to relief in equity against an illegal tax, he must bring his case under some acknowledged head of equity jurisdiction.

19. Courts of equity will enjoin the casting of a cloud upon a title, in cases wherein the cloud itself, when cast, would be removed.

20. If the record showing the valuation and levy of a tax is complete on its face, such record creates a lien upon the real estate against which the tax is assessed, and is a cloud upon the title of the owner.

21. If a tax deed is made *prima facie* evidence of the purchaser's title, and may be introduced in evidence, without showing the regularity of the proceedings up to the delivery of the deed, such

deed is a cloud upon the title of the owner, and equity would interfere, when by the averments of the bill it appears that the property is exempt from taxation, or that the assessment was void

22. If the illegality of the tax appears upon the face of the proceeding, no cloud is cast upon the title.

23. Equity will enjoin the collection of a tax levied upon property that is exempt from taxation, to prevent a multiplicity of suits, and to afford a complete remedy.

24. Equity will interpose to prevent the destruction of a franchise.

25. A franchise is property, and in the case of a continuing injury to the same, courts of equity will prevent a repetition of the injury and protect the franchise.

26. Any encroachment upon the quiet enjoyment of an easement, whether created by grant or prescription, will be prevented by injunction.

27, Equity will interfere to protect rights when it sufficiently appears that the evidence by which such rights can be established, is liable to be lost.

The demurrer to the complaint ought to have been overruled, and the judgment is therefore reversed with costs, and the cause remanded for a new trial.

SUPREME COURT OF UTAH.

BENITES v. BICKNELL ET AL.

Filed February 25, 1884.

ACCOUNT STATED, WHAT CONSTITUTES. In an action on an account stated against the three defendants as partners, in which the defendant H. alone appeared and answered, it appeared on the trial, after evidence showing that the defendants B. and M. originally composed the firm, under the name of B. and M., and that the defendant H. subsequently became a partner, and the firm name was, therefore, changed to B., M. & Co.; that the plaintiff sent by mail, from Stockton, his place of residence, a copy of an account, inclosed in an envelope and properly directed to the defendant H. at Frisco, his residence and post-office address. This account was headed "B. & M. in acct. with L. Benites," and contained a large number of items running through several years, only one of which was charged to the firm of B., M & Co., and showed a balance of $1,663.70 due to the plaintiff. No letter or other writing accompanied it explaining it, or why it was sent to the defendant H., nor demanding payment. There was no evidence whatever showing the distance between Stockton and Frisco nor the time required for transportation of the mail between those places, nor the number or frequency of mail communication between them, nor the length of time which had elapsed after the mailing of said account to the defendant H. before the commencement of this action; nor did it appear when this action was commenced. There was evidence that the defendant H. received the account. *Held*, that no account stated between the parties was shown, and a ruling on the trial refusing to admit a copy of such account in evidence against the defendants was not error.

THE SAME—EFFECT OF AN ACCOUNT STATED. When the parties to an account have examined it, and have expressly agreed upon a certain sum of money as the balance justly due thereon from one party to the other, then such account has become an account stated, and an action upon it is not founded upon the original items, but upon the balance ascertained by the mutual accounting of the parties.

THE SAME—ACCOUNT STATED BY IMPLICATION. An account stated may be implied from circumstances. If an account be presented for payment by one party thereto, and the other party, upon an examination of it, and after a reasonable time has elapsed, makes no objection to it, it may be legitimately presumed that he was satisfied with it as presented, and the

presumption is so strong that a suit can be maintained upon the account as an account stated without proof other than that the account was presented, with a demand for payment, and that reasonable time and opportunity have passed since its presentation, for a proper examination of it, and to make objections to it, if there be any. Such presentation may be by mail.

THE SAME—BURDEN OF PROOF. The effect of an account stated being to establish *prima facie* the accuracy of the balance found due, the burden of proving that an account is stated or settled, rests upon the party making such allegations.

APPEAL from the district court from a judgment of non-suit in an action on an account stated. The opinion contains the facts.

E. D. Hoge, T. Burmester and *Arthur Brown*, for appellant.

Marshall & Royle, for respondents.

TWISS, J. The complaint alleges that the defendants, between the thirty-first day of June, 1875, and the thirty-first day of August, 1876, were partners, doing business under the firm name of Bicknell, Morrison & Company.

"That on the thirty-first day of August, 1876, the said defendants, as partners, were indebted to plaintiff on a balance of account for goods, wares and merchandise before that time sold and delivered, in the sum of sixteen hundred and sixty-three and 70-100 dollars."

"That being so indebted as aforesaid, there was an account stated by and between plaintiff and defendants on the thirteenth day of August, A. D., 1878, and upon such statement a balance of sixteen hundred and sixty-three and 70-100 dollars was found to be due plaintiff from defendants; and that the defendants agreed to pay the plaintiff the said balance; and that no part of the same has been paid;" and prays judgment for $1,663.70.

The separate answer of defendant Hampton is an admission of the partnership of the defendants as alleged in the complaint; but is a denial of all the other material allegations of the complaint. The other defendants made no answer.

There was evidence from which the jury might well find that Bicknell and Morrison were partners from about the first day of January to the first day of July in 1875, in the business of burning lime and charcoal; that on or about the last named day they caused an inventory of their partnership assets and a statement of their partnership debts to be made, and sold to Hampton one-half of their partnership property, in consideration of which he agreed to become responsible for and did make himself responsible for and assumed the payment of one-half of the partnership debts of Bicknell and Morrison existing at that time, and that the plaintiff was a large creditor; that from the first day of July, 1875, to the thirty-first day of August, 1876, the defendants were partners, Bicknell and Morrison each owning one-quarter part interest and Hampton an interest of one-half in the partnership assets or property.

That on the thirteenth day of August, 1878, Hampton lived at Frisco, Beaver county, in the territory of Utah, which was his post-office address; that the plaintiff, Benites, lived at Stockton, in this territory, and on the last-named day caused the account which he

claims in his complaint to be an *account stated* by and between the plaintiff and the defendants, the balance of which he alleges the defendants promised to pay to him, as the balance due on such account stated, to be put into an envelope properly directed to the defendant Hampton at Frisco, Utah Territory, the expenses, fees and postage thereof and thereon to be prepaid and deposited the same in the post-office at Stockton, in this territory. That Hampton admitted the receipt thereof and said he neglected to write to the plaintiff about it, or to take any notice of it. But the record fails to show any testimony as to the distance between Frisco and Stockton, or how long time was necessary or usually taken to convey the mail from Stockton to Frisco, or how frequently it was conveyed between those two places. That defendant Hampton after this action was commenced, and service upon him was made, acknowledged to the plaintiff that he had received the account and said that he neglected to write to plaintiff about it or to take any notice of it; he also said that he ought to have had credit for a certain note by him mentioned and described.

But the record before us nowhere shows when the suit was commenced or service upon either of the defendants was made.

The account enclosed in the envelope and sent to Hampton commences as follows:

"1871. Bicknell & Morrison,
In acct. with L. Benites.
1875. April 25, To 20¼ lbs. nails 2.00
30 5 lbs 50
2.50"

And from and after the date of this item there were more or less items of account on almost every day until June 30, 1875, when this item appears in the account:

"To balance due on settlement charged to Bicknell, Morrison & Hampton.....350.29"

The account has then almost daily items, on one side or the other, the last item being:

"1876. Feb. 18th, A credit of 210 lbs. of barley.....$4.72"

At the bottom or end of the account is:

August 13th, To balance due L. Benites.....1663.70

This account was offered in evidence by the plaintiff; it was objected to by the defendants and the court sustained the objection.

Upon motion of the defendant Hampton, the court directed a non-suit. The plaintiff excepted and appealed to this court.

The paramount questions in this case are: Did the district court err in refusing to permit the account to go to the jury and in sustain-the motion for a non-suit.

By our statute a judgment of non-suit may be entered by the court upon motion of the defendant, when upon trial the plaintiff fails to prove a sufficient case for the jury.

When the parties to an account have examined it and have expressly agreed upon a certain sum of money as the balance justly

due from one party thereof to the other, then such account has become an account stated, and an action upon it is not founded upon the original items, but upon the balance ascertained by the mutual accounting of the parties. "Upon an *insimul computassent* the plaintiff is not obliged to give evidence of the articles. It is sufficient if he prove the account stated." Union Bank v. Knupp. 3 Pick. 96.

The effect of an account stated is to establish *prima facie* the accuracy of the balance found due without other proof. The burden of proving that an account is stated or settled is upon the party making such allegations; but it is not always necessary in proving an account stated to show an actual examination of the items of account or demands of the respective parties thereto, or that there has been an express assent or agreement on the part of the party sought to be held liable upon an alleged account stated, that it is correct. This may be implied from circumstances. If an account be presented for payment by one party thereto, and the other party, upon an examination of it and after a reasonable time has elapsed, makes no objection to it, it may be legitimately presumed that he was satisfied with it as presented, and this presumption is so strong that a suit can be maintained upon the account as an *account stated* without proof other than that the account was presented with a demand for payment; that reasonable time and opportunity have passed since its presentation, for a proper examination of it and to make objections to it if there be any: Lockwood v. Thorne, 11 N. Y. 170. The same rule applies where a party to an account sends it for payment to the other by mail if the party to whom it is sent does not, after a reasonable time has passed, express any objection to it, his silence unexplained is an implied admission that he has none, that the account is correct and truly though not conclusively stated: Terry v. Sickles, 13 Cal. 427.

But it is not an estoppel; its effect is to establish *prima facie* the accuracy of balance due as stated in the account without further proof: Lockwood v. Thorne, 18 N. Y. 205.

But in cases where there is no claim that the alleged *account stated* is the result of an express assent or agreement of its correctness by the person sought to be charged thereby, such person must in *terms* be a party to the account, or the grounds upon which it is sought to hold him as a debtor should be clearly made known to him, and a demand for payment should be made. If anything less than this will operate as an admission of the correctness of an account which does not contain as a party thereto the name of the person to whom it may be sent or otherwise delivered, and such admission as a *prima facie* liability for its payment, the law by these means is prostituted to purposes not contemplated by its father, who glorified in it as "the perfection of human reasoning."

In this case the account, "Bicknell & Morrison in acct. with L. Benites," containing about two hundred and fifty items, was placed in an envelope and sent by mail to Hampton without any accom-

panying letter or statement expressing why or for what purpose it was sent to him, and without any demand or request for its payment. The firm name of Bicknell, Morrison & Company nowhere appears in the account, the name "Hampton" once and in an item as follows: "To balance due on settlement charged to Bicknell, Morrison & Hampton, $350.99."

There is nothing in this record showing or attempting to show what the subject matter involved in the settlement was, who it was with or the parties to the account, or why this balance should be charged to Bicknell, Morrison & Hampton, or why this balance should be charged to the defendant company of Bicknell, Morrison & Company. Nor does the record show any claim or attempt to prove that Bicknell, Morrison and Hampton were or that they constituted the defendant firm of Bicknell, Morrison *& Company*, or that defendant Hampton knew that the plaintiff intended to hold him on this account as partner of Bicknell & Morrison or otherwise, or that this account was sent to him by the plaintiff, or that the plaintiff at that time did, or had at any time claimed that Hampton was indebted to him as partner or otherwise, by reason of any of any of the transactions represented by this account.

Neither does the record contain anything tending to show how long time this account was on the way between Stockton and Frisco, or how frequently the mails were transferred from one of these places to the other; and of these matters we can take no judicial notice. The record also fails to inform us when this suit was commenced. For aught that appears it may have been commenced on the day, day after, or day before Hampton received the account. Whether a reasonable time after Hampton had received the account had elapsed or not we cannot tell; but it is certain that the record does not show that it had. Judge Story in his equity jurisprudence, sec. 520, says: "Between merchants at home an account which has been presented and no objection made thereto after the lapse of several posts, is treated under ordinary circumstances as being by acquiescence a stated account."

There is no evidence that even one mail had been conveyed from Frisco to Stockton after the receipt of the account by Hampton, and before the action was commenced; and, therefore, the record fails to show the existence of the posts and circumstances which must exist before the implication of law arises that the account is correct and agreed to as correct by Hampton. The plaintiff having failed to prove the existence of the material parts necessary to the existence of an *account stated* at the time of the commencement of this action, there was no error on the part of the court in refusing to permit it as such to go to the jury.

And it may further be said, that upon trial in the court below the judge undoubtedly had the papers of the case before him, and from them might and probably did know the date of the commencement of the action; it is but just and fair to presume that he did, we cannot say he did not; and error is not to be presumed. It must

be affirmatively shown. The date of the commencement of the action, the length of time between the receipt of the account by Hampton and the commencement of the suit, and the number of the mails between Frisco and Stockton during this time, may all have been in evidence before the court, and the ruling of the court correct on the facts, or they may not have been in evidence; if they were not, there was a lack of evidence of facts which must have existed, or the account did not become an account stated. In the absence of any testimony on the subject we cannot assume there was error in the rulings of the court, either in refusing to allow the account to be read to the jury or in sustaining the motion for a nonsuit: Weggins v. Burkham, 10 Wall. 129.

The judgment of the district court is affirmed.

HUNTER, C. J., concurred.

EMERSON, J., dissented.

SUPREME COURT OF CALIFORNIA.

No. 10870.

PEOPLE, etc., *v.* RILEY.

In Bank. Filed March 17, 1884.

SETTING ASIDE INFORMATION—FAILURE TO FILE REPORTER'S NOTES. An information filed by the district attorney, after a prisoner has been examined and held to answer by a committing magistrate, will not be set aside for the failure of the shorthand reporter to transcribe and file his shorthand notes.

THE DECISION OF THE TRIAL COURT IN OVERRULING A DEFENDANT'S challenge to a juror for actual bias is not reviewable on appeal.

THE MODE OF SELECTING A JURY IN CRIMINAL CASES, as stated in prior opinions of the court, affirmed.

ONLY TEN PEREMPTORY CHALLENGES ARE ALLOWED A DEFENDANT on a trial for robbery.

INSTRUCTIONS IN REGARD TO ROBBERY. When a defendant is on trial and is convicted of the crime of robbery, erroneous instructions relating to the crime of grand larceny will not warrant a reversal, when the instructions in regard to the crime of robbery are correct.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered upon a verdict convicting the defendant of the crime of robbery, and from an order denying him a new trial. The opinion states the facts.

L. I. Mowry, for the appellant.

Attorney-General, for the respondent.

MORRISON, C. J. The defendant was informed against in the superior court of the city and county of San Francisco, and on the trial was found guilty of the crime of robbery. On his appeal several errors were assigned, which we will briefly consider in their proper order.

First—It was claimed on motion to set aside the information, that the trial court had no jurisdiction, and this pretension is based on the ground that there were no such preliminary proceedings in the case as to warrant a prosecution by information. We think the point is not well taken. It appears that a preliminary examination was had before a committing magistrate, and that at such examina-

tion the evidence was all taken down by a shorthand reporter, in pursuance of an order of the court, but that the shorthand notes were not transcribed and filed with the court or the clerk thereof. In our opinion such transcription was not necessary to the jurisdiction of the court. The substance of the requirements of the constitution and statute was complied with. An examination was had and an order committing the defendant was made. The defendant could have had a transcription of the shorthand notes if he had desired it, but he was not prejudiced in any *substantial right* by the failure of the shorthand reporter to write out the notes; and such transcription was not essential to the jurisdiction of the court: Const. art. I, sec. 8. The district attorney was not obliged to wait until the shorthand notes were written out and filed before proceeding by information: Pen. C. sec. 809, sub. 5; sec. 809.

Second—The next alleged error relates to the action of the court in overruling defendant's objection to the juror Eastland, who was challenged for actual bias. Such a decision is not the subject of review on appeal, as has been frequently held by this court: People v. Costa, 49 Cal. 161; People v. Vasquez, 49 Cal. 560; People v. Taing, 53 Id. 602.

Third—The next objection raises a point frequently decided by this court, and fully settled, so far as judicial decisions can settle any question. The mode of selecting a jury in a criminal case was clearly stated in the case of People v. Scroggins, 37 Cal. 676, and has been followed in People v. Russell, 46 Id. 121, and also in People v. Jams, 57 Id. 125. We are satisfied with the principle enunciated in the foregoing cases.

Fourth—As to the number of peremptory challenges to which the defendant was entitled. He claimed that he had a right to twenty, but the court restricted him to ten. This was in accordance with the ruling of this court in People v. Clough, 59 Cal. 438, and to the ruling in that case we adhere.

Fifth—The last error relied upon which we will notice, challenges the correctness of certain portions of the judge's charge to the jury. It may be conceded, for the purposes of the argument, that there *was* error in the charge, so far as the same related to the crime of grand larceny, but the defendant was convicted of the crime of robbery, and what the court said about that crime is properly before this court.

The crime of robbery was defined by the court in the very language of the statute; and the objection to the charge is rather hypercritical than substantial.

There is no such inconsistency in the charge as would justify this court in interfering with the judgment below. On the question of reasonable doubt the charge was strictly correct, and, in conclusion, we find no substantial error in the case.

Judgment and order affirmed.

MYRICK, J., THORNTON, J., SHARPSTEIN, J., MCKINSTRY, J., and ROSS, J., concurred.

No. 9310.

PEOPLE EX REL. DOUGHERTY v. BOARD OF ELECTION COMMISSIONERS, ETC.

In Bank. Filed March 17, 1884.

BOARD OF SUPERVISORS OF SAN FRANCISCO—FORMATION OF. The consolidation act of the city and county of San Francisco regulates and determines the formation of the board of supervisors of such city and county until changed or superseded by proceedings under article XI of the constitution of 1879.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants. The opinion states the facts.

John Coffey for the appellant.
William Craig for the respondent.

MYRICK, J. The petitioner at a general election held in the city and county of San Francisco, November 7, 1882, received votes for supervisor, first board, and he claims that under the clause of section 7, article XI of the constitution of 1879, which reads as follows: "In consolidated city and county governments of more than one hundred thousand population, there shall be two boards of supervisors or houses of legislation," etc., he was elected a member of the first board of supervisors, and is entitled to a certificate of election; that the clause above quoted is self-executing, and requires no legislation. The court below held that the office for which the votes were cast does not exist in said city and county. This court had occasion to consider this question in Desmond v. Dunn, 55 Cal. and its views thereon will be found on pages 249–9. The consolidation act of the city and county of San Francisco will (so far as the present question is concerned) remain in force until changed or superseded by proceedings under article XI of the constitution.

Judgment affirmed.

THORNTON, J., SHARPSTEIN, J., ROSS, J., MCKINSTRY, J., and MORRISON, C. J., concurred.

No. 9176.

BODE ET AL v. HOLTZ, Assessor, etc.

In Bank. Filed March 17, 1884.

ASSESSMENT OF PROPERTY IN THE POSSESSION OF A WAREHOUSEMAN. Where a warehouseman has in his possession property liable to taxation, and on demand refuses to furnish the assessor with the names of the owners, or a description of such property, as required by section 3629 of the Political Code, it is the duty of the assessor to note such refusal on the assessment-book, and to make an estimate of the value of the property.

Appellants, Bode & Searle, are warehousemen in the city of San Francisco. As such warehousemen they had on storage on March 5, 1883, large quantities of goods, the property of various merchants of San Francisco, many of the goods being in unbroken packages, and consigned from foreign countries.

Appellants rendered the statement of their property as required by law, to the respondent, the assessor of said city and county—but such statements did not disclose the quantities or owners of the goods on storage in their warehouses—and when asked by said assessor, "What property have you on storage in your warehouses, or either of them, belonging to persons other than yourselves, and what are the names of such persons, and describe the property belonging to such persons?" appellants refused to answer the question, and the respondent thereupon threatened to arbitrarily assess such goods to plaintiffs. Appellants thereupon brought this action for an injunction, and the court below having sustained respondent's demurrer to the complaint, this appeal is now had from the order sustaining the demurrer and the judgment of the court below entered thereon.

J. H. Dickenson, for the appellants.

William Craig, for the respondent.

By the COURT. The complaint shows upon its face that the plaintiffs at twelve o'clock M. on the first Monday in March, 1883, had in their possession *some* personal property belonging to citizens of the city and county of San Francisco which was subject to taxation, and that after demand made upon them by the assessor of that city and county, they refused to disclose the names of the owners or the description of the property. The law made it the duty of the plaintiffs to furnish the assessor with a statement of the property in their possession: Political Code, sec. 3629. Failing in that regard, the assessor was authorized and required by section 3633 of the same code to note such refusal on the assessment-book and to make an estimate of the value of the property.

Judgment affirmed.

No. 7824.

HAWES v. GREEN.

Department Two. Filed March 17, 1884.

JUDGMENT REVERSED FOR FAILURE TO FIND ON A MATERIAL ISSUE.

APPEAL from a judgment of the superior court for San Mateo county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

J. C. Bates, for the appellant.

Winans, Belknap & Godoy, for the respondent.

The COURT. The defendant sheriff, in his answer justified the taking of the property in controversy, by virtue of attachment issued against the property of plaintiff's vendor. There is no finding on the issue raised by the answer as to the averments in justification; the findings are silent upon this subject.

Judgment and order reversed.

No. 8995.

KINSEY, County Clerk, etc. v. KELLOGG, Auditor, etc.

In Bank. Filed March 21, 1884.

COUNTY CLERK OF HUMBOLDT COUNTY, SALARY OF.—On February 28, 1876, the offices of county clerk, auditor and recorder of Humboldt county were united in the same person. On that date the legislature passed an act fixing the annual salary of the person filling such offices at five thousand dollars. Subsequently Humboldt county was organized as a county of the second class, and the offices of auditor and recorder were separated from that of county clerk. The annual salary of the county clerk was thereupon fixed by the board of supervisors at two thousand seven hundred dollars. *Held* that the act of February 28, 1876, was intended to regulate the salary of such officers only while they were united in the same person. That when the organization of the county government was changed, and the offices were separated, no one of the three officers was entitled to receive the salary intended for the three; and as the act did not provide for the separation of the three offices, it became inoperative when such separation occured.

THE SAME.—As there was no operative law fixing the compensation of the county clerk after Humboldt county became organized as a county of the second class, the board of supervisors had authority to fix the compensation of that officer.

APPEAL from a judgment of the superior court for Humboldt county entered in favor of the defendant. The opinion states the facts.

S. M. Buck for the appellant.

J. J. De Haven for the respondent.

MCKINSTRY, J. February 28, 1876, the following legislative act was approved by the governor:

"SECTION 1. The county clerk of Humboldt shall receive for all services required of him as county clerk and *ex officio* clerk of the district court, probate court, board of supervisors, board of equalization, auditor and *ex officio* county recorder, a salary of five thousand dollars per annum, which salary shall be in full for all services required of and performed by him, and it shall be paid monthly out of the county treasury. He shall collect and safely keep all fees of whatever kind or nature allowed him by law for services rendered by him in his *several official capacities*, and upon the first Monday of each and every month, shall pay the same over to the county treasurer of said county, and at the same time shall make out and file with said treasurer a full and accurate statement under oath, of all fees, of whatever kind or capacities, for the preceding month.

SEC. 2. This act shall take effect and be in force from and after the first Monday in March, eighteen hundred and seventy eight. And all acts and parts of acts, so far as they conflict with the provisions of this act, are hereby repealed:" Stat. 1875–6, p. 81.

By the census taken in the year 1880, Humboldt was found to contain a population exceeding eight thousand and less than twenty thousand inhabitants. The county was organized as a county of the second class, and since July 1, 1881, has had at all times a board of supervisors consisting of five members, and other officers prescribed for counties of the second class: Pol. Code, 4006, 4007, 4025.

The board of supervisors did not, at any time prior to the election of plaintiff as county clerk, as hereinafter mentioned, unite or consolidate the office of county clerk with those of recorder or auditor, or either of them. The board of supervisors, by an ordinance duly adopted on the eighth day of July, 1882, united and consolidated the offices of recorder and auditor, and caused such ordinance to be duly recorded and published for three months before the general election held November 7, 1882: Pol. Code, 4106.

At such general election plaintiff was elected county clerk and defendant recorder and *ex officio* auditor of Humboldt county. Plaintiff entered upon the discharge of the duties of county clerk on the first Monday of January, 1883, and defendant commenced to act as recorder and auditor on the eighth day of January, 1883, and has ever since discharged the duties of said offices.

On the eighth day of February, 1883, the board of supervisors of Humboldt fixed and determined the annual salary of the clerk at two thousand seven hundred dollars.

After plaintiff had served one month as county clerk, and on the eighth of February, 1883, he applied to defendant for a warrant on the treasury of the county in the sum of four hundred and sixteen dollars and sixty-six cents, as the amount of his salary for the preceding month. Defendant refused to draw the warrant for the amount demanded, or, as alleged in the complaint, "for any amount whatever." There is, however, no averment in the complaint that plaintiff *demanded* a warrant for a less sum than four hundred and sixteen dollars and sixty-six cents ($416.66), and in his answer defendant offers to draw a warrant for plaintiff's salary at the rate of two thousand seven hundred dollars per annum.

The court below denied the writ of mandate and dismissed plaintiff's application therefor.

The cause was argued here by counsel for both parties on the *assumption* that the matters set forth in the answer as facts are true.

On the eighteenth day of March, 1876, the act following was approved:

"SECTION 1. Humboldt county is hereby constituted a county of the second class, within the meaning of and for the purposes designated by section four thousand and twenty-two of the Political Code.

"SEC. 2. The Board of Supervisors of Humboldt county must redistrict said county into five supervisor districts, as nearly equal in population as may be. At the first election hereafter at which any supervisor is by law to be elected, supervisors must be elected for each new district to be created by virtue hereof: Stats. 1875–6, p. 333."

It is contended on the part of plaintiff that the statute of February 28, 1876, on which he relies, provides for a salary to be paid the *county clerk* "in full for all services required of and to be performed by *him*," and that the specification of duties which precedes this provision can not take from the language quoted any of

its force or meaning . It is also urged that because some duty formerly performed by the clerk has, without the consent of that officer, been imposed by an inferior board upon another person, it does not follow that such board can deprive the clerk of any portion of his salary. That the law only authorized the supervisors to fix the compensation of a county officer, not fixed by the Political Code, or by general or special law: Pol. Code, 4046.

On the part of defendant (respondent here) it is contended:

1st. The offices of clerk, recorder and auditor are distinct offices, though held by the same person, by virtue of an election to one: People v. Dennick, 20 Cal. 94.

2d. At the date of the passage of the act of 1876, the same person was required to fill all the offices named in the county of Humboldt, and, in view of the existing state of facts—taken in connection with the language of the act itself—the intention of the legislature is manifest to fix the compensation of five thousand dollars, not for the discharge of the duties of clerk alone, but for the discharge of the duties of recorder and auditor as well.

3d. The clerk having ceased to be recorder and auditor, the law which fixed a compensation for all his services as clerk, recorder and auditor, must be held to have ceased to have a practical operation. A law must be applied according to its manifest intent, and a thing, even within the *letter*, is without the statute, if without the *intention*.

We think the positions of defendant well taken. In 1810 the congress of the United States passed an act fixing the salary of Consul at Algiers at four thousand dollars a year. Algiers became a province of France, and most of the powers and duties of the Consul at Algiers, as prescribed by the act which authorized his salary, ceased. In Mahoney v. United States, the Supreme Court of the United States said: "When the act was passed Algiers was a part of one of the Barbary states of that name, and it is evident from an examination of its provisions, that the act was intended to apply to a consulate at that place, only so long as it belonged to one of the Barbary powers": 10 Wall. 65.

Here, when the act of 1876 was passed, there was a person who was discharging the duties of clerk, recorder and auditor, and, unless subsequent legislation should require otherwise, one person would continue to fill the three separate offices. It was to this condition of things that the law was made applicable, and the compensation provided by it was provided as compensation to the clerk, the recorder, and the auditor. The law did not determine how much should be paid to each of the three officers—a matter of no consequence so long as the three officers were in one man. But when the organization of the county government was changed, and the person who was clerk was not auditor nor recorder, it is clear that no one of the three officers was entitled to receive the compensation intended for the three; and as the act of 1876 did not provide for the event, the act, by force of its own expressions, became inoperative when the event occurred.

As there was no operative law fixing the compensation of the county clerk after Humboldt became organized as a county of the second class, the board of supervisors had authority to fix the compensation of that officer: Pol. Code 4046, sub. 18.

Judgment affirmed.

ROSS, J., SHARPSTEIN, J., THORNTON, J., MYRICK, J., MORRISON, C. J., McKINSTRY, J., Concurred.

No. 8701.

KIMBALL v. STORMER.

In Bank. Filed March 21, 1884.

FINDING AS TO ADVERSE POSSESSION—EJECTMENT—In an action of ejectment, where the plaintiff alleges title in himself, and the defendant relies upon a title obtained by adverse possession, a finding that the defendant has such title, if sustained by the evidence, is sufficient, without finding upon the question whether the plaintiff had or had not title originally.

FAILURE TO FIND UPON A MATERIAL ISSUE IS GROUND FOR REVERSAL—IN THE ABSENCE OF FINDINGS THE APPELLATE COURT WILL PRESUME that the same were waived, unless the contrary appears by a bill of exceptions. This presumption cannot arise where the lower court filed a writing designated as its "decision," and intended to be a finding upon a material issue.

TITLE BY ADVERSE POSSESSION CAN NOT BE ACQUIRED by occassionally cutting up dead timber, felling trees and removing wood from the land.

ADVERSE POSSESSION—COLOR OF TITLE—POSSESSION—A defendant who claims under color of title a larger tract, which includes the land to which the plaintiff has shown title in fee, cannot establish an adverse possession as to the plaintiff's land, which has remained vacant and unoccupied, by proving an actual possession of a portion of the larger tract, when such possession does not extend to any of the land claimed by the plaintiff. Especially is this the case when it appears that the defendant had not asserted an absolute and unqualified right to such plaintiff's land for the time required by the statute of limitations.

APPEAL from a judgment of the superior court for Colusa county entered in favor of the defendant, and from an order deny the plaintiff a new trial. The opinion states the facts.

Goad and Belcher, for the appellant.

A. L. Hart, for the respondent.

McKINSTRY, J. The appeal is by plaintiff from a judgment and order denying a new trial in an action of "ejectment."

The complaint is in the usual form; the answer denies the averments of the complaint, and avers that the cause of action is barred by sections 318 and 319 of the code of civil procedure.

A jury having been waived the action was tried by the court. Within thirty days after the cause was submitted for decision the court filed with the clerk a paper writing in words following:

DECISION.

Superior Court, County of Colusa.

Thos. E. Kimball,

v.

E. I. Stormer.

Under the testimony introduced I am of the opinion that, at the

time this action was brought, the defendant had acquired a title to the premises in controversy by virtue of the provisions of the statute of limitations. Judgment is therefore ordered for the defendant."

(Signed by the judge.)

Thereupon judgment was entered; (Title of court and cause):

"This cause coming on regularly for trial on the day of , 1881, plaintiff and defendant appeared by their respective counsel, and the cause was tried by the court without a jury, a jury having been waived by the parties to said action. The evidence of plaintiff and defendant was introduced in due form, and the cause subsequently argued to the court by the respective counsel, and then taken under consideration by the court; and the court having fully considered said cause, and being fully advised as to the law and the evidence, *makes and files its written decision* in favor of the defendant and against the plaintiff, and orders judgment accordingly. Wherefore," etc.

The code of civil procedure provides: "Upon the trial of a question of fact by the court, its *decision* must be given in writing and filed with the clerk, within thirty days after the cause is submitted for decision. In giving the decision the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly;" Secs. 632–3.

From the "decision" filed it is apparent the court below intended to find that defendent had been in adverse possession for more than five years, and *therefore*, as a conclusion of law, that he was entitled to judgment. Finding thus, the court deemed it unnecessary to find whether the plaintiff did or did not have title prior to the running of the statute. If the finding as to adverse possession had been sufficient, and the evidence had sustained it, we would affirm the judgment, holding that the question whether the plaintiff had or had not title originally was immaterial. But, as we shall see, the evidence does not justify the finding in favor of defendant upon the plea of the statute of limitations. The case is to be treated therefore as one in which the court below, upon insufficient evidence, found that the defendant had acquired title by adverse possession, but failed to find whether the plaintiff had title and right of possession, independently of the question of adverse possession. We are not prepared to say that the evidence clearly and unmistakably shows the plaintiff had no title to the premises in controversy, and that defendant is the owner of them. We expressly decline to determine that question, however, leaving it to be passed upon by the court below. It has been so often held here that when the court below has failed to find upon any material issue made by the pleadings the judgment must be reversed, that cases need not be cited as authority on that point.

It is no objection to the reversal of the judgment, for want of finding upon a material issue, that the finding with respect to the statute of limitations is not in form a *sufficient* finding. If the court, in addition to the finding with respect to the limitation, had found

the plaintiff was the owner, etc., or facts from which the ownership of plaintiff conclusively followed, we would perhaps reverse the judgment on the ground that there was no finding such as is required by law upon the fact of adverse possession.

But the writing filed by the court below as its "decision" or findings, (which is a very different thing from an *opinion*), is always sent up here, and constitutes a part of the judgment-roll: C. C. P., 670. It is only because the findings, sufficient or insufficient, are sent up as a part of the judgment-roll, that we can determine whether a particular finding is or is not sufficient. In one sense an insufficient finding is not a finding, because it is not determinative of an issue, but in another sense an *attempted* finding found in the decision, filed as such by the court below, is a finding. It is to be treated as a finding in so far as it enters into the record to be reviewed in this court, and in that it clearly shows that findings were not *waived* by the parties. It has been held here, in support of the presumption that the trial court has done its duty, we will, (where there are *no* findings,) presume that findings were waived, unless the contrary is made to appear by bill of exceptions. But this presumption cannot have force as against a writing on its face designated the "decision," filed by the court below, clearly intended to be a finding upon a material issue, and showing that the court ordered a judgment in favor of defendant, *because* the evidence proved that one of the pleas of the defendant was true. The court below having attempted to find upon one of the material issues, (the evidence not sustaining the finding), and having failed to find upon another material issue, the judgment must be reversed.

We return to the question: Did the evidence justify the finding in favor of defendant upon the plea of the code limitation?

In considering this question, in the absence of a finding that plaintiff was or was not the owner or entitled to the possession of the demanded premises, or of facts showing such right of possession, we must assume that plaintiff deraigned title from the *Jimeno* grantees, which is the right to establish which the evidence on the part of plaintiff was addressed.

The action was commenced April 15, 1875. It is admitted that the demanded premises are entirely within the limits of the *Jimeno* grant. There is no evidence that defendant ever had actual possession of the *Jimeno* grant, or of any part of the lands claimed by plaintiff, until the year 1872. Prior to that year the land in controversy was an open common on which ranged the stock of defendant and other persons. There was evidence tending to prove that on divers occasions defendant had cut up the dead timber or down trees and removed the wood from the land. Such fugitive acts did not of themselves constitute an adverse possession.

It is claimed, however, that defendant had been in adverse possession of the land in controversy for more than the statutory period, because, in the year 1868, he had received from a stranger a deed purporting to convey a tract, "known as the Mizner tract," which

comprehended within its bounds land lying without the *Jimeno grant*, and also land lying within the *Jimeno grant*—the latter including the premises here demanded—and had been in actual possession of the portion of the land *without* the Jimeno grant for more than five years when this action was commenced.

The question presented therefore is: Can a defendant who claims under color of title a larger tract which includes the land to which plaintiff has shown title in fee, establish an adverse possession as to plaintiff's land (which has remained vacant and unoccupied,) by proving an actual possession of a portion of the larger tract—such possession not extending to any of the land claimed by plaintiff.

The fourth subdivision of section 323 of the code of civil procedure provides:

"Where a known farm or single lot has been partly improved, the portion of such farm or lot that may have been left not cleared, or not inclosed according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated."

It is apparent that, for a person to acquire a constructive adverse possession of land, he must actually oust the true owner of some part of his land. The owner is not disseized of his land merely because one stranger may pretend to convey it to another, and he is not driven to any assertion of his legal rights, because one with or without title shall occupy lands not *his*.

It is but necessary to state the facts to demonstrate that the fourth subdivision of section 323 does not apply to them.

Even, however, if the acceptance of a deed of the "Mizner tract" by defendant, and his actual possession of a part of that tract, could be held to create a presumption that he asserted an absolute right to the whole "exclusive of any other right," such presumption would, in the case before us, be overcome by defendant's own testimony. As a witness he stated that prior to 1872 he had fenced only the portion of the land claimed by him, lying to the west of the Jimeno grant, and west of the land claimed by plaintiff, knowing there was a dispute as to the title of this land now in controversy;" that he "had not thoroughly understood how it was, he didn't want to go too far until he could find out," and that in 1872 he enclosed the land claimed by plaintiff "when he found out that Col. Hager (alleged agent of plaintiff) never had any possession." These declarations of defendant prove he did not assert an absolute and unqualified right to the land in controversy until, at least, the year 1872.

Judgment and order reversed and cause remanded for a new trial.

ROSS, J., SHARPSTEIN, J., THORNTON, J., MYRICK, J., MORRISON, C. J. Concurred.

No. 7915.

MANUEL, Admr'x, v. ESCOLLE.

Department Two. Filed March 21, 1884.

ACCOUNTING BETWEEN PARTNERS—PRESENTATION OF CLAIM. In an action of accounting between a surviving partner and the administratrix of his deceased partner, the surviving partner is entitled to an allowance for sums drawn by the deceased partner from the partnership during his lifetime, notwithstanding the claim for the sum so drawn has never been presented to the administratrix of the deceased partner for allowance and approval.

APPEAL from a judgment of the superior court for Monterey county in an action for an accounting. The opinion states the facts.

Gregory & Shipley and *Webb & Wall*, for the appellant.

S. F. Geil, for the respondent.

The COURT. The defendant and plaintiff's intestate were partners, and the complaint is filed to obtain an accounting and settlement of the partnership affairs, the plaintiff alleging that there is due from defendant the sum of $3192.22. An accounting was had, and the court found a balance of $265.90 due plaintiff, for which judgment was rendered. In arriving at this conclusion, the court heard evidence regarding sums drawn from the partnership by the plaintiff's intestate during his lifetime, and charged the plaintiff as representative therewith. Plaintiff claims this to be error, and claims that defendant, in order to have the benefit of the allowance, should have presented to the administratrix and judge, for allowance and approval in course of administration, the amount which he claimed as an allowance in this action.

We are of opinion that the allowance and approval by the administratrix and judge were not pre-requisites to the right of the defendant to have the accounts adjusted and the amount claimed allowed as an off-set in the accounting.

Section 1585, C. C. P., seems to be clear and explicit as to the powers and duties of the surviving partner.

Judgment and order affirmed.

No. 9400.

HACKLEY v. CRAIG.

Department Two. Filed March 21, 1884.

APPEAL FROM JUSTICE'S COURT—JURISDICTION OF—The supreme court has no jurisdiction of an appeal from a judgment of the superior court, affirming a judgment of the justice's court, in an action brought to recover one hundred and eighty dollars, with interest and costs.

THIS action was originally commenced in the justice's court of the city and county of San Francisco, for the recovery of one hundred and eighty dollars, with interest and costs. Judgment was given in favor of the plaintiff. On appeal to the superior court such judgment was affirmed. This appeal is taken from the judgment of the superior court.

J. H. Meredith for the appellant.

York & Whitworth for the respondent.

The COURT. This court has no jurisdiction of this appeal.

Appeal dismissed.

No. 8033.

WIDEMAN *v.* FRANKS.

Department Two. Filed March 21, 1884.

FRAUDULENT TRANSFER—EVIDENCE HELD SUFFICIENT TO JUSTIFY the finding that the sale under which the plaintiff claims title was fraudulent and void as to his vendor's creditors.

APPEAL from a judgment of the superior court for Monterey county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. This was an action to recover the value of certain sheep. The defendant, a sheriff, justified under an execution against one Alvarado the plaintiff's vendor. The further facts appear in the opinion.

A. S. Kittredge, for the appellant.

D. M. Delmas, for the respondent.

The COURT. We think the evidence sufficient to justify the finding that the transaction between Alvarado and plaintiff was fraudulent and void as to the creditors of the former.

Judgment and order affirmed.

No. 9392.

ELLIOTT, Administrator, etc., *v.* PATERSON, Judge, etc.

Department Two. Filed March 21, 1884.

SUBSTITUTION OF ADMINISTRATOR—MANDAMUS TO COMPEL. Mandamus does not lie to compel the substitution of an administrator in the place of a deceased plaintiff, and to btain a re-trial of an action in which a judgment of non-suit was entered after the death of plaintiff. Such judgment is not void on its face, and should be set aside before an applica o for mandamus is made by the administrator.

APPLICATION for a writ of mandate. The judgment referred to in the opinion of the court was one of non-suit rendered against a plaintiff after his death, and before the fact of his death was brought to the attention of the trial court. Subsequently the petitioner, as administrator of such plaintiff, suggested his death and asked to be substituted in his place, and that the case be tried again. This motion the court denied.

Byers & Elliott, for the petitioner.

R. B. Hall, for the respondent.

By the COURT. Application for a writ of mandate. We are of opinion that the writ should not issue. So long as the judgment stands, the judgment is not void on its face. The petitioner should procure the judgment to be set aside before making application for mandamus.

Writ denied.

WEST COAST REPORTER.

WHOLE No. 14. APRIL 3, 1884. VOL. II. No. 6.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

RIPARIAN PROPRIETORS AND RIPARIAN RIGHTS ON PRIVATE STREAMS.

THE preceding discussion has been exclusively confined to the rights of appropriating and using the waters of public streams, flowing entirely through the public lands of the United States, before any private owner has acquired from the government, by patent or otherwise, the title to a tract or tracts of land upon their banks. All the decided cases heretofore cited, and all the judicial opinions, except perhaps a few *dicta* in one or two of the very earliest California cases, have distinguished between the appropriation from these public streams, and the rights to the water after the land, or any part of it, bordering on a stream has passed into the ownership of private proprietors. In the recent decisions, the court most carefully guards against any inference that they affect the rights of such owners, and expressly distinguishes between the rules laid down governing the taking and use of water from public streams, and those relating to "riparian proprietors" and "riparian rights" properly so called. I purpose now to examine the position of these "riparian proprietors," and to ascertain, as far as possible, what are their "riparian rights," under the law of the Pacific communities. If, before any appropriation whatever has been made of the waters of a stream hitherto wholly public, a private person acquires from the government the title to, and thus becomes the absolute owner of, a tract of land through which such stream runs, or even lying on one of its banks, although he makes no actual diversion of the water, an entirely new element is introduced into the problem. He is clearly not embraced within the operations of the doctrines heretofore explained; he is a true "riparian proprietor;" his own rights over the stream are as complete and perfect as though all the other lands on its borders were held by private owners; the unrestricted right of diverting and using the water for some beneficial purpose by any prior appropriator does not exist against him. *A fortiori* is this so, where many owners have acquired title to different tracts abutting on the stream, and finally where all the lands bordering

on both sides of the stream through its whole length have passed into the ownership of private proprietors. There is then presented exactly the condition of circumstances which exists in England and in the older and fully settled states of the Union—the condition in which the common-law doctrines concerning riparian rights arose, and to which they were originally applied. Assuming a stream to be so situated, with the lands on its banks owned by private proprietors, and assuming that no proprietor has yet made any actual diversion of its waters, the question is fairly presented: Can any one of these owners, by means of a *prior* appropriation, acquire the right, as against the others, to divert, use, and consume any quantity of the water which may be necessary for some beneficial purpose, such as irrigating, mining, etc., and thus deprive all the other proprietors bordering on the stream, above and below him, of the benefits and uses of the stream, as may be done by the prior appropriator on a public stream? Or, on the other hand, are the rights of all these proprietors equal and alike, irrespective of any appropriation or diversion actually made by any one of them, and are their rights defined, measured, and regulated by the common-law rules concerning riparian proprietors; in other words, are their rights, in a true sense, the "riparian rights" recognized and protected by the common-law doctrines? Or, finally, if neither of these inquiries can be fully and unreservedly answered in the affirmative, has any other peculiar system of rules applicable to such persons been established, combining in some measure the common-law doctrines with the special doctrines touching the appropriation of public streams? Do the common-law rules wholly control? or do the doctrines concerning public streams govern? or has any other modified system of regulations been established? or is the whole matter still left in a condition of uncertainty, to be settled by the courts or the legislature? These are the questions which must be examined, and their answer, if possible, given. In pursuing this examination, we must ascertain, first, whether the statutes furnish any, and if so what, auswer; and second, what conclusions may be derived from judicial decisions. I shall, therefore, by way of introduction, give a summary of the legislation on the subject which has been adopted by the various states and territories embraced within our discussion.

I. Summary of statutory legislation.

California. The civil code of California, which went into effect on the 1st of January, 1873, contains the following provisions, which, in terms, apply to all streams, public and private; their language being general, not restricted to any class of streams, must, of course, be construed as applying to all. It will be noticed, however, that these provisions are a mere statutory declaration or enactment of the special rules which had been previously settled by the courts concerning the appro-

priation of public streams, virtually as formulated in the previous sections of this essay. The title of the code is denominated "Water Rights," and contains the following sections, which I quote in full.

"§ 1410. The right to the use of running water flowing in a river or stream, or down a canyon or ravine, may be acquired by appropriation. § 1411. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases. § 1412. The person entitled to the use may change the place of diversion, if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made. § 1413. The water appropriated may be turned into the channel of another stream, and mingled with its water, and then reclaimed, but in reclaiming it the water already appropriated by another must not be diminished. § 1414. As between appropriators, the one first in time is the first in right. § 1415. A person desiring to appropriate water must post a notice in writing, in a conspicuous place, at the point of intended diversion, stating therein, (1) that he claims the water there flowing to the extent of (giving the number) inches, measured under a four-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted. § 1416. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain. § 1417. By "completion" is meant the conducting the waters to the place of intended use. § 1418. By a compliance with the above rules, the claimant's right to the use of the water relates back to the time the notice was posted. § 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith. § 1420. Persons who have heretofore claimed the right to water, and who have not constructed works in which to divert it, and who have not diverted nor applied it to some useful purpose, must, after this title takes effect, and within twenty days thereafter, proceed as in this title provided, or their right ceases. § 1421. The recorder of each county must keep a book, in which he must record the notices provided for in this title." All these provisions by themselves would furnish a reasonably clear and certain system of rules applicable to *all* streams, whatever may be thought of their expediency or justice; but the following and

final section turns the whole into utter doubt and uncertainty so far as it can apply to private streams or streams bordering on the lands of private owners. This final section is as follows: "§ 1422. *The rights of riparian proprietors are not affected by the provisions of this title.*"

I would remark in passing, that so far as the title applies to streams wholly public, on the banks of which there are as yet no riparian proprietors and, of course, no "riparian rights," it furnishes a system of rules which must be complied with by all those who seek to make an appropriation of the water subsequently to the going into effect of the statute. Thus, for example, the contents of the notice and the place of posting are definitely described; also the time within which work must be commenced after posting the notice is fixed in all cases; and the work must be prosecuted "uninterruptedly," the only causes of interruption allowed being "snow or rain." The early decisions prescribed no such definite rule, but left the time of commencing the work, and of prosecuting it to completion, to depend upon many other special circumstances of each case, such as the situation and physical conformation of the country, the difficulty of transportation, of obtaining materials and labor, and the like. So far, therefore, as the title applies solely to the appropriation of water from streams wholly public, it furnishes rules which must be obeyed, somewhat more definite and less elastic than those laid down by the courts; and as to its meaning, force and effect in connection with such streams, there seems to be no uncertainty nor difficulty.

In addition to these provisions of the civil code there is a statute called "An act to promote irrigation,"[1] passed in 1872. This statute provides that if "owners of any body of lands susceptible of one mode of irrigation," desire to irrigate the same, they may take steps in connection with the board of supervisors by which they become an association for irrigating purposes. They may make by-laws for the appointment of trustees, who have general management of their affairs, and for the construction and maintaining of irrigating works. The powers and duties of these trustees are defined. Provisions are made for assessments upon the members of the association, for the purpose of defraying the cost of constructing and maintaining the works. § 22. "The trustees may acquire, by purchase, all property necessary to carry out and maintain the system of irrigation provided for. § 23. The trustees may acquire by condemnation: (1) The right to the use of any running water not already used for culinary or domestic purposes, or for irrigating, milling or mining purposes; (2) the right of way for canals, drains, embankments, and other works necessary," etc., etc. § 24. The provisions of title VII, part III, of the code of civil procedure (concerning the condemnation of private property for public uses) are applicable to, and

[1] Stats. of 1871-2, p. 945-948.

the condemnation herein provided for must be made thereunder." It is further provided that parties owning the whole district to be irrigated may proceed as above described, without appointing any trustees—that is, may manage the whole by themselves. This act is declared not to extend to the counties of Fresno, Kern, Tulare and Yolo.

It is very plain that this statute does not contemplate nor recognize any right of land-owners to appropriate the waters of private streams—that is of streams running through or adjacent to lands of private owners. The "riparian rights" of such owners are most certainly assured and protected; for the owners desiring to appropriate the water of such a stream must proceed to condemn it under the right of eminent domain, and must of course pay compensation; and the only parties who could be compensated are the owners of lands on the banks of the stream, whose "riparian rights" to use its waters would be invaded. Such riparian rights, like all other rights of private property, are held subject to the state's power of eminent domain.

Nevada. The only legislation of this state bearing on the subject, which I have found, is contained in certain sections of the compiled laws, which permit the construction of flumes or ditches for carrying water. Parties may construct a ditch or flume across private land, and to that end may take such land by right of eminent domain, on paying just compensation to the owner thereof, the amount of the compensation to be determined in a manner and by a proceeding described. This act shall not interfere with any prior or existing claim or right.[3] The statute makes no allusion to the appropriation of or acquisition of title to the water to be conducted by such ditches or flumes.

Montana. The legislation of this territory is in complete derogation of the common-law "riparian rights." It will be noticed that the lands for which it provides the use of water may be situated anywhere within the territory. Their situation on, near or at a distance from streams is wholly immaterial. I give an abstract of the provisions, only quoting the exact language of the most important and fundamental provisions.[4]

§ 731. Any person or corporation owning or having a possessory title to any agricultural land "shall be entitled to the use and enjoyment of the waters of the streams and creeks in said territory, for the purposes of irrigation and making said land available for agricultural purposes, to the full extent of the soil thereof." *Proviso,* when by a prior appropriation any person has diverted all the water of a stream, or so much thereof that there is not an amount left sufficient for those having a subsequent right thereto for irrigation, then any surplus left by said prior appropriator shall be turned back into the stream for the use of subsequent claimants, with a penalty in the form of damages for a neglect to do so after demand made.

[3] Comp. Laws of Nev. (1873), vol. 2, §§ 3852-3855.

[4] Rev. Stat. of Mont. (1879), p. 562, §§ 731-741.

§ 732. Any such person or corporation owning land, when there is no available water thereon, or when it is necessary to raise the water of "said stream," so as to irrigate said land, or when said lands are too far removed from said streams to use them, said persons, etc., shall have a right of way *across any tract of land* for ditches, canals, flumes, etc.

§ 733. Such right only extends to the digging ditches, etc., across the land of another, as may be necessary.

§ 734. All controversies between different claimants of water shall be determined by the dates of their respective appropriations.

§ 735. All waters of streams are so available to the full capacity thereof for irrigating, "without regard to deterioration in quality or diminution in quantity," so as not to affect the rights of a prior appropriator; but in no case can water be diverted from the ditches, etc., of such appropriator.

§ 736. Any person digging a ditch, etc., under § 732, and thereby injuring the lands of another, shall be liable in damages to the injured party.

§ 737. This act shall not impair rights already acquired.

§ 738. Nor shall this act prevent the appropriation of said streams for mining, manufacturing, and other beneficial purposes, and the right to appropriate for such purposes is hereby declared and enforced.

§ 739. Persons constructing ditches across public highways must repair the same.

§ 740. Penalty for violation of last section.

§ 741. All controversies respecting rights to water for any purposes, and the rights of parties to use water, shall be determined by the dates of their respective appropriations, "with the modifications hertofore existing under the local laws, rules, or customs, and decisions of the supreme court of said territory."

The same statutes, in the chapter concerning corporations, authorize the formation of corporations for the purpose of taking and conducting water from streams for various beneficial purposes.[5] The most recent volume of session laws also contains the following provisions: An act of congress[6] declaring that all non-navigable streams on the public land in the territory shall be free and open for appropriation for irrigation, mining and other purposes, subject to existing rights: Also an act of the territorial legislature providing a penalty for diverting water by one not entitled to the injury of another.[7] *J. N. P.*

(TO BE CONTINUED.)

[5] Ibid. pp. 456, 457; §§ 271-275.
[6] Sess. Laws of Montana (1883), p. 27, Act of 44th Cong. 2d Sess., ch. 107.
[7] Ibid., p. 113, §§ 1 and 2.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

PIONEER GOLD MINING COMPANY v. BAKER.

Decided March, 1884.

A MORTGAGE OF CERTAIN PROPERTY OF A CORPORATION, held to be created by a sheriff's sale, and certain contracts made by the defendant with two of the directors of the corporation, in their names, but for the benefit of the corporation.

IN A SUIT BY THE CORPORATION TO REDEEM from such mortgage, the directors who made the contracts are not necessary or indispensable parties, where they claim no individual interest, and no relief is asked against them.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

ON demurrer to the complaint.

This is a suit to redeem the Pioneer mine in Sierra county, California, from the defendant, under a mortgage alleged to have been effected by means of certain contracts and sheriff's sale, as set forth in the complaint. A demurrer to the complaint was interposed on two grounds: 1, insufficiency of facts to constitute a cause of action; and, 2, non-joinder of W. S. Chapman and A. L. Sayre as necessary parties defendant.

The complaint sets forth *in hæc verba* certain contracts made by the defendant Baker, the first made August 22, 1876, with the Pioneer Mining Company, by which the company became indebted to Baker $100,000, to be paid from the net proceeds of the mine, within three years; if not so paid Baker was to take possession of the mine and work it until he should from the net proceeds pay himself said $100,000.

The second contract between Baker and W. S. Chapman, president and principal stockholder of the company, recited that Baker was about to foreclose his claim for $100,000, as a lien upon the mine, and provided that if the mine was sold under the judgment of foreclosure and Baker purchased the same, he was to take possession of the mine and work it with reasonable diligence in a skillful manner, and out of the proceeds was to pay: 1, his judgment of $100,000; 2, all sums he might advance to pay judgments and indebtedness of the company; 3, expenses of working the mine; and 4, reasonable compensation for Baker's services. When these claims were paid to Baker he was to convey the mine to Chapman. Baker was to keep accurate accounts of his receipts and expenditures, subject at all times to Chapman's inspection. Baker was not to sell, convey or otherwise dispose of the mine without Chapman's written consent. Baker commenced suit and obtained judgment by default against the company in August, 1878, foreclosing his lien on the mine for $100,000. Instead of selling the mine on his judgment of foreclosure, Baker, with the advice and assistance of Chapman, made an agreement with the California powder works by which the mine was sold on a judgment obtained by the powder works against the company, and the title under that sale was to be conveyed to one

Titus, as trustee, who was to mortgage the mine to the powder works to secure the payment of the amount of their judgment, within thirty months thereafter. The sale was made accordingly on October 21, 1878, and the title thereunder conveyed to Titus, as trustee, who executed the mortgage to the powder works, and subsequently, in September, 1882, deeded the mine to Baker, subject to the contract of December 20, 1878, hereinafter mentioned. On December 20, 1878, and before the statutory period of redemption had expired, Baker make a final agreemeent with Chapman and A. L. Sayre. Chapman and Sayre constituted a majority of the directors of the company, and owned 47-48 of the stock. This contract recites that the company is "the owner" of the mine, and states the sale and proceedings had on the powder works judgment, and the agreement with the powder works, and provides that "in consideration of the premises" Chapman and Sayre should have the right and privilege to redeem the mine at any time within four years, on paying Baker his judgment of $100,000, the powder works judgment with interest, and all other judgments and demands against the Pioneer Company, which Baker might pay, with the consent of Chapman and Sayre, also such sums as Baker might expend in working the mine, and a reasonable compensation for his services. Baker was to keep accounts of his receipts and expenditures, which were to be at all times open to the inspection of Chapman and Sayre. Baker was not to sell or encumber the mine without the written consent of Chapman and Sayre. The contract further provided that if the mine was not redeemed within four years, Chapman and Sayre should have the right to redeem the same at the expiration of four years, by paying one-half of the sum then due Baker and giving him a mortgage on the mine for the remaining half. The complaint averred that Chapman and Sayre had made the contracts with Baker for the use and benefit of the company, which had by vote of its board of directors, including Chapman and Sayre, adopted and ratified all that Chapman and Sayre had done in the premises.

Before the commencement of the suit the Pioneer Mining Company conveyed and assigned all its rights in the premises to the Pioneer Gold Mining Company, the complainant. Other facts stated in the complaint sufficiently appear from the opinions of the judges.

Stewart & Herrin for complainant.

Van Clief & Gear for defendant.

SABIN, D. J. (delivering an oral opinion.) In this suit a demurrer to the bill has been filed. The grounds of demurrer are: first, that the bill does not state facts sufficient to constitute a cause of action, and, second, that Chapman and Sayre are necessary parties to the bill. I shall not attempt an extended review of the case, as I do not deem it necessary, nor have I so thoroughly collated the facts in the case as I should desire, were I to attempt to review it upon all the points raised. But it seems to us that the considerations

which I am about to submit are controlling in the matter, and, if so, the demurrer upon both points must be overruled.

The bill sets out that in 1876 the defendant Baker entered into a certain contract, "A," with the Pioneer Mining Company, the predecessor in interest of plaintiff in this suit.

This contract was for the purpose of securing the payment to Baker of an acknowledged indebtedness due him from said company, as provided therein. In case this indebtedness was not paid within three years from the date of said contract, Baker was entitled to take possession of the property and mines of the company, work the mines, and from the net proceeds thereof pay himself the amount due him, with expenses, and a reasonable compensation for his services.

Subsequent to that contract, another contract, "B," was entered into between Baker and W. S. Chapman, then president of said Pioneer Mining Company.

This contract was made, as alleged in the bill, for the benefit of said company, and taken in connection with contract "A," there can be little, if any, doubt on this point.

It was virtually in aid of contract "A." Its object was the same, the payment of this very indebtedness of the company to Baker and also the indebtedness of the Pioneer Mining Company due to the Bank of La Porte, and also the debt of the company to the California Powder Works, nearly twenty thousand dollars due to the two last-named parties.

Now it will be observed that the sole object of this contract "A" was to pay an indebtedness of the company to Baker, and as modified by contract "B," the indebtedness to the Bank of La Porte and the California Powder Works, in addition to the indebtedness due Baker. These debts paid, Baker had no further demand or claim upon this property.

If it be assumed that Chapman, as president of the company, and Sayre, as one of the directors thereof, in any of the contracts which they severally or jointly entered into with Baker acted solely in their individual capacity, in violation of their duties as directors of the Pioneer Mining Company and in derogation of the rights of the stockholders of that company, it will be sufficient to say it was beyond their capacity as directors of that company to bind the company by such contracts, but if any benefits accrued to the Pioneer Mining Company by virtue of any of those contracts the company is entitled to the benefits arising therefrom. But taking all of the facts together, as alleged in the bill, no such presumption arises. They may have been careless in the manner in which they executed these contracts, but nothing criminal or fraudulent appears therefrom. They were, all of the time and in all of these contracts which were made, contracting about and handling the property of the Pioneer Mining Company for the purpose of paying and discharging those debts. Certain sales were made upon payments, and the same purpose and object runs through all of those sales. They were permitted to be

made, and were made in the interest of the Pioneer Mining Company, and to save the property, if possible, for the company, and to prevent its passing from its control. They were made pursuant to an understanding and agreement between Baker and the company, and for its benefit and not its ruin. Baker subsequently executed a mortgage upon this property to secure the payment of the judgment of the California Powder Works obtained against the Pioneer Mining Company, but he executed it only upon and with the written consent of Chapman, and all the time, in all their transactions, it seems to me patent not only that Baker so understood it, but that Chapman and Sayre also understood that they were managing and handling this property for and on behalf of the Pioneer Mining Company, and to save it for the company. Neither Baker, nor Chapman nor Sayre ever assumed to contract in reference to this property upon any other basis than that it was the property of the Pioneer Mining Company, and not the property of Chapman or Sayre, or both, and all of the transactions between these parties, from first to last, had but one object, to wit, the payment of the various debts of the Pioneer Mining Company, due Baker and others. Baker all the time knew that the property involved in these contracts and sales was the property of the Pioneer Mining Company; that it did not belong to Chapman and Sayre individually, or to either of them, and he knew their official relation to the Pioneer Mining Company.

If, then, it be true, as alleged in the bill, that Baker has been fully paid, or has been tendered the full amount due him, and for which this property was pledged to him, the Pioneer Mining Company, or its successor in interest, the plaintiff herein, is entitled to a surrender of the property. It was upon this very condition that he was given possession of the property, and under which he has held it and worked the mine. All that Baker has a right to demand is that his debt be paid. The bill alleges that Baker has taken from the mine sufficient money to pay his debt; it also alleges that he refuses to account for the moneys taken from the mine; and it also alleges a tender and demand—a tender of anything that may be due. If these matters set forth in the bill are true, and of course we take the bill as true, it seems to us very plain that Baker, having received from the company after going into possession of the property, all that is due him, ought to, and must, surrender the property to the company or its successor in interest.

I may observe that in the contract made December 20, 1878, between Chapman and Sayre and Baker, Baker expressly agreed that he would not sell or encumber the mine. The contract provides for the redemption of the property when the debt is paid. In 1882 Baker extended the time for the redemption of the property. Now if these things demonstrate anything, it appears clear to my mind that Baker, in each and every one of these transactions, and Chapman and Sayre also, considered that he, Baker, merely held this property as a pledge to be handled by him to pay himself his indebt-

edness; and if he has been paid he ought to surrender the property to the owners.

This is all as to the first point of the demurrer.

As to the second point raised, that Chapman and Sayre should be made parties to the bill. Whatever Chapman and Sayre may have done in and about this property and in making these contracts, they acted in their official capacity for and on behalf of the Pioneer Mining Company.

It is possible, and I believe it is true, that they signed some of these contracts individually, and not in their official capacity; and it might seem, viewing the contracts alone, and not in connection with all of the facts set forth in the bill, that they were of a personal nature. As I observed before, if they sought to do anything in derogation of their duties as trustees and directors of the company, to that extent their contracts might be held void, but to the extent to which their acts and contracts were beneficial to the company, the company would have a right to the enjoyment of such benefit. All of the contracts which they at any time made were made in regard to the property of the company. They did not assume to own any of this property themselves. They were merely stockholders and directors in the Pioneer Company, which fact Baker well knew. If Chapman and Sayre are now stockholders in the company, they will, by this action, be benefited to the extent of their interest in the company, whatever the interest may be. If they are not stockholders they have no interest in the matter one way or the other. It is barely possible that they might have been joined as proper parties, though I do not see that point clearly, but I do not think that in any sense they are necessary parties to the bill as made. There is no relief demanded against them. There is nothing demanded of them one way or the other. They merely appear in this case as actors in the contracts and matters set forth in the bill. Their actions in the various matters set forth are those of directors of the company, and no claim or demand is made against either of them.

We therefore think that even if, under any construction, they might be proper parties to the bill, they certainly are not, from anything disclosed upon the face of the bill, necessary parties thereto.

The demurrer therefore, is overruled upon both points.

SAWYER, C. J., orally concurring.

I desire to make an observation or two in addition to what has been said by my associate. There is some point and a considerable argument made on the fact that there was no valid cenveyance from the Pioneer Mining Company to Baker. These parties, Chapman and Sayre, so far as appears, were not authorized to convey, and they did not attempt to convey, to Baker. There does not purport to be any conveyance from them to Baker. The legal title, which

became vested in Baker, did not pass through that channel, but through a purchase at a sheriff's sale under the judgment in favor of the California Powder Works, instead of another decree of foreclosure in favor of Baker for one hundred thousand dollars, as it seems to have been at first contemplated. But the sale and purchase were made in pursuance of an express agreement and understanding that the mine and other property of the Pioneer Mining Company should be redeemed upon terms expressed in the agreement. The result of the various agreements, in substance, was that Baker should purchase the property in question at the sheriff's sale under the Powder Works judgment; should have possession, work and develop the mine; pay all the necessary expenses, together with a reasonable compensation for his own services, and pay the amount of his own claim against the company, the Powder Works judgment and all other indebtedness of the Pioneer Mining Company specified in the agreement, within a designated time, out of the proceeds of the mine; and, when this should be accomplished, or when the sums provided for should be otherwise paid, on behalf of the Pioneer Company, the property remaining should be restored to said company, or to said Chapman and Sayre. The time within which this was to be done, so as to prevent the title becoming absolute, was limited.

The sale took place and the purchase was made by Baker under the Powder Works judgment, and the title vested in pursuance of the agreement, and upon the conditions indicated in it. The fact that the legal title of the corporation vested in Baker through a sale on the judgment, instead of a conveyance by the company, under the circumstances, cannot affect the question involved, or the rights of the parties. The sheriff's sale is merely the channel through which the legal title passed, but the sale took place, and the title nevertheless passed in pursuance of the agreement and subject to its conditions. We must presume that if this agreement had not been made, other arrangements would have been made to avert a forced sale on the judgment. The company, at least, had a right to make other arrangements. It cannot be presumed that productive mining property of the value, as alleged, and admitted by the demurrer, of half a million dollars, would have been allowed to be sacrificed for the indebtedness provided for in the agreement, of, say, $150,000.

The title passed by virtue of the sheriff's sale, which was made in pursuance of, and in subordination to, the understanding between the parties, and subject to the prescribed conditions, that the property should be held and worked until the designated moneys due should be paid, either by the company or Chapman and Sayre themselves, or satisfied out of the proceeds of the mine and property sold. There are subsequent supplementary agreements, whereby Baker extended the time for the performance of the prescribed conditions upon which the title should be restored. The title in Baker was not to become absolute, except upon a failure in the performance

of the prescribed conditions, to secure payment of the demands provided for. Though not called a defeasance, and not a defeasance in form, the conditions of the several agreements are substantially in the nature of a defeasance, giving and continuing a right of redemption, for the benefit of the Pioneer Company. Or the instruments may be regarded, in substance, as declarations of the trusts, upon which the title vested under the sheriff's sale. The corporation was the owner of the property sold, and the first contracts were, in form, made in its name. The corporation was recognized in all subsequent agreements as owner of the property, and it was the corporation's indebtedness that was to be paid out of the property. The transaction was intended to secure Baker for the moneys due him, and such other expenses and indebtedness as he should pay or should accrue in pursuance of the agreements made. The transaction was in substance, either a mortgage, pledge or trust, to enable Baker to satisfy the debts of the Pioneer Company provided for out of the property sold—out of its own property. The whole transactions set out in the bill were transactions relating solely to the property, and the indebtedness of the Pioneer Mining Company. It is manifest, in the nature of things, from the facts alleged, that these transactions, on one side, were intended to be for and on account of the corporation. Whether we call the sale and conveyance in pursuance of it, under the circumstances set out in the bill, technically, a mortgage, a pledge, a trust, or by any other name, the facts alleged are such as entitle the complainant to relief upon the face of the bill.

Whatever technical name may be given to the transaction, it was intended to put the title of the mine and property of the corporation in the hands of Baker, for the purpose of working and developing the mine; paying the expenses and designated indebtedness of the corporation, and compensation for his own services out of the proceeds, and when this should be accomplished, or when the money and expenses provided for should be otherwise paid, to restore the property remaining to the Pioneer Mining Company.

It is alleged in the bill that those moneys so intended, and secured to be paid, have all been paid out of the proceeds of the mine. If not, that the complainant has offered to pay, and that it is now ready to pay, any balance that may be found due on an accounting. If these allegations are true, and the demurrer admits their truth, then the indebtedness of the Pioneer Mining Company, contemplated, has been paid out of the proceeds of the property of this company, and not out of the property of Chapman and Sayre, or of either of them, and the complainant, the successor in interest of the Pioneer Mining Company, is entitled to a reconveyance of the mine and other property sold under the judgment mentioned; and if the defendant refuses to reconvey, then, clearly, it seems to me, it is entitled to the relief prayed in the bill.

On the other point, that Chapman and Sayre are indispensable parties to the bill, I do not know what the pleadings and proceedings

may develop in the subsequent stages of the case, but there is nothing on the face of the bill, as it now stands, to show that Chapman and Sayre are indispensable or necessary parties to the bill. No relief is asked against them, and it does not appear that they personally claim any interest in their own behalf either against the complainant or the defendant. The court can order them to be brought in at any time, when it appears that the rights of the present parties to the bill cannot be fully and finally determined without their presence. They would, perhaps, be proper parties, but there is nothing disclosed on the face of the bill as it now stands to render it necessary to make them parties.

As before stated, tthe agreements first set out were made in the name of the corporation. The subsequent agreements in the names of Chapman and Sayre, in form, all recognize the title of the property as being in the corporation, and all the agreements and proceedings relate exclusively to the property and the indebtedness of the corporation, and are intended to facilitate the payment of the indebtedness of the corporation out of its own property. Chapman and Sayre were, in fact, two out of the three trustees, and they owned all the stock except one-forty-eighth part. According to the allegations of the bill, the indebtedness of the corporation had been paid out of the proceeds of the working of the productive mine, owned by the corporation, subject only to the incumbrances indicated, in pursuance of the terms of the various agreements, and of the trusts thereby imposed on Baker; and the property remaining, after satisfying the demands provided for, is, in equity, the property of complainant.

But had Chapman and Sayre redeemed with their own money, in pursuance of the terms of their several agreements, the corporation would doubtless have been entitled to take the property upon payment of their advances. They were trustees for the corporation, and would not be permitted to take advantage of their own position as such to obtain a title to the property as against the corporation, in violation of their trusts, through the transactions set out.

I concur in the order overruling the demurrer.

DISTRICT COURT, DISTRICT OF OREGON.

THE C. D. BRYANT. J. P. BUTMAN, CLAIMANT; HENRY OLSEN, LIBELANT.

Decided March 18, 1884.

SALVAGE BY PILOT.—Under the Oregon pilot act of 1882 (Ses. L. 15), a pilot is bound to render aid to a vessel "in stress of weather or in case of disaster," and he is not entitled to salvage for such service unless he is thereby involved in "extraordinary danger and risk."

CASE IN JUDGMENT.—The libelant, in a smooth sea and calm weather, boarded the Bryant in a thick fog, while she lay aground at low tide on the outer edge of the middle sand of the Columbia river, and at the next flood sailed her over into deep water in the south channel, and after drifting out to sea in the night, brought her into port the next morning. *Held*, that the service of the libelant did not involve any "extraordinary danger and risk," and that he was only entitled to a pilot's compensation therefor.

IN Admiralty. The opinion states the facts.

Frederick R. Strong, for the libelant.

M. W. Fechheimer, for the claimant.

DEADY, J. The libelant, Henry Olsen, brings this suit to obtain a decree for salvage against the American bark C. D. Bryant and her cargo, for services rendered her at the mouth of the Columbia river on September 4 and 5, 1883.

The master of the Bryant, James P. Butman, intervening for his interest and that of his co-owners in the vessel, as well as the owners and consignees of the cargo, answers the libel, denying that the libelant performed any salvage service on the occasion in question, and alleging that he acted as bar pilot merely, for which service he was duly paid.

The evidence is very voluminous, and, as usual in such cases, is largely irrelevant, immaterial and repetitious.

The material facts appear to be that on September 4, 1883, the Bryant being bound on a voyage from Hongkong to Portland, drawing about nineteen feet of water, was off the mouth of the Columbia river, when, about 2:30 P. M. and near high water, she grounded on the outer edge of the middle sand in twelve to fifteen feet of water at low tide, and about three miles southwest of Cape Disappointment light, the sea being smooth, the water calm and a thick fog or smoke on the bar; that about 5 o'clock she was boarded by the libelant, a bar pilot from the pilot schooner Cousins, who thereupon took charge of her; that the vessel lay quietly in her bed in the sand after the libelant took charge until the flood tide began to make, and the wind freshened from the northwest, when with the aid of her sails and the swell of the sea she rubbed across the sand some time before 3 o'clock on the morning of the 5th, in a southeasterly direction into deep water; and was afterward carried by the ebb tide and an easterly wind in a southwesterly direction to sea, where she lay off until daylight, and then came in over the bar

with a light breeze and the flood tide, and was taken in tow by a tug and brought to Astoria and beached, with three or four feet of water in her hold; that the vessel commenced to leak before 9 o'clock on the evening of the 4th and continued to do so until beached in the mud at Astoria, both pumps being worked continuously in the mean time, which leak was wholly caused by the displacement of thirty or forty feet of the after part of the keel, while on the sand as aforesaid; and that the vessel is worth $15,000 and her cargo, which consists of rice and China goods, is worth about $50,000.

Much of the testimony and controversy in the case relates to the question whether the conduct of the libelant while in charge of the vessel was that of a skillful and diligent pilot or not. For instance, it appears that soon after boarding the vessel, while the tide was ebbing to the southwest and a light breeze was blowing from the northwest, the libelant caused the port anchor to be dropped from the cathead and went below to change his clothes, which were wet, and take some rest, where he remained until near 9 o'clock, when at the suggestion of the master he came on deck, and had the anchor taken up, because the master insisted that the vessel was surging ahead—taking chain—and would soon be on the anchor, all of which the libelant denied at the time and since.

Upon the vessel being brought to Portland and hove down it was found there were some bruises and indentations, well forward on her port side, which were thought to have been made by the vessel coming in contact with the fluke of the anchor while she lay on the sand. All of them were mere surface bruises, the wood in the worst one not being bruised more than three inches deep, and were all repaired by cutting out the bruised portions and letting in a scarf piece in its place at a comparatively small cost, and did not at all affect the tightness of the vessel or cause her to leak.

So far as appears, the dropping of this anchor was a useless act. It might prevent the vessel from going off as she went on, of which there was not the least probability at that time, if ever, and it was impossible for her to go further on until the tide flooded.

At the same time, it was certainly a harmless act, provided it was taken up, as it was, before the flood tide commenced to make; and even then, with the heave of the sea and the wind, both from the northwest or thereabout, the vessel would be driven, not upon the anchor, but to the southeast of it.

But the management of this anchor, whether skillful or unskillful, does not affect the libelant's right to salvage. If any damage was caused to the vessel by the neglect or want of skill on the part of the libelant in this respect, at most, the amount thereof could only be deducted from the salvage to which the libelant might otherwise be entitled. But no claim is made in the pleadings for any damage on this account, and it is doubtful if any was sustained. If, under the circumstances, the act was bad seamanship, it is a matter for the consideration of the pilot commissioners from whom the libelant obtained his branch, and not a defense to this suit.

Salvage service is a meritorious one, and it has always been the policy of the law to reward liberally those who successfully engage in it, according to the skill, danger and property involved in the undertaking. But the drift of American legislation and decision is against the policy of allowing pilots to act as salvors on their own pilot grounds. It has been thought or found that the temptation to become a salvor might induce a pilot to make or allow an occasion for such service, that he might profit by the distress of a ship which he is bound to navigate: Hobart v. Dogan, 10 Pet. 120; the Schooner Wave, 2 Payne, 136; 2 Par. S. & A. 271.

A pilot is a public officer whose duties and compensation are prescribed by law; and when acting in the line of his duty he is not entitled to any other compensation. As was said by Mr. Justice Washington in the case of Le Tigre, 3 Wash. C. C. R. 571, while considering the question whether official duty could be compensated by salvage: "Of this class of cases is that of the pilot who safely conducts into port *a vessel in distress at sea.* He acts in the performance of an ordinary duty, imposed upon him by the law and the nature of his employment, and he is therefore not entitled to salvage, unless in a case where he goes beyond the ordinary duties attached to his employment."

The pilot laws of the several states generally require pilots to render aid to vessels, if possible, on their cruising ground whenever needed; and in cases when extraordinary risk and danger is thereby incurred provision is made for extra compensation.

The duties and compensation of an Oregon Columbia river bar pilot are prescribed by the pilot act of 1882: Ses. L. 15. The act, section 27, gives the pilot so much a foot draft of the vessel for his service; and (section 21) provides that he must keep a suitable pilot-boat on which he shall cruise outside the bar, "unless prevented by tempestuous weather;" and he "must at all times promptly extend aid to vessels in stress of weather or in case of disaster. * * * Provided, that this section shall not affect any claim for salvage arising out of services involving extraordinary danger and risk."

Under this section 21 it was the duty of the libelant to extend to the Bryant whatever aid she might need and he as pilot could give, and in so doing he did not entitle himself to salvage or other compensation than that prescribed by law, unless he thereby incurred "extraordinary danger and risk." Neither the value of the vessel nor the benefit she receives from the service enter into the question of compensation. Unless the pilot incurs more than ordinary "danger and risk" in the discharge of his duty, he is only entitled to the ordinary compensation. Whether this section includes the case of a wreck properly speaking—that is, a vessel abandoned at sea or stranded and abandoned—is a question not necessary to decide in this case. If it does, as it well may, the pilot must render what aid he can, as such, and if in so doing he does not incur extraordinary "danger or risk," he must be content with the ordinary compensation.

The Bryant was not a wreck in any sense of the word. She had just gone easily on to a sand bank, where, if the weather had continued as calm as it then was, she might have remained for weeks without any serious injury. Her master and crew were on board, with reason to believe that the vessel could be floated off at the next tide, as she was; and, in any event, that the tugs would come to her assistance and pull her off as she went on.

There is a conflict in the testimony as to whether the libelant boarded the vessel and took charge of her as a pilot or not. But there is not much room for doubt about the matter. He boarded her from a pilot schooner, saying he was a pilot, and did nothing while on board but a pilot's duty. It is true that the libelant testifies that he told the master after he got on board that his vessel was aground, and that he would not take charge as a pilot until she was afloat. But this, under the circumstances, is a very improbable statement, and was not remembered by the libelant on his examination in chief, nor until he was pressed on cross-examination; and it is absolutely denied by the master of the bark.

But, be this as it may, the law did not authorize the libelant to go on board and take charge of the vessel without the master's consent, in any other capacity than that of pilot. The Brig Dodge Healey, 4 Wash. C. C., 656. This was not a case for a salvor, but a pilot, unless the former had a tug or other means external to the vessel at his command, wherewith to pull her off the sand, with or without the aid of the wind and tide. But the libelant could be of no aid to the vessel personally, otherwise than from his knowledge of the tides, channels and shoals in the vicinity, and his skill in handling her by means of her sails, rudder and anchors, and all this he was bound to know and do as a pilot. If the master had possessed this local knowledge he could have sailed the Bryant over the sand into deep water as well as the libelant. Indeed, nothing was done by the latter except to set the sails and wait for the wind and tide, which fortunately—I may say providentially—came and pushed her over into the south channel. But even then, but for the local knowledge of the libelant, she might, in the darkness and fog, have gone on to Clatsop spit. The services rendered by the libelant were those of a pilot; and, unless when boarding her or while on her, he personally incurred "extraordinary danger and risk," he is not entitled to anything more than a pilot's compensation therefor; and this is so whether or not his services saved the vessel from a great peril or imminent danger of destruction.

I hardly know how to discuss the question of the "danger and risk" incurred by the libelant personally. I suppose that a bar pilot when on duty is always involved in more or less danger. He is bound to cruise outside the bar, and board and render aid to vessels, unless the weather is so "tempestuous" as to prevent it—as to make it absolutely unsafe to do so. In this case, in my judgment, the libelant did not incur even the ordinary danger of a pilot service in that locality.

It was a remarkably calm time—not wind enough to clear the bar of the smoke and fog incident to that season of the year. There was a light breeze from the northwest, and the ebb tide made a ripple on the sand where the vessel lay aground. On sighting the Bryant, the Cousins ran down from the windward and hove to some distance astern and south of the former, from whence the libelant, with the aid of another oarsman, undertook to pull up to the Bryant in a small boat, but on account of the wind and tide, particularly of the latter, was unable to do so, and had to return to the schooner, which by this time had drifted farther to the southwest. The schooner then beat up into the vicinity of the Bryant and hove to again under the lea of the latter in comparatively still water, from whence the libelant, with the aid of the oarsman, boarded her without any trouble—the latter taking the boat back to the schooner, which then, by the libelant's direction, stood out to sea. In all this there was some time and labor spent, and much of it because of the libelant's mistake in not bringing his schooner round under the lea of the Bryant in the first instance, but certainly no "extraordinary danger or risk." And while on the vessel the libelant incurred no such danger or risk, for if there was any immediate prospect or probability of her going to pieces on the sand or sinking in the deep water, as there was not the least, all hands could safely have taken to the boats.

But the libelant has himself furnished very satisfactory evidence that he did not, at the time, regard this service as dangerous, or otherwise than an ordinary pilot service.

On September 6th it appears that he made out a bill against the Bryant for "pilotage" at the prescribed rates, amounting to the sum of $136, and delivered the same to the agent of the schooner for collection, and as his report of the transaction, which was paid accordingly. Nothing then appears to have been said or thought of any claim for salvage on account of any unusual danger or risk incurred by the libelant in this service.

There must be a decree for the claimant, dismissing the libel and for costs.

SUPREME COURT OF ARIZONA.

DAWSON *v.* LAIL.

January Term, 1884.

CAUSES OF ACTION, STATEMENT OF.—In an action on several bills of exchange, all bearing the same date, payable to the same party, due at the same time, the better practice is for the complaint to contain a separate statement on each bill. If, however, the complaint contains but a single statement, an order overruling a demurrer thereto will not be disturbed.

COSTS OF PROTEST OF INLAND BILL.—The allowance of costs for the protest of inland bills of exchange is not reviewable on appeal, when no motion to retax costs was made in the lower court.

APPEAL from a judgment of the district court for Yavapai county, entered in favor of the plaintiff. The opinion states the facts.

PINNEY, J. This was an action brought on five several bills of exchange executed by the appellant, all bearing the same date, and all due and payable the same time, and all made payable to the respondent or his order, and each for the same amount.

The complaint states but one cause of action. A demurrer was interposed on the ground that more than one cause of action being declared upon, the complaint should separately state the same. The demurrer was overruled, an answer filed, the cause tried, and judgment entered in favor of respondent.

It is claimed that the court below erred in overruling the demurrer. Counsel insist that where a complaint sets up more than one cause of action each count must contain all the facts necessary to constitute a cause of action. Sec. 64 of chapter 48, compiled laws, provides that the plaintiff may unite several causes of action in the same complaint, when they all arise out of contracts, express or implied, etc., when the causes of action so united shall all belong to one class, affect the same parties, tried at the same place, and be separately stated.

It is claimed that several bills of exchange are several causes of action and should be separately stated. In Van Namee v. People, 9 How. 198, it is held that each promissory note is a distinct and complete cause of action in itself, and must be stated in a separate count.

The complaint in that case set forth three promissory notes of different dates and amounts, and while we are of the opinion that the better practice would be to make a separate statement on each note or bill, still, in a case like the one at bar—where the bills all bear the same date, and are made payable to the same party, and at the same time—we do not feel inclined to disturb the judgment, because a separate statement is not made.

A protest of each of the bills was made by the respondent, for which costs were allowed in the sum of $12.50, and it is urged that no protest of an inland bill of exchange is necessary unless prescribed by local law. Conceding this to be the law, there was no

motion made in the court below to retax costs, and that question cannot be raised for the first time in this court.

Judgment affirmed.

SHELDON, J., concurred.

SUPREME COURT OF COLORADO.

BUCK *v.* WEBB ET AL.

Filed February 29, 1884.

PERSONS NOT PARTIES TO ACTION, DECREE RESERVING RIGHTS OF.—The rights of persons not parties or privies to an equitable action, cannot be injuriously affected by the judgment therein. Equity, however, has power to protect by reservation or limitation in such decree the rights of persons interested, although they are not parties. Such power is conferred by section 16 of the code of civil procedure.

DECREE ENFORCING RESULTING TRUST, RIGHTS OF CREDITORS UNDER RESERVATION IN.—A decree in an action to enforce a secret resulting trust upon certain property of a corporation required the company to convey such property to its *cestui qui trust*, and provided that the latter should take the same subject to the payment therefrom "of any and all just debts against the corporation which may be determined by due process of law to be preferred over the claim of the *cestui qui trust*:" *Held*, that the effect of such provision was to create a specific lien on such property in favor of certain creditors of the company; that such lien would exist in favor of a creditor without notice of the existence of such secret trust, whose claim accrued prior to the rendition of such decree, and while the company was in possession and apparently the owner of the property; that a single action might be brought to establish such claim and to enforce the lien, and that in such action the corporation was a proper party.

ERROR to the county court of Gunnison county. The opinion states the facts.

Louis Boiset, for the plaintiff in error.

Shackelford & Karr, for the defendants in error.

HELM, J. The complainant in this case avers that in 1880, Webb, one of the defendants in error, brought suit in the district court and obtained a decree recognizing and enforcing a secret resulting trust upon certain lands and other property held by the Good Enough Milling and Mining Company, the other defendant in error.

That said decree required the company to convey to Webb title to the property therein described; but that the decree, and also the deed afterward executed in pursuance thereof, further provided that Webb should take the property subject to the payment therefrom "of any and all just debts against the said Good Enough Milling and Mining Company which may be determined by due process of law to be preferred over the claim of said William H. Webb, in and to the said land and other property."

The complaint further alleges that before the rendering of said decree the company became indebted to plaintiff's assignor, and still remain indebted to plaintiff, in the sum of over $1100 for goods, wares and merchandise sold and delivered at its instance and request; that at the time of such sale and delivery neither plaintiff nor

his grantor had any notice or knowledge whatever of the existence of defendant Webb's said secret trust; that the company was then in possession, and the apparent owner of the property; and that when this suit was commenced the company was wholly insolvent, and had no effects of any kind whatever.

Each of the defendants filed a demurrer to the complaint on the grounds, first, that the facts stated do not constitute a cause of action; second, that there is a defect or misjoinder of parties defendants, and, third, that causes of action are improperly united. These demurrers were sustained and judgment rendered for defendants.

We are now asked to reverse this judgment. The truthfulness of the foregoing averments in the complaint is of course admitted, and it is apparent that plaintiff must look to the property conveyed to Webb or lose his entire debt. Whether he may do so or not depends upon the construction we shall give to the reservation above mentioned in the decree and deed.

No protection of *bona-fide* mortgage, judgment, or other existing incumbrance or lien, was needed in the decree; no action taken or conclusion reached in that proceeding could interfere with the rights of such prior incumbrances.

If, therefore, we say that this provision of the decree refers to this class of obligations, we declare that the court did something which was entirely unnecessary, that it performed the useless task of protecting rights which needed no protection. To take this view is practically to admit, with counsel for defendant in error, that the condition in question is merely surplusage. But under a well-known rule of construction, it is our duty to give meaning and effect to this provision if we can reasonably do so; the whole of the decree and deed must be considered together, with the purpose of the court in connection therewith; and both instruments must be so interpreted as "that every word (if it may) may take effect, and none be rejected."

The object of the court in rendering the decree, as we understand it from the complaint, was to protect the interest of Webb arising out of his equitable rights in the property. But the company had for some time been transacting business, and it had incurred debts, among which was that of plaintiff in error. The trust recognized and enforced by the court not only arose by implication of law, but was also secret. It was clearly the province of a court of equity to guard so far as possible the company's creditors, who became such without notice of the secret claim or interest of Webb. This we believe the district court endeavored to do; that portion of the decree under consideration was doubtless intended to protect the interests of just such creditors as plaintiffs in error.

The phraseology is not the best that might have been used, but its meaning is reasonably plain. The "preference" given to "all just debts" is such a superiority or advantage as a court should award a *bona-fide* creditor over a secret and hidden equity, of which

he knew nothing, against the property of his debtor. But counsel for defendant in error argue that the rights of persons not parties or privies to a suit can not be affected by a judgment or decree rendered therein.

It is true that the interests of such persons cannot be *injuriously* affected thereby, but courts of eqity have the power to protect by reservation or limitation in their decrees the rights of individuals who appear to be interested, even though they be not parties to the action.

The usual and proper course is to continue the cause until such persons can be made parties and their rights adjudicated. Many instances exist where this must be done.

But when, as in the case before the district court, the rights of plaintiff against defendant may be fully determined without the presence as parties of such persons, the court may render a decree reserving and protecting therein their interests.

This power is expressly recognized in the 40th order of the English chancery orders of 1841, and in the fifty-third rule of the equity rules of 1842, supreme court of the United States. But section 16 of our code of civil procedure renders unnecessary any further discussion of this subject. It provides that a "court may determine any controversy between the parties before it, where it can be done without prejudice to the rights of others, *or by saving their rights.*"

This was all the district court undertook to do. It said to Mr. Webb: "You have an equitable right to this property; that right shall be enforced, and protection shall be given you in connection therewith; but inasmuch as by your own conduct in keeping secret your interest, the company was given a fictitious credit, and enabled to incur liabilities, you shall take the property encumbered. Innocent creditors of the company without notice of your equity shall have the right, upon the establishment of their claims within a reasonable time, in the manner provided by law, to subject this property to the payment thereof."

The remaining questions presented by the record before us may be discussed together. These questions are: Was there a misjoinder of parties defendant, and were causes of action improperly united in the suit?

Our consideration of the first ground of demurrer leads us to the following conclusion, viz.: That the provision in the decree and deed concerning the first debts of the company created a specific lien upon the land thereby conveyed to Webb in favor of certain credi ors. The recording of either the decree or deed gives notice of this lien to all the world.

The objects of this suit, therefore, are to show that plaintiff is one of these creditors, and entitled to the benefit of this lien; also to enforce the same. The preliminary propositions to be established are, that plaintiff has an existing valid claim against the defendant company; that such indebtedness was incurred prior to

the date of the decree in favor of defendant Webb; and that when the credit was given neither plaintiff nor his assignor had any knowledge of Webb's secret equity.

It is possible that plaintiff might first bring a separate suit against the company and reduce his claim to judgment, then proceed in another action to enforce his lien. But supposing Webb should appear at the former trial, offer to show that his property might ultimately be subjected to the payment of this judgment, and ask to be made a party, should not the court grant his request? He had a vital interest in the result; he is entitled to know that the claim is just, and that the judgment is not exorbitant.

But with him as a party, why not try the remaining questions and enforce his lien in the same action?

Again, the situation is analogous to that of a debt secured by mortgage, where the land has been sold by the mortgagor. In the action of foreclosure both the original mortgagor and the purchaser are necessary parties. The former has an interest in the controversy, because he is liable for the balance, should the property fail to pay the debt; the latter, though he bought with notice of the mortgage, is interested because his property is to discharge the obligation secured thereby, and because he owns the equity of redemption: Dunlap v. Wilson, 32 Ill. 523.

The insolvency of the mortgagor, if that be his condition, does not affect his right to contest against the judgment on the liability which may thereby rest upon him.

The complaint was sufficient; there was no misjoinder of parties or of causes of action, and both demurrers should have been overruled.

The judgment will be reversed, and the cause remanded.

Reversed.

TUCKER, Executrix, Etc., *v.* EDWARDS.

Filed February 29, 1884.

PLEADING CONTRACT FOR CONVEYANCE OF LAND.—In pleading a defense arising out of a contract for the conveyance of land, it is not necessary to allege that such contract was in writing. The statute of frauds has changed the rule of evidence, not the rule of pleading.

INCONSISTENT PLEAS, WHEN ALLOWABLE.—Under the practice prior to 1877, the several parts of each plea could not be repugnant to each other; but separate special pleas in the same answer might be inconsistent without rendering the pleading obnoxious to demurrer.

ACCORD AND SATISFACTION—ELECTION—PLEADING.—In pleading his readiness to perform an accord agreement, where the promisee is given the privilege of electing between two alternative promises on the part of the promisor, it is sufficient for the latter to aver his constant readiness and willingness to perform either, at least until the promisee has indicated his choice. An actual tender of performance need not be averred.

FAILURE TO PERFORM AN AGREEMENT FOR AN ACCORD cannot be taken advantage of by the party through whose fault such failure was occasioned.

OVERRULING DEMURRER, WAIVER OF EXCEPTION TO.—In an action on a judgment where the defendant pleads *nul tiel record* and an accord and satisfaction, an exception to the sustaining of a demurrer to each latter plea is not waived by proceeding to trial on the issue raised by the former.

ERROR to the county court of Jefferson county. The opinion states the facts.

Wells, Smith & Macon, for the plaintiff in error.

V. D. Markham, D. J. Haynes, Charles & Dillon and *L. P. Northrup*, for the defendant in error.

HELM, J. Upon a careful examination of the record before us, we conclude that there is but one error of sufficient importance to justify a reversal. This is a proceeding by *scire facias*, under the old practice, to revive a judgment.

After considerable preliminary skirmishing, defendant below filed four special pleas in bar of the action, viz., first, *nul tiel record;* second, *actio non accruit*, three years; third, *idem*, seven years; and fourth, accord and satisfaction.

That plaintiff agreed with defendant that if defendant would journey with him from Boulder to Gilpin county, and pay all the expenses of both during the journey, and at plaintiff's election either convey to him by quitclaim deed a certain possessory right which defendant then had in and to a certain parcel of the public domain, or in lieu of such conveyance pay him $100 in cash, he would receive such conveyance or money, together with the other acts and expenditures specified in full satisfaction of the judgment, to revive which this proceeding is now instituted, and also in satisfaction of the costs connected therewith.

That afterwards said journey was made at defendant's expense, in accordance with the terms of the contract; and that defendant "was then and there willing and ready, and ever since hath been, and now is ready and willing to convey to said plaintiff by deed of quitclaim the said property right, or to pay him $100," as he, the said plaintiff, should elect.

To the first of said pleas a replication was filed; to the second, third and fourth, a demurrer was interposed. This demurrer the court sustained, and the cause was then tried upon the issue of *nul tiel record*. The fourth plea stated a good defence, and the demurrer thereto should have been overruled.

We may suppose with counsel for defendant in error that the contract therein stated provided for the transfer of an interest in lands; yet it was not necessary to aver that the same was in writing. There is nothing in the plea to show that it was *not* written, and therefore no demurrer would lie upon this ground. The statute of frauds has changed the rule of evidence, not the rule of pleading: Gould's Pl., ch. 4, sec. 43, and cases.

But counsel argue that the ruling of the court was proper, because the pleas were inconsistent. The pleadings in this case must be tested by the rules relating to the subject, as they existed with us prior to 1877. Sec. 14, p. 504, revised statutes of 1868, would seem to answer counsel's objection; it permits the defendant to

plead "as many matters of fact, in several pleas, as he may deem necessary for his defense."

A similar statute was construed in Illinois to allow the filing of pleas which are inconsistent with each other: Forman v. Childs, 66 Ill. 547. See also People ex rel. Crawford v. Lathrop, 3 Colo. 448, interpreting a like code provision, and Peters v. Ulmer, 74 Pa. St. 403.

Under the procedure existing when this suit was brought and determined, the parts of each plea could not be repugnant to each other, but separate special pleas in the same answer might be inconsistent and yet not render the pleading obnoxious to demurrer.

By the terms of the contract averred in the plea under consideration, plaintiff was given an option; he was to have the privilege of electing between the conveyance of the possessory interest and $100 in cash. He has never made this election, and the averment by defendant of his constant readiness to do either is sufficient. It cannot be said that he must make an actual technical tender of either the deed or the money, at least until plaintiff indicates his choice. See 1 Chitty's Pl. (16 ed.), 336.

The failure to make the accord a full satisfaction being the fault of plaintiff, defendant was not precluded from the benefit of this defense. See Cary v. McIntyre, 2 West Coast Rep., decided at the present term.

Plaintiff in error did not waive his exception to the ruling upon the demurrer, as counsel contend.

The plea of *nul tiel record*, and that of accord and satisfaction, present entirely dissimilar issues. The former denies the existence of the original judgment as pleaded, the latter admits its existence and avers satisfaction thereof. Had defendant amended the latter plea and gone to trial thereon, his objection would not now be considered; but trying the issue made by the former was no waiver of his exception to the court's ruling against the latter.

For error in sustaining the demurrer to defendant's fourth plea the judgment must be reversed.

Reversed and remanded.

CITY BANK OF LEADVILLE *v.* TUCKER, Sheriff, etc.

Filed February 29, 1884.

SHERIFF'S FEES FOR KEEPING ATTACHED PROPERTY, ALLOWANCE OF.—Where property has been attached by a sheriff at the instance of the plaintiff, in an action which is afterward dismissed, the sheriff is entitled to a reasonable compensation as fees for his expenses in maintaining a keeper in charge of the property attached. Such fees may be taxed as costs against the plaintiff. To determine the amount of his fees, there being no statute regulating the same, the sheriff should present his bill to the court or judge, and procure an order allowing the same, or so much thereof as may be proper. The party against whom such allowance is made may, upon motion to retax, procure a rehearing and re-examination. The clerk has no power to make such allowance. If, however, he does so, and his action is affirmed by the court on a motion to retax, such irregularity furnishes no ground for a reversal.

ERROR to the county court of Lake county. The opinion states the facts.

George Maxwell and *A. C. Phelps*, for the plaintiff in error.

D. J. Haynes, *D. E. Parks* and *M. Adams*, for the defendant in error.

HELM, J. The personal property attached in this action consisted partly of engines, boilers, pumps, etc. This property, by direction of plaintiff's attorney, the sheriff held possession of under the writ at the mine where it was attached, for the period of nine months. To do this he was compelled to employ a keeper, whom he paid $5 per day. The suit was finally dismissed, with the consent of the plaintiff, and at its costs. The clerk taxed as costs the expense of keeping the property, at $5 per day, and also that of removing it at the expiration of the time mentioned aforesaid and storing it until the termination of the suit. A motion to retax costs was overruled by the court.

There is nothing in the record requiring us to pass upon the reasonableness or justice of the sheriff's charges. He was ordered by the plaintiff not to store, but to hold possession at the mine. The mine may have been so situated, and the hardships and dangers so great, that $5 per day was the least sum for which a reliable person could be procured to perform the duty. But the finding of the county court upon this matter is not presented for our consideration.

The questions before us for adjudication are: Is the sheriff entitled to any reimbursement at all for these expenses? If he is, can they be recovered of plaintiff below? And if these two questions are answered affirmatively, can they be taxed as costs in this suit, by the clerk, or must the officer resort to a separate action therefor? Upon the first two of these questions there can be no doubt. This is not the case of a promise of extra compensation in the performance of a duty for which the fee is fixed by statute. The point presented is simply the sheriff's right to just and equitable expenses incurred in the proper care and keeping of attached property while in his custody. For obvious reasons, no fees are fixed and no rule is stated by statute for determining these expenses. Neither, on the other hand, is there anything in the statutes which, in terms or by implication, requires him to make these expenditures *without compensation* therefor. The law does compel him to take and retain possession of the property, and it holds him responsible for the preservation and safe keeping thereof.

There were formerly many doubts as to his right to reimbursement for the expenses incurred in this way; but the question now seems thoroughly settled in his favor. The rule now is that if plaintiff recover, and the property be ultimately sold by the officer under execution in the suit, he may deduct these charges, if allowed, out of the proceeds received. If the judgment goes for defendant, or, as in the suit at bar, the cause be dismissed, he may look to the plaintiff therefor. See the following works and cases cited therein:

Drake on Attachments: sec. 311; Story on Bailments, sec. 131; Crocker on Sheriffs, secs. 1144 and 824.

The officer's rights are, if possible, stronger when the plaintiff directs at what place and in what manner the property shall be held under the writ. The remaining question before us is more difficult to answer. The authorities seem to be somewhat in conflict. But upon principle there appears to be no reason why these expenses may not properly be allowed and taxed as costs. Technically, they are not fees; but they are disbursements necessarily required in the performance of a duty enjoined upon the officer by law.

Costs are not confined to fees paid the officers; they are "expenses incurred by the parties in prosecuting or defending a suit at law": 1 Bouv. Law Dict. 370. Such charges as these are made in connection with the suit, and the plaintiff, or defendant, as the case may be, is liable therefor, just as he is for the regular fees.

Our statutes allow the successful party to recover his costs, unless the court otherwise directs. Many of the cases hold that from the date of the levy until the final determination of the attachment proceeding, the defendant is primarily liable to the officer for the reasonable expenses of keeping or storing.

Supposing the defendant in this case had paid the sheriff the charges under consideration, would they not be such "expenses incurred in the suit" as would properly be taxable as costs against the plaintiff? Theoretically, the officer collects his fees and expenses at or before the performance of the duties in connection with which they become due; but, practically, almost all sheriffs, if the parties litigant be responsible, wait until the termination of the case for a large part of their fees and disbursements. This forbearance does not in any way interfere with the officer's right to his pay. We assent to the proposition that fees and costs cannot be collected unless allowed by statute. But, as above indicated, it is our opinion that the disbursements under consideration are costs within the meaning of our laws. If we are correct in this, there is no more reason for remitting the officer to a separate suit for these charges than for regular fees not collected in advance. To require the institution of a separate suit in every case where the sheriff fails to collect fees in advance would be disastrous to litigants as well as himself. There is no necessity for such a rule; if these expenses are allowed as costs by the court, and taxed by the clerk, the party dissatisfied can, by a motion to retax, as fully and fairly inquire into and try the legality, justness and reasonableness of the same, as he could in another action.

Parties ought not to be harassed with a multiplicity of suits, and it is to the interest of all concerned that the additional trouble and expense of a new action be avoided.

But the *amount* of these expenses is not and cannot be fixed by statute, and they are not properly taxable as costs until allowed by order of the court or judge; we think the sheriff's account therefor should first be so examined and allowed.

The clerk ought not to tax such charges as costs upon his own motion in the first instance.

We do not say that a separate suit therefor may not be maintained by the officer; our conclusions are that he may present his bill in the attachment proceeding to the court or judge, and procure an order allowing the same, or so much thereof as may be deemed proper; that the amount so allowed may be taxed and recovered as other costs of the suit; that although the court has passed upon this question, a party complaining may, by his motion to retax, procure a rehearing and re-examination, and have his objections fully adjudicated. In this case it appears that a motion to retax was made and the questions raised thereby were fully tried; we are of opinion, therefore, that the action of the clerk in taxing these costs, without an order of the court or judge, could not have so prejudiced plaintiff in error as to justify a reversal.

The judgment will be affirmed.

SUPREME COURT OF NEVADA.

GOULD v. WISE.

Filed February 25, 1884.

MECHANICS' LIENS FOR CONSTRUCTION AND REPAIR AGAINST A LESSOR.—Where the owner of a mill and reduction works leased the same for a term of years, and during the term the lessee made repairs in the mill, in pursuance of a clause of the lease that the lessee "at his own cost and expense should make all necessary repairs and improvements in and about said mill and reduction works," and an agent of the lessor had personal and full knowledge that said repairs were being made by the lessee, and the lessor and his agent failed to give notice, as provided by the statute, that the lessor would not be responsible for the same: *Held*, that under sec. 9 of the lien law, the parties furnishing the materials or labor for said repairs, obtained a lien for the price of such materials and labor upon the estate or interest of the owner and lessor of said mill.

THE SAME—WORK AND LABOR IN "CARRYING ON" A MILL.—Under the same circumstances, by the proper construction of sec. 19 of the same lien law (of 1875), persons who performed work and labor, by the employment of the lessee, in "carrying on" or operating the mill, obtained a lien for the price of such work and labor upon the estate or interest of the owner and lessor of the mill. LEONARD, J., dissenting.

CONSTRUCTION OF STATUTES.—In construing a provision of a statute the word "*on*," although found both in the published statutes and in the enrolled bill, may be treated by the court as a clerical error, and may be read "*or*," when the latter word would give a full, consistent and effectual meaning to the provision, in complete conformity with the general intent of the whole statute, while the word "*on*" would render the provision uncertain, delusive, virtually inoperative, and opposed to the general intent of the entire statute. This is especially so when the provisionis borrowed, without other material change, from previous statutes on the same subject, in all of which the word was "*or*."

THE SAME.—In the absence of all testimony, and of any objection at the trial, the court will infer that the land used in connection with the mill, and to which the lien was declared to extend, was reasonably convenient for the use of said mill, under the requirements of the statute.

LEONARD, J., dissented from a portion of this decision, holding that under a correct construction of the whole statute, the estate of the lessor, under these circumstances, was liable only to a lien for materials and labor in repairing or constructing, and not for labor in carrying on or operating.

APPEAL from a judgment of the fourth judicial district court for Humboldt county, entered in favor of the plaintiff, in a proceeding to foreclose certain mechanics' liens. The opinion states the facts.

Dickson & Varian, for the appellant.

A. C. Ellis, for the respondent.

BELKNAP, J. The Boca Mill Company, a corporation, was the owner of reduction works and the land upon which they are situated. One Torrey entered into the possession of the premises under a written lease, duly recorded, for the term of two years.

During Torrey's term the plaintiff and intervenors furnished materials and labor which were used in repairing and "carrying on" the mill. This suit is brought against defendant as the successor in interest of the Boca Mill Company to the property, to enforce lien claims for the materials and labor so furnished.

The first question presented is whether Torrey, the lessee, could create a lien upon the premises that would affect the estate of the lessor.

Sec. 1 of the lien law provides that "every person performing labor upon or furnishing materials * * * to be used in the construction, alteration or repair of any building, * * * has a lien upon the same for the work or labor done or materials furnished by each respectively, whether done or furnished at the instance of the owners of the building or his agent; and every contractor, sub-contractor, architect, builder or other persons * * * having charge of the construction, alteration or repairs, either in whole or in part, of any building, or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this chapter: Stats. 1875, p. 122.

It may be conceded, for the purposes of this case, that to authorize a lien there must be an employment by the owner of the building or his authorized agent, and that an employment by a lessee does not constitute the employment contemplated by the statute; and, further, that to constitute the contractor, sub-contractor, architect, builder or other person, the statutory agent of the owner, such person must have been employed, directly or indirectly, at the instance of the owner or his conventional agent. But the interest of the owner may be subjected to lien claims, notwithstanding the labor and materials have not been furnished at his instance, if, knowing that alterations or repairs are being made or contemplated, he fail to give notice that he will not be responsible therefor, as provided for in sec. 9 of the act.

The provision is as follows: "Sec. 9. Every building or other improvement mentioned in sec. 1 of this act, constructed upon any lands with the knowledge of the owner or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person having or claiming an interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended construction,

alteration or repair, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land, or upon the building or other improvement situate thereon."

The evidence showed that the corporation had an agent residing in the vicinity of the premises who personally visited the reduction works, and knew that the work was being done and improvement made. This evidence was, *prima facie*, sufficient to charge the corporation with knowledge of the fact. No notice having been given by it that it would not be responsible for the materials and work, it results from the provisions of this section that its estate is chargeable with the liens.

Again: A consideration for the lease was that the lessee, "at his own cost and expense, * * * make all necessary repairs and improvements in and about said mill and reduction works, and furnish all necessary materials to place the same in good condition for crushing," etc. The money so used, together with that expended in paying taxes and insurance, the lease provides, "shall be in full payment and satisfaction for the rent of said premises for the first year."

This of itself shows knowledge on the part of the corporation of the "intended construction, alteration or repair" within the meaning of sec. 9.

A question growing out of the provisions of this section is whether persons performing labor in operating the mill can acquire a lien against the estate of the lessor.

Sec. 19, as will be hereafter shown, provides liens for labor performed in "carrying on" mills, manufactories and hoisting works, and declares that all of the provisions of the lien law respecting the mode of filing, recording, securing and enforcing liens shall be applicable to the provisions of this section.

The provisions of the lien law preceding sec. 19 were, with two exceptions, immaterial to this case, enacted with reference to liens for work done or materials furnished in the construction, alteration or repair of buildings. In extending the right of lien to a new class, it was natural for the legislature to ordain that the general rules governing liens should also be extended; and in sec. 19 these general provisions were made applicable in so far as they are appropriate to the new subject of lien. This conclusion is warranted by the phraseology of the statute, and by the presumed intention of the legislature to create a harmonious and not an incongruous law.

The question also arises whether the law as it now stands contemplates lien claims for work performed in "carrying on" reduction works.

At the session of the legislature of 1869, the following supplement was made to the mechanics' lien law: "All foundrymen and boilermakers, and other persons performing labor, or furnishing machinery or boilers, or castings, or other material for the construction,

or repairing, or carrying on of any mill, manufactory, or hoisting works, shall have a lien on such mill, manufactory or hoisting works for such work or labor done, or *for* such machinery, or boilers, or casting, or other material furnished by each respectively": Stats. 1869, p. 61.

At the next session the lien law underwent some alterations, but this section was re-enacted without change, save that the italicized word "for" was omitted. The employment of this word in the original enactment was unnecessary, and its omission worked no other alteration in the law.

The supplemental law provides for two classes of lien claimants. One class consists of foundrymen, boilermakers and persons furnishing machinery, boilers, castings or other materials; the other class consists of persons performing labor. Down to the time of its enactment, persons performing labor, or furnishing materials for the purpose of operating mills, manufactories or hoisting works, were not entitled to liens under the lien law. The only object of the provision was to extend the right of lien to this class of claimants. Foundrymen, boilermakers and others furnishing labor or materials in constructing or repairing, were already secured in their rights of lien by the provisions of sec. 1 of the lien law, and the provisions of the supplemental law did not confer upon them additional rights.

In the year 1875 the law was again revised, and the revision constitutes our present law. The section under consideration was then re-enacted, without change other than this: The italicized word "on," in the following quotation, was inserted in lieu of the word "or," in the original enactment. The section, as changed, stands as follows:

"Sec. 19. All foundrymen and boilermakers, and all persons performing labor, or furnishing machinery, or boilers, or castings, or other materials for the construction, or repairing, or carrying on of any mill, manufactory or hoisting works, shall have a lien on such mill, manufactory or hoisting works for such work or labor done *on* such machinery, or boiler, or castings, or other material furnished by each respectively": Stats. 1875, p. 126.

If this language be followed, the right of lien is restricted to "work and labor done on such machinery, or boiler, or casting, or other materials," as the lien claimant may have furnished, and is withheld from persons furnishing labor without materials; and, also, from those furnishing the many articles of mining and milling supplies upon which no labor is bestowed by the vendor.

The section, as it appears in the published statutes and in the enrolled bill, is delusive. It purports to provide for two distinct classes of lien claimants, but in fact provides for only one class. No reason can be assigned why the pretended provision for "persons performing labor" should have been nullified by the inconsistent provisions succeeding, nor for the senseless discrimination in favor of those laboring upon materials furnished by themselves, and

against those laboring upon materials furnished by others. If the intention of the legislature had been to change the law, it is reasonable to presume that language fairly expressive of such intent would have been employed, and that so radical a change would not have been brought about by the simple changing of the word "or" to "on."

Instead, however, of fairly expressing a change in the law, the phraseology of the statute, unless attributable to clerical mistake, is intentionally misleading. No intention to mislead can be indulged, and we conclude that the change arose through a clerical mistake, and should be disregarded. The error may be accounted for by the similarity in appearance of the words "or" and "on" as ordinarily written. By mistaking the former word for the latter the error doubtless originated.

The principle that courts will disregard clerical errors apparent upon the face of a legislative act has been frequently recognized. In United States v. Stern, 5 Blatch. 513, the court had occasion to consider a statute providing for the indictment of persons convicted of bribery.

If effect were given to the clause concerning convictions, the whole act would be rendered meaningless. In order to carry out the intention of congress the clause was disregarded.

A statute of the state of Minnesota, providing for the removal of actions to the supreme court, declared, by its first section, that "a judgment or order in a civil or criminal action, in any of the district courts, may be removed to the supreme court, as provided in this chapter."

The second section was in these words: "All penal judgments in the district courts may be examined and affirmed, reversed or modified, by the supreme court. * * * Such examination may be made upon writ of error or appeal, as hereinafter provided."

The court held that the manifest design of the statute was to subject all judgments of the district courts to examination by the supreme court; that the second section contained the only provision touching the manner of removing judgments; that if it were construed according to its letter the whole statute would be rendered ineffectual; that the substitution of the word "final" for the word "penal" would render the whole chapter effectual and consistent with its intent and purpose, and thereupon the court concluded that the use of the word "penal" instead of the word "final" was a clerical or typographical error, and that the section should be treated as if the word "final" were substituted for the word "penal." Moody v. Stephenson, 1 Minn. 401.

Decisions involving the same principle were made in the following cases: Jenks v. Langdon, 21 Ohio St. 370; Turner v. State, 40 Ala. 21; Narzo v. Merchants' Ins. Co., 14 Wis. 295; Harney v. The State, 34 Ark. 268; People v. Onondaga, 16 Mich. 254; Blanchard v. Sprague, 3 Sumn. 279; People v. Hoffman, 97 Ill. 234; McConkey v. Alameda Co., 56 Cal. 83; Frazier et al. v. Gibson, 7 Mo. 272.

The meaning attaching to the words "carrying on," as used in sec. 19, was construed by the district court of the United States for this district, in the year 1871, to the effect that a teamster, in hauling quartz to a mill, performed labor for carrying on the mill, and was entitled to a lien against it: In re Hope M. Co., 1 Saw. 710.

In 1875, as before stated, the legislature re-enacted the provision so construed. It has frequently been held that the re-enactment of a statute without substantial alteration, after an authoritative construction has been placed upon it, is a legislative adoption of the construction.

The cases in which the rule is announced are generally those in which the construction has been given by the highest court of the state. No case has fallen under our notice in which the construction was given to a statute of the state by the courts of the United States.

The rule is based upon the presumption that the legislature knew of the construction.

In Hunter v. Truckee Lodge, 14 Nev. 39, this court felt safe in holding that before an official publication of a decision by the supreme court of California "there ought to be no presumption that the decision was known to our legislature." "In frequent instances," says the court in that case, "the courts have taken pains to show by comparison of dates, and otherwise, that it was reasonable to presume that the previous construction of borrowed statutes was actually known to the legislature by which they were adopted; and in one case—Campbell v. Quinlin, 3 Scam. 289—some stress was laid upon the fact that the decisions had not only been made, but the 'reports published to the world' prior to the adoption of the statute in question."

The federal decision to which we have referred was published in the year 1873, in the reports of cases determined by the United States courts within the district embraced by the state of Nevada.

If the presumption of knowledge on the part of the legislature is based upon the fact that publicity is given to the construction by publication of the decision, as this court appears to have held, we see no reason why the presumption of legislative adoption of the judicial construction of the statute in this case should not apply with the same force as in the cases decided by the state courts.

Again, courts frequently refer to the history of a statute, and to any circumstance evidencing its object, for the purpose of ascertaining the intention of the legislature. Such reference is based upon the presumption that legislatures are conversant with the subject-matter upon which they are acting. The decision in the first of Sawyer's reports forms part of the history of the lien laws, and it is reasonable and just to assume that in legislating upon the subject of mechanics' liens it was not overlooked. Independently of these considerations, we are convinced that persons furnishing labor or materials used in operating the mill are entitled to liens; be-

cause, first, the language of the statute so declares; and, second, as stated in another portion of this opinion, the enactment of sec. 19 was unnecessary, unless its object was to extend the right of lien to these classes of claimants.

The last point made is that there was no testimony showing how much of the land upon which the reduction works stood was necessary for its convenient use and occupation.

When the reduction works were leased, the land determined by the court as subject to the lien was embraced within the demised premises; and when the defendant acquired the property he purchased this land and the reduction works.

This testimony, showing that the land and reduction works had been leased together, and sold together, tends to prove that the property subjected to the liens has been treated as a unit, and used for a common purpose.

With this testimony the court, in the absence of any suggestions to the contrary (and none was made at the trial), might properly have inferred that the land so used and treated was reasonably convenient for the use of the reduction works.

The judgment and order of the district court overruling motion for new trial are affirmed.

HAWLEY, C. J., concurred.

LEONARD, J., dissenting. Whether or not any person has a lien on real property depends entirely upon the statute.

Our statute, in the case mentioned therein, only gives liens for labor performed and materials furnished, at the instance of the owner or his agent. "Every contractor, sub-contractor, architect, builder, or other person having charge of any mining claim, or of the construction, alteration or repairs of any building, or other improvement," is an agent of the owner. A contractor is one who enters into a contract with the owner to perform labor, or furnish materials, and is responsible to the owner. A sub-contractor enters into a contract with the contractor, and is responsible to the latter. An "architect, builder or other person," may have charge for the owner, contractor or sub-contractor.

There may be, at the same time, an owner of the fee and an owner for years, as there was in this case: Phill. on Mechanics' Liens, 151.

The plaintiff was a contractor with Torrey, the lessee, but not with defendant's grantor, the owner of the fee.

Plaintiff was an agent of Torrey, but not of the Boca Mill Company, nor was Torrey the latter's agent.

As agents of the Boca Mill Company, neither plaintiff nor Torrey had power to burden the interest of the former with liens.

Under sec. 1 of the lien law it is only upon contracts made with the owner, or his agents named, that liens are allowed at all; and, without sec. 9, it is my opinion that Torrey's interest alone would have been subject to any liens filed in this case.

In Georgia, the statute giving all persons employed on steamboats a lien thereon for wages, and for wood and provisions furnished, was

so amended as to be applicable to all steam sawmills, at or near any of the water-courses in the state, in behalf of all persons who might be employed by the owner or owners, agents or superintendents, for services rendered, or for timber or firewood of any description, provisions or supplies, delivered to any such steam sawmill. The amendment also declared that the same course should be pursued for the recovery of any such claim as was stated in the original act: provided the demand for such claim should be first made to the owner or agents of any person having control of any steam sawmill, against which any proceedings might be had under the provisions of said act: Cobb's Dig. of Ga. for 1851, p. 428.

Construing that statute in Harmon v. Allen, 11 Ga. 46, the court said:

"The lien given by the act of 1842, and the summary remedy provided for its enforcement, are in behalf of the persons who are employed by the owner, agent or superintendent of the mills; or for services rendered or for supplies of any description which may be furnished the mill.

"It is clear that the lessee is neither agent nor superintendent, in contemplation of the statute. He must, therefore, be the owner of the property, or otherwise the act does not apply to him at all. But he is the qualified owner of the mills; and it was competent for him, as such, to bind the property for the unexpired term for which it was let. Beyond this he could not go. It would be intolerable to hold that he could create liens upon the reversion *ad libitum*, for stocks and other materials consumed during his temporary occupancy. It has been contended that the words agent and superintendent include those who, *de facto*, control the property, irrespective of ownership. If so, then a mere trespasser or disseizor, who wrongfully obtains the custody, might encumber the estate with the most ruinous burdens. Such, we apprehend, could not have been the intention of the legislature. None but the rightful owner, his agent or superintendent, can exercise this power, and inasmuch as the tenant for the time being is the rightful owner, he may, by his contract, bind the property to the extent of his interest, but no further."

In my judgment the court's reasoning in that case is sound, and is applicable to this case, under sec. 1. See, also, McCarthy v. Carter, 49 Ill. 57; Phill. on Mechanics' Liens, 117.

But sec. 9 provides that "every building or other improvement mentioned in sec. 1, constructed upon any lands with the knowledge of the owner, or the person claiming an interest therein, shall be held to have been constructed at the instance of such owner or person claiming an interest therein and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein, shall, within three days after he shall have obtained knowledge of the construction, alteration or repair, or the intended alteration, construction or repair, give notice that

he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place upon said land or building, or other improvement situated thereon."

If defendant's grantor had knowledge, through its agent, of the construction, alteration or repairs made by Torrey, and did not post the required notice within the specified time, then, by the terms of the statute, the materials furnished by plaintiff, and the labor performed in repairing or altering the mill, must be held to have been furnished and performed at the instance of the Boca Mill Company, and under sec. 1, as well as sec. 9, the interest of that company became burdened with liens for such materials and labor.

But for the labor performed by intervenors in "carrying on the mill," I do not think the statute, construed as an entirety, permits any interest beyond that of the lessee to be subjected to the liens.

Sec. 19 of the existing lien law was enacted as an independent statute in 1869, and was embodied in the present law in 1875, when sec. 9 was, for the first time, made a part of the law governing liens.

I feel satisfied, as before stated, that without the aid of sec. 9, even the plaintiff could not have subjected the interest of the Boca Mill Company to liens for materials furnished and labor performed for Torrey; and if I am right in this, then intervenors are not entitled to a lien upon that interest for labor performed in "carrying on" the mill, because sec. 9 does not declare that such labor shall be held to have been performed at the instance of that company, unless it gave the notice required in case of construction, alteration or repair.

Under sec. 9 the Boca Mill Company was bound to give the required notice or have its property subjected to liens for machinery and materials furnished, and for labor performed, under contract with Torrey, in constructing, altering or repairing the mill.

But for the labor performed in running the mill no notice was required; and it cannot be said that the owner of the reversion was bound to give notice as to such labor, simply because it had to be given in the matter of materials furnished and labor performed in improving the mill.

On the contrary, since the legislature, *ex industria*, limited the necessity of a notice to one class of claims, the presumption is that the other was not intended to be included.

Sec. 9 is a harsh law, and it should not be construed to mean more than was plainly intended by the legislature. If a mill is altered or repaired by a lessee a lien may, with some reason, be given upon the interest of the lessor, unless he gives the notice required, for the value of the property may be, and probably will be, enhanced by the outlay. But before I can say that the legislature intended to give a lien upon the mill of a lessor for work performed in running it, under a contract with a lessee and for his sole benefit—in other words, before I can say that the legislature intended to make a lessor's property liable for a lessee's debts, such intention

must be so plainly expressed that no other construction is consistent with the language employed. In my opinion that intention nowhere appears in the statute under consideration.

It is provided in sec. 19, under which intervenors claim their lien, that "all the provisions of this act respecting the mode of filing, recording, securing and enforcing the liens of contractors, journeymen, laborers and others, * * * shall be applicable to this section of this act." That is to say, lien claimants under sec. 19, shall pursue the same course in recovering their claims that is required of other lien claimants.

I am of opinion, also, that under sec. 3 of the lien law the liens of intervenors cannot attach to any interest in the land occupied by the mill except Torrey's.

To the extent stated I dissent.

ELDER *v.* FREVERT ET AL.

Filed March 8, 1884.

PRACTICE—FILING STATEMENT FOR A NEW TRIAL—EXTENDING TIME.—When a party, having filed and served a notice of motion for a new trial, suffers more than five days thereafter to elapse without filing a "statement," and without taking any steps to enlarge the time for its filing, he thereby waives the right to move for a new trial, and no power exists in the district court to reinstate this right. An order made by the district court under such circumstances after the expiration of the five days, granting the party ten days' additional time to prepare and file his statement on motion for new trial, is nugatory.

DECISION—FINDINGS—NOTICE OF MOTION FOR A NEW TRIAL.—Under the provision of the practice act requiring the party moving for a new trial to give notice of his intention "within ten days after receiving written notice of the rendering of the decision of the judge," where the action has been tried by the court, the "decision" referred to is the announcement by the court of its judgment, and is separate and distinct from the "findings," which may be made and filed by the court either before or after its decision. The time within which notice of intention to move for a new trial must be given begins to run from the service of notice of the announcement by the court of its judgment, and not from notice of its "findings."

STATEMENT ON NEW TRIAL, AND ON APPEAL.—A "statement" not filed in time for a motion for a new trial may be treated as a sufficient "statement on appeal," if filed within the time required for such statements.

DISMISSING APPEAL—AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL.—On a motion in the supreme court to dismiss an appeal on the ground that no notice of appeal has been served, an affidavit of service, filed by the appellants in the district court on the same day the notice of motion to dismiss was filed in the supreme court, may be considered on the argument of the motion to dismiss, whenever the supreme court would, upon application, have allowed the appellants to furnish such proof.

THE SAME—CONTENTS OF SUCH AFFIDAVIT.—The affidavit so presented alleged a service of the notice upon respondent's attorney at a time when he was absent from his office and had no clerk therein, or other person in charge upon whom service could be made, "by leaving a copy thereof in a conspicuous place in the office of said attorney between the hours of 8 A. M. and 6 P. M.": *Held*, that an affidavit of service thus repeating the exact language of the statute is insufficient; that whether the place where the notice is left is conspicuous is a fact to be judicially determined by the court, and not by the affiant. The affidavit should set forth the probative facts touching the place where the paper was left, so that the ultimate fact, whether such place was conspicuous, may be inferred therefrom by the court.

THE SAME—LEAVE TO AMEND.—As this question had never before been decided by the court, and as the service might be a surprise upon the appellants, and might possibly deprive them of a substantial right, leave to amend the affidavit of service should be given them.

APPEAL from a judgment of the second judicial district court, for Ormsby county, entered in favor of the plaintiff. Motion to strike

out the statement on motion for a new trial, and also to dismiss the appeal. The opinion gives the facts.

R. M. Clarke, for the appellants.

T. Coffin, for the respondent.

BELKNAP, J. Respondent moves the court to strike out the statement on motion for new trial upon the ground that it was not filed within the time required by law; and also to dismiss the appeal because there is no proof of service of the notice of appeal.

The cause was tried by the court. Notice of motion for new trial was filed and served on the 27th day of March, and within ten days after appellant had received written notice of the decision. The statement on motion for new trial should have been filed five days thereafter, unless the time was enlarged by the agreement of parties or order of the court or judge. Nothing was done in this behalf until the sixth day, April 2d, when the court caused an order to be entered granting appellant "ten days' additional time to prepare and file his statement on motion for new trial and on appeal."

The failure of defendants to file their statement within five days after giving notice of intention to move for a new trial—nothing having been done in the mean time to retain jurisdiction of the matter—operated, by the express terms of the statute, as a waiver of the right to move for a new trial, and no power existed in the district court to reinstate this right: Clark v. Strouse, 11 Nev. 78; Hegeler v. Henckell, 27 Cal. 491.

Additional findings were filed on the 20th of April, and a second notice of intention to move for a new trial given within ten days thereafter. It is contended that this notice was in time, because the decision was not complete until the additional findings were filed. In support of the contention we are referred to the case of Polhemus v. Carpenter, 42 Cal. 375. This case was decided under a statute of the state of California, providing that a party intending to move for a new trial should give notice thereof "within ten days after receiving written notice of the filing of the findings of the commissioner, referee or court, when written findings are filed by the court, or of the rendering of the decision of the court when no findings are filed; * * * and when amendments are filed to remedy defects in the findings, within ten days after receiving written notice of the filing of such amendments: Cal. Pr. Act, sec. 195.

The statute of the state of Nevada requires the party moving for a new trial to give notice of his intention "within ten days after receiving written notice of the rendering of the decision of the judge": Nevada Pr. Act, sec. 195; Compiled Laws, sec. 1258.

Unless the "decision" here spoken of is tantamount to the "findings," which the court may be required to make, the contention cannot prevail.

The finding of facts contemplated by the statute is the written statement of each issuable fact established by the evidence. From these determined facts the conclusion of law is deduced.

The decision is the announcement by the court of its judgment, and although based upon the settled facts of the case, such facts may never be reduced to writing so as to constitute findings within the meaning of that term as used in the civil practice act. It is a matter of frequent occurrence for courts to announce judgment and afterward to prepare the findings. The decision may be rendered after or before the filing of findings, or, as is frequently the case, no findings may be made. The decision is, therefore, distinct from the findings, and the time within which notice of intention to move for a new trial must be given begins to run from the announcement of the judgment.

The decision in Polheumus v. Carpenter is inapplicable. Sec. 195 of the civil practice act of the state of California underwent several amendments at the different sessions of the legislature of that state. At the session of 1864 the provisions embraced by our act were adopted. At the next session the section was changed so as to read as above set forth, and under these provisions that case was decided. When the legislature of our state, in 1869, enacted the practice act, they adopted, in the main, the California act as it then stood, but took sec. 195 as amended in 1864, and not as it existed in 1869. The adoption *ex industria* of provisions so entirely dissimilar indicates a different design from that of the California act as amended after 1864.

The statement not having been filed within the time required by law, must be disregarded as a statement on motion for new trial. It, however, purports to be a statement on appeal, as well as on motion for new trial, and all of the orders made enlarging the time for its filing, and the certificate of the district judge in settling and allowing the statement, is consistent with this pretension. It was evidently prepared with the intention that it should, if possible, perform the office of a statement on motion for new trial, or, failing in this, should serve as the statement on appeal. It was filed within the time required by law for the filing of statements on appeal, and must be treated as such statement.

When the motion to dismiss the appeal was made, an affidavit of service of the notice of appeal, filed in the district court upon the day the notice of the motion to dismiss was filed in this court, was presented, and we are asked to consider it as supplying the omitted proof. Upon application, we should have allowed the proof to have been made, and shall now consider the affidavit as having been filed upon leave given: Moore v. Besse, 35 Cal. 187.

The affidavit alleges a service of the notice upon respondent's attorney at a time when he was absent from his office, and had no clerk therein, or other person in charge upon whom service could be made, "by leaving a copy thereof in a conspicuous place in the office of said attorney, between the hours of 8 A. M. and 6 P. M."

In the regard shown by the quotation, the affidavit does not set forth the evidentiary facts establishing the ultimate fact that the place where the paper was left was conspicuous, but merely repeats

the language of the statute. Whether the place was conspicuous is a matter upon which the minds of men may differ, and must be determined by the court, in the exercise of its judicial functions, rather than by the party making the affidavit. The necessity for this requirement is illustrated by the New York reports. In that state a compliance with the provisions of a law similar to ours has been claimed by throwing papers through the transom over the attorney's office door, or by passing them under the door, and by leaving them in the office. In these and similar cases courts have held that when the office is locked the service must be made in some other way: Campbell v. Spencer, 1 How. Pr. 199; Livingston v. McIntyre, Id. 253; Gelston v. Swartwout, 1 Johns. 137; Lathrop v. Judivini, 2 Cow. 484; O'Shiel v. Degraw, 6 Cow. 63; Corning v. Pray, 2 Wend. 626; Anon, 18 Wend. 578; Haight v. Mowe, 6 J. & S. 294.

For aught that appears, the service in this case may have been made in some of the modes which the courts of New York have denounced, and yet have satisfied the requirements of the statute, in the opinion of the person making the affidavit. The affidavit should set forth the probative facts touching the place where the paper was left, so that the ultimate fact—whether such place was conspicuous—may be deduced therefrom by the court.

Upon the argument appellant asked leave to amend his affidavit so as to show the facts constituting the service, if, upon consideration, the court should be of opinion that the proof of service already offered was insufficient. Having reached this conclusion, the question whether leave should be granted to amend is presented.

We are not aware that the sufficiency of proof, such as has been made in this case, has ever been passed upon by the courts of this state or coast. And in New York the question, so far as our examination of the case has extended, has been made upon affidavits in contradiction of the affidavit of service.

Our decision, therefore, might operate as a surprise, and deprive appellant of a substantial right if the leave he asked for were withheld. Under these circumstances, and because courts should liberally exercise the power of amendment for the purpose of establishing the truth and sustaining the substance of proceedings before them, we shall grant leave to amend the proof of service.

Motion denied, with costs to respondent, and appellant allowed ten days in which to amend affidavit of service of notice of appeal.

SUPREME COURT OF NEW MEXICO.

TERRITORY, Etc., *v.* LUNA, Sheriff, Etc.

Filed January, 1884.

REVENUE ACTS—DISTRIBUTION OF POLL-TAX.—The revenue act of 1872, in so far as the same provides for the distribution of the poll-tax, was not repealed by the revenue act of 1882. Poll-taxes should be paid into the county school fund, and not into the territorial treasury.

ERROR to the district court for Valencia county. The opinion states the facts.

Chaves, Fiske & Warren, for the plaintiff in error.

McComas & Breeden, for the defendant in error.

BRISTOL, J. This is an action of assumpsit brought by the territory in the lower court against Patrocinio Luna, the sheriff and *ex-officio* collector of taxes for Valencia county, to recover the sum of $1,000, collected by him as a poll-tax. By consent of the parties, a jury was waived and the cause tried by the court.

The case was submitted to the lower court for its decision and judgment on the following agreed statement of facts, viz.:

"It is hereby stipulated and agreed by and between the said parties that this suit is brought to recover the amount of poll-tax collected by defendant as sheriff and *ex-officio* collector of the county of Valencia during the years 1882 and 1883; that the amount of such tax so collected by defendant is correctly stated in the declaration in this cause; that this cause shall be submitted to the court upon the following statement of facts for his decision and judgment, with the right to either party to except to said decision, and take the same to the supreme court of the territory of New Mexico, by appeal or writ of error; that such judgment may be given in vacation and shall be entered as of the present term and have the same force and effect as though actually entered at this term."

Upon this statement the court found for the plaintiff in the sum of $1,000, and entered judgment accordingly, to which finding and judgment the defendant excepted.

The only question raised is whether this poll-tax should be paid into the territorial treasury, or go to the school fund of the county. Counsel for the defendant in error contend that the prior statute which provided among its provisions that the poll-tax should go to the school fund has been repealed *in toto*, and that inasmuch as there is no express provision under the present law for the appropriation of this poll-tax, it goes to the territorial treasury by implication of law; while counsel for plaintiff in error hold the contrary doctrine.

The question is one of construction of the statutes on the subject. In 1872 a revenue act was passed, which, among other provisions, contained the following:

"All real estate situated in this territory, and all personal property of residents of this territory, wheresoever the same may be, and all other personal property in this territory, on the first day of March of each year, excepting the value of five hundred dollars to each head of a family resident in this territory, * * * shall be subject to an *ad valorem* tax of one per centum upon each dollar of the value thereof, which shall be assessed and collected as is now or as may hereafter be provided by law for the assessment and collection of taxes; one-half thereof to be applied solely and exclusively for territorial purposes, one-fourth in like manner for county purposes, and the remaining one-fourth to be in like manner applied to school purposes in the county where collected. * * *

"There shall be assessed upon and collected from every male citizen above the age of twenty-one years resident of this territory, idiots and persons of unsound mind excepted, an annual poll-tax of one dollar each, and the tax so collected shall be applied to school purposes exclusively": Prince's Stats. 5, 13, secs. 6 and 7.

In 1874 an act was passed, and, among others, contained the following provisions: "The assessors are hereby required to make out separately a complete list of all persons in each precinct of his county who are liable to pay a capitation tax, which said list shall be delivered to the constable of the corresponding precinct, who is hereby authorized and constituted collector of said capitation tax. * * * Said constable shall make at each term of the probate court a report of all taxes collected by him, and shall immediately turn over to the county treasurer the same": Id. 515, sec. 5.

In 1876 an act was passed providing as follows: "Any person required by law to pay a poll-tax, the full value of whose property does not exceed three hundred dollars, shall be liable and required to pay for such poll-tax the sum of fifty cents, and no more": Id. 524, sec. 11.

In 1882 a general revenue act was passed, embracing all subjects of taxation, including property tax, real and personal, license taxes and poll-tax, and providing that the sheriff of each county shall be *ex officio* the collector of all these taxes within his county. It provides for the distribution of the property tax, also of the various license taxes, but is silent as to the disposition of the poll-tax. The repealing section of this act is as follows: "The provisions of this act shall be in full force and effect from and after its passage, and all laws and parts of laws, in conflict herewith are hereby appealed. And all laws and parts of laws heretofore in force *regarding* the raising of revenue from taxation or from licenses are by this act hereby repealed": Prince's Stats. 1882, p. 712, sec. 118.

This act provides for the raising and distribution of the property tax as follows: "There shall be levied and assessed upon the taxable property within this territory in each year, the following taxes: For territorial revenue one-half of one per cent.; for ordinary county revenue one-fourth of one per cent.; for maintenance and support of public schools one-fourth of one per cent.": Id. 688. sec. 6.

The provision for the distribution of the license taxes is as follows: "License taxes, one-half of which shall be for territorial and one-half for county purposes, shall be imposed each year as follows": Id. 707, sec. 96. Then follows an extended list of taxes on a variety of licensed occupations.

The act provides for a poll-tax as follows: "A poll-tax of one dollar shall be assessed against every able-bodied male inhabitant of this territory over the age of twenty-one years, whether a citizen of the United States or an alien, and collected in the same manner as other taxes": Id. 712, sec. 113.

The duty of the sheriff, as *ex-officio* collector in paying over tax moneys collected by him, is provided for in the act as follows:

"On or before the tenth day of each month, the collector shall pay to the county treasurer all moneys due the county for taxes and licenses or otherwise, collected by him for county or school purposes, remaining in his hands on the first day of that month, and to the territorial treasurer all moneys due the territory on any account in his hands on the first day of that month": Id. 698, sec. 56.

There being no provision in this act as to what disposition shall be made of the money collected as a poll-tax, the question arises whether it should be applied to school purposes, under the revenue act of 1872 aforesaid, and paid to the county treasurer, or whether the provisions of that act, that the poll-tax should "be applied to school purposes exclusively," as well as all of its other provisions, were repealed by the aforesaid act of 1882, thus leaving the poll-tax without any express provision of law as to its disposition; and in the latter case, whether by implication merely it should be paid over to the territorial treasurer and applied to general territorial purposes.

The poll-tax is a part of the system for raising a revenue, and the repealing clause of the act of 1882 repealed all previous laws "regarding the *raising* of revenue" by a poll-tax, as well as by a property and license tax; and it also repeals all prior laws in regard to the distribution of the revenue arising from property and license taxes, since it contains plain and unambiguous provisions as to its disposition. But does it repeal the provision of the act of 1872 as to the distribution of the poll-tax?

In the act of 1876 a modification of the poll-tax was made in regard to persons the value of whose property did not exceed $300, but this could not affect the prior law as to the disposition of the revenue from that source. So the act of 1882 makes a modification of the poll-tax, but such modification alone cannot affect its distribution.

In construing statutes the legislative intent, if clearly ascertainable, must of course govern; and if uncertain or ambiguous, then the probable intention, as near as it can be ascertained, should control judicial construction. In cases of this kind prior legislative enactments on the same subject, though repealed, are often resorted to in order to determine the probable legislative intent in a doubtful statute of a later date.

A case of this kind arose at an early day in Massachusetts. Prior to 1783 the statute of 4 William 3, c. 7, in regard to devises was in force as common law. During that year (1783) the legislature of that state passed an act on the subject of devises containing a repealing clause, as follows:

"All acts and laws so far as they relate to the devising any estate are repealed."

It was doubted whether the statute of 12 W. 3, c. 7, was within this repealing section, as all the provisions of that statute vest distributive shares in the cases there mentioned, where in fact there was a will. But on reference to the act of 1783, in which was the repealing clause, it was found to be entitled "An act prescribing the manner of devising lands, tenements and hereditaments," and that it re-enacted the provisions of the statute of 12 W. 3, c. 7, excepting the third section. It was held that the legislature intended to repeal the statute of William; and as the third section of that statute had not been re-enacted, it was further held that a marriage without issue was no longer as to the widow a revocation of a will made before marriage: Church v. Crocker, 3 Mass. 21.

On this subject, in Eaton v. Green, 39 Mass. 530–1, the court said:

"It is a familiar rule of construction where any section or clause of a statute is doubtful its meaning is to be ascertained, if may be, by taking into consideration the whole statute, and even the preamble, in order to discover the *probable* intention of the legislature. * * * The general system of legislation upon the subject-matter may be taken into consideration in order to aid the construction of a statute relating to the same subject, and all statutes *in pari materia, whether they be repealed or unrepealed,* may be considered with the same view."

This doctrine was affirmed in Holbrook v. Bliss, 91 Mass. 75, and quoted as authority in the late case of Ex parte Crow Dog in the United States supreme court. In Savings Bank v. Collector, 3 Wall. 495, it was decided that in interpreting a section of a statute which remains in force, resort may be had to a proviso in it, *though the proviso be repealed.*

In the light of these adjudications there can be no doubt that in the absence of any express provision in the revenue act of 1882, as to the disposition of the revenue arising from the poll-tax, a resort may be had to the act of 1872, to determine the probable intention of the legislature on the subject under the act of 1882.

The fact that in the latter revenue law there are express provisions as to the distribution of the revenue from all sources except the poll-tax, and none in regard to that tax, is a circumstance tending to show there was no intention to change the law as to the application of the poll-tax.

The repealing section of the act of 1882, above quoted, is somewhat peculiar. It contains two repealing clauses. One is: "All laws and parts of laws in conflict herewith are hereby repealed." If the repealing section ended there it would have left the provision of the

act of 1872, applying the poll-tax to the county school fund, in force beyond any doubt. The other and additional repealing clause is as follows: "And all laws and parts of laws heretofore in force regarding the raising of revenue from taxation or from license are by this act repealed."

A law is a rule of action prescribed by the legislature. A complicated revenue act like ours, prescribing as it does the modes of assessment, collection, paying over and the distribution of taxes by the various officers designated by law for the purpose, contains several separate and distinct rules of action, and in that sense the revenue act may be regarded as containing several separate and distinct laws. There is one law for the assessment of the property tax, another for the assessment of the poll-tax, several others for the various license taxes, another for the collection of taxes, others for the distribution of the tax moneys, and still others for the payment of the same to the respective county and territorial treasurers.

Repealing the laws or rules of action in regard to the various modes of raising revenue which relate alone to the assessment and collection of taxes does not of itself necessarily repeal the law or rule of action as to the distribution of the revenue after it has been raised.

It is quite clear that before the revenue arising from the poll-tax can be legally paid into the territorial treasury, it must be reasonably certain that by the act of 1882 it was the intention of the legislature, among other things, to change the application of the poll-tax from the county school fund to the territorial treasury. It is certainly very difficult to arrive at that conclusion from the legislation on the subject. The act of 1872, appropriated the poll-tax, whatever it might be, to the school fund exclusively and in the plainest and most explicit terms. By that act the policy of the territory on that particular subject was settled. And it is against the rules of statuory construction to consider a change as having been effected from vague implications. All the circumstances and the various provisions of the statutes *in pari materia* duly considered, I am of the opinion that there has been no legislative intention to change the law of distribution of the poll-tax, and that so much of the law of 1872 as appropriates the same to the county school fund is still in force.

BELL J., concurring. This case came to the supreme court upon a *pro-forma* judgment entered in the court below. The case was not there examined, it being understood that the question had been decided in another district, but that no appeal had been taken from that judgment, and it was desired that the question should be reviewed by this court.

After an examination of the authorities, in the light of the learned opinion of my associate judge, Bristol, I am fully in accord with the views he expresses, the judgment of the court below should be reversed, and the case sent back with instructions to enter judgment absolute for the plaintiff.

PEREA ET AL., Administrators, Etc., v. GALLEGOS.

January Term, 1884.

FRAUDULENT CONVEYANCE—RESULTING TRUST—DISMISSAL OF SUIT.—A voluntary conveyance from an insolvent debtor to his wife does not create the latter a trustee of the creditors of the former. Such conveyance may be set aside at the instance of the creditors on the ground of fraud. A bill in equity against such grantee to have her declared a trustee for the creditors, and for an accounting of the rents and profits of the land conveyed, should not be dismissed. An amendment to the prayer of such bill should be allowed, and the appropriate relief granted.

PROBATE COURTS—ACTIONS AGAINST ADMINISTRATOR.—Whether a probate court has jurisdiction of an action at law to recover a judgment against an administrator, and to enforce the same by execution, *quære.*

APPEAL from a judgment of the district court, entered in favor of the defendant. The opinion states the facts.

Catron & Thornton, for the appellants.

Breeden & Waldo, for the appellee.

BRISTOL, J. The record discloses the following facts: Jose Leandro Perea, now deceased, filed a bill in equity in the lower court, during his lifetime, against the appellee, Candelaria Montoya de Gallegos.

A summary statement of so many of the material facts alleged in the bill as are necessary to be considered is in effect: that in 1868 the appellee was married to and became the lawful wife of one Manuel Gallegos; that they lived together as man and wife until his death, which occurred about the year 1876; that for a long time prior to his death said Manuel Gallegos was insolvent and had not property sufficient to pay more than one-third of his indebtedness; that prior to his death and during such insolvency and while he was indebted to various creditors to the amount of about $30,000, among which creditors was said Jose Leandro Perea to the amount of about $4,000, the said Manuel Gallegos conveyed by deed to his said wife, now the appellee, certain pieces or parcels of real estate described in the bill; that said conveyance was executed without consideration, and for the purpose of covering up his property and defrauding his creditors; that at the date of the death of said Manuel Gallegos he was indebted to said Jose Leandro Perea to the amount of $10,809.40 on a judgment rendered by the probate court, and that the same is still due and unpaid; that the said Jose Manuel Gallegos left no estate out of which said indebtedness could be paid other than the real estate so as aforesaid conveyed to the appellee; that the appellee still holds and is possessed of said real estate under said conveyance and is utterly insolvent and unable to respond in damages for rents and profits. The prayer of the bill is that the appellee be declared a trustee and to hold the said real estate so conveyed to her, and the rents and profits thereof, in trust for the use and benefit of said Jose Leandro Perea until his said demand shall be fully paid off and discharged; that she be decreed to account for all rents, issues and profits by her received from said

real estate, to be applied toward such payment; that a receiver be appointed to take charge of said real estate with authority to lease, rent and manage the same, and receive the rents, issues and profits thereof, pending the litigation, and that said real estate be sold and the proceeds applied on and toward payment of the indebtedness so as aforesaid due and unpaid to said Jose Leandro Perea, etc.

A demurrer to the bill was interposed the specific grounds of which are follows:

1. "The judgment on which said complainant basis his right to bring said bill is not such a judgment as will support a bill of this nature.

2. "There is not shown any privity to exist between the said complainant and the said defendant by which any trust has been created or can attach as against said defendant.

3. "It does not appear from said bill that said complainant was in any way connected with the transaction by which defendant acquired the premises in question.

4. "It does not appear in said bill that there is any judgment or lien in favor of said complainant upon, or any estate or interest of any kind whatsoever in said premises in said complainant, by reason whereof any trust can be implied in favor of, or result to said complainant.

5. "It does not appear by said bill that the complainant ever acquired any lien upon the said real estate, or that he obtained any judgment upon his alleged demand in the lifetime of the said Jose Manuel Gallegos, so as to give him any rights in or upon said real estate."

At this stage of the proceedings, Jose Leandro Perea, the complainant, died, and upon his death being suggested, the now appellants, Jesus Maria Perea, Mariano Perea and Pedro Perea, as administrators of the estate of said Jose Leandro Perea, were substituted as complainants.

The demurrer was heard and sustained by the court below, and a decree entered dismissing the suit. The case is here on appeal from that decree.

The only questions that are necessary to consider, are whether upon this demurrer the suit ought to have been dismissed absolutely so as to constitute a bar to any future proceeding in equity for relief on the statement of facts contained in the bill; whether the appellees ought to have had leave to amend the prayer of their bill upon the demurrer being sustained and in case of dismissal, whether it ought not at least to have been "without prejudice."

The facts alleged in the bill, if true, and the demurrer admits them to be true, clearly entitle the appellants to equitable relief, though perhaps not in the mode indicated in the prayer of the bill.

It would not, under the circumstances, be equitable to turn the widow out and place a receiver in possession of the premises pending the determination of the suit. Neither can we see the propriety of treating the conveyance of the premises to the appellee, under the circumstances alleged in the bill, as creating a resulting trust in the

appellee for the benefit of the appellants. If the conveyance is fraudulent as against creditors, as the allegations of the bill, if true, seem to indicate, it would be proper for a court of equity to entertain a suit for the purpose of annulling the conveyance, as *against creditors*, on the ground of fraud, and decreeing a sale of the premises and applying the proceeds to the payment of debts contracted by Manuel Gallegos during his lifetime, provided it appears that there is no personal estate out of which to pay the same.

Probate courts have the undoubted right to pass upon and allow claims against the estates of deceased persons; but it is doubtful whether they have authority, or that the legislature under the organic act can confer on such courts the authority, to entertain actions at law to recover judgments against administrators in sums mentioned in the bill, and enforce the collection thereof by their own executions.

We are of the opinion that the decree rendered by the court below dismissing the suit *absolutely* ought to be reversed, and the cause remanded to the court below, with directions to grant leave to the appellants to amend the bill, and thereupon to proceed according to the regular course and practice in equity to a final decree, the parties to pay their own costs of the appeal respectively. And it is so ordered.

BELL, J., concurred.

STAAB ET AL. v. HERSCH.

January Term, 1884.

ATTACHMENT PROCEEDINGS, TRIAL OF ISSUES ON.—Under the statutes of this territory attachment proceedings are auxiliary to actions at law, but each is characterized by separate pleadings and a distinct practice. If on the trial of the issues alleged in the affidavit for an attachment a verdict is rendered for the defendant, the attachment is dissolved, but the action at law proceeds to final judgment, when the same is founded upon a matured demand. Where, however, the statute authorizes an attachment on demands not due, but fails to prescribe the mode of procedure to be followed in such cases, this court has authority to provide by rule what the practice shall be, so as to give effect to such attachment.

IN ATTACHMENT PROCEEDINGS ON DEMANDS NOT DUE, the only consistent mode of procedure is to treat such proceedings as separate and distinct from the action at law, and to go no further than to create an attachment lien in advance of the commencement of such action. The writ of attachment should contain a citation to the defendant to appear and answer the affidavit. The issues thus raised should be tried and the attachment lien dissolved or continued, according to the verdict of the jury. If sustained, the attachment would remain a subsisting lien on the property of the debtor, and upon the maturity of the demand a declaration might be filed and the defendant cited to plead thereto. If the plaintiff recovered judgment, then a writ of *venditione exponas* might be issued for the sale of the property attached, and the proceeds thereof applied to the satisfaction of the judgment.

APPEAL from a judgment of the district court for Santa Fe county, entered in favor of the plaintiffs. The opinion states the facts.

Gildersleeve & Knabel, for the appellant.

Breeden, Catron, Thornton & Clancy, for the appellees.

BRISTOL, J. The case is here by appeal from the district court of Santa Fe county. The record discloses the following facts:

On the 20th day of January, 1882, Zadoc Staab and Abraham Staab, as the members of a partnership, as Z. Staab & Bro., the appellees, filed in the court below their declaration in assumpsit against the appellant, Luis Hersch.

The declaration contains but one count, which is as follows: "For that whereas the said defendant heretofore, to wit, on the 16th day of January, A. D. 1882, at the county of Santa Fe, aforesaid, was justly indebted to the said plaintiffs in the sum of $545.67, for divers goods, wares and merchandise, by the said plaintiffs, before that time sold and delivered to the said defendant and at his special instance and request, and being so indebted he, the said defendant, in consideration thereof afterwards, to wit, on the day and year aforesaid, at the county of Santa Fe aforesaid, undertook and then and there faithfully promised the said plaintiffs to pay them the said sum of money above mentioned when he, the said defendant, should be thereunto afterward requested," etc.

The count then contains the usual allegation of non-payment and demands judgment. On the same day on which the declaration was filed the appellees filed an affidavit for an attachment, the affidavit being as follows:

"TERRITORY OF NEW MEXICO, } ss.
County of Santo Fe. }

"This day personally appeared before me, the undersigned clerk of the district court of aforesaid county, Abraham Staab, and, being duly sworn, says: That Luis Hersch is justly indebted to the said Abraham Staab and Zadoc Staab, doing business under the name of Staab & Bro., in the sum of five hundred and forty-five dollars and sixty-seven cents, after allowing all just credits and offsets, on account of goods, wares and merchandise sold and delivered. Said sum of money is not yet due and payable according to the contract of sale and delivery of the goods, but the sum of two hundred and eighty-six dollars and twenty cents will become due and payable on the first day of February next, and the whole of the residue thereof on the fifteenth of February, A. D. 1882; and that this affiant has good reason to believe, and does believe, that the said Luis Hersch is about fraudulently to dispose of his property or effects, so as to hinder, delay or defraud his creditors. ABRAHAM STAAB.

"Subscribed and sworn to before me this 20th day of January, 1882. F. W. CLANCY, Clerk."

On the 8th day of February, 1882, the appellant pleaded the general issue of *non assumpsit* to the declaration (but without concluding to the country).

On the 4th day of December, 1883, a jury was called in the court below to try the issues raised upon the affidavit for attachment. Upon the conclusion of the evidence, and while the jury were out considering their verdict, on the following day, the appellees moved the court to proceed to the trial of the cause on the issue raised by

the plea of *non assumpsit* to the declaration. This was objected to on behalf of appellant, on the ground that such trial was premature and could not properly be proceeded in until the determination of the issues as to the truth of the affidavit for attachment; and upon the further ground that it appeared on the record of the attachment proceedings that the action was brought to recover demands before they were due and payable.

Each of these objections being overruled, exceptions were duly taken. A trial thereupon was then had. A sale of the goods, wares and merchandise as alleged in the declaration was established, except as to the time of payment, the appellees admitting on the trial that, under the contract of sale, a credit was given until some time in February, 1882. Upon this condition of the evidence appellant moved for a nonsuit, on the grounds that the attachment issue had not yet been disposed of; that the trial of the main issue was premature; and that it appeared from the plaintiff's own evidence that no part of the claims sued on was due or payable when the action was commenced.

This motion was overruled and an exception taken. The appellant then, on substantially the same grounds, moved the court to instruct the jury to find for the defendant.

This motion was overruled and an exception taken. The court thereupon instructed the jury to find for the plaintiffs, to which instruction the appellant excepted. The jury brought in a verdict for appellees in the sum of $561.04, and judgment was rendered thereon for that sum and costs. Thereafter the jury in the attachment proceeding came in and announced their disagreement, and without finding a verdict were discharged.

The questions raised in this court are upon the exceptions taken in the court below. As the law now stands in this territory, attachment proceedings are auxiliary to actions at law, but each is characterized by separate pleading and a distinct practice.

The affidavit for an attachment has never been considered sufficient as a declaration under our practice. This common-law declaration must be responded to by a common-law plea in order to raise an issue. If the defendant desires to raise an issue on the affidavit for an attachment, he must do so by a specific denial of some material fact or facts contained in the affidavit, instead of pleading by a general denial, the statute on the subject being as follows:

"In all cases where property or effects shall be attached, the defendant may, at the court to which the writ is returnable, put in his answer without oath, denying the truth of any material fact contained in the affidavit, to which the plaintiff may reply; a trial of the truth of the affidavit shall be had at the same term, and on such trial the plaintiff shall be held to prove the existence of the facts set forth in the affidavit as the ground of the attachment:" Prince's Stats. 139, sec. 16.

In 1874 an act was passed containing, among others, the following provision:

"In all cases hereafter commenced by attachment in which the truth of the affidavit for attachment or of any material allegation therein contained shall be denied, and the issue thus formed shall upon the trial be found for the defendant, the attachment shall be dismissed, and all property rights, effects and credits held or affected thereby or thereunder shall be released and discharged from the operation thereof, *but the dismissal of the attachment shall not abate the suit, but the same shall proceed as in ordinary cases:*" Id. 143, sec. 38.

This statute removes all doubt as to the mode of procedure on matured money demands; a common-law action may be commenced, attended with common-law pleadings and practice; and, simultaneously, proceedings by attachment auxiliary thereto may be instituted and attended with statutory pleadings.

If, on trial of the issues as to the grounds of the attachment alleged in the affidavit a verdict is rendered for the defendant, the attachment is dissolved, but the action at law proceeds to final judgment.

But what should be the mode of procedure in case of an attachment on demands not due?

The only provision of statute on this question is as follows: "An attachment may be issued on a demand not yet due in any case where an attachment is authorized in the same manner as upon demands already due": Id. 143, sec. 37, subd. 3. All the other provisions of the statute on the subject of attachment relate to demands due at the institution of the proceedings. Can this statute, thus injected into attachment proceedings, be construed as authorizing by implication an action at law to be commenced before demands are due for the purpose of obtaining judgment thereon after they become due? The statute is silent as to the mode of procedure in a contingency of this kind. Attachment proceedings being in derogation of the common law, must be construed strictly; nothing can be inferred. If an action be commenced on demands not due, when should the defendant be cited to appear and plead to the declaration?

It cannot be inferred from this brief statute that he must interpose his defence, if he has any, before he can be called on to pay the demand. There being no statute regulations on the subject, this court, no doubt, has authority to prescribe, by rule, what the practice may be, so as to give effect to attachments covering demands not due, without in the least changing the practice in actions at law to recover judgment on the same demands.

The sole object of an attachment is to create a prior lien on the property of the attachment debtor as security on any judgment that may thereafter be obtained against him on the demands covered by the attachment.

When this extraordinary remedy is resorted to covering demands not due, and especially where long credits are given, and the grounds of the attachment are traversed, a speedy determination of that issue becomes of the greatest importance; but it is evident that the main issue on the indebtedness cannot be raised, nor any defense

interposed until the maturity of the demand sued on, except to show that no such demand exists on which an attachment will lie.

Under our common-law pleadings and practice, the only consistent mode of procedure in cases of this kind would be to treat the attachment proceedings on debts not due as separate and distinct from any action at law to recover judgment thereon, and to go no further than to create an attachment lien in advance of the commencement of such action; the writ of attachment to contain a citation to the defendant to appear and answer the affidavit, the issues, if any, thus raised in the attachment proceedings to be speedily tried and the attachment lien dissolved or continued, according to the verdict of the jury for or against the defendant; if sustained, the attachment to remain a subsisting lien on the property of the debtor, and upon the maturity of the demand a declaration to be filed and the defendant cited to plead thereto; if the plaintiff recover judgment, then a writ of *venditione exponas* to be issued for the sale of the property attached, and the proceeds applied to the satisfaction of the judgment.

The record in this case discloses the fact that, in addition to the affidavit for an attachment covering demands not due, a common-law declaration was at the same time filed containing a single count for goods, wares and merchandise sold and delivered, etc., and a *promise* on the part of the defendant *to pay on demand*. The defendant pleaded that he did not so promise. On the issue thus raised the parties went to trial, resulting in a verdict and judgment for the plaintiffs.

The commencement of the action was the plaintiffs' demand for payment; and, if the count in the declaration were true, the demand at once became due and payable. But the plaintiffs on the trial admitted that the demand at the time mentioned in the declaration was not due and payable, and did not become due for some time thereafter, under the express contract of sale and delivery of the goods. This was conclusive upon the plaintiffs, and left them without any evidence to support their count in the declaration. The count was not true, and the plea of *non assumpsit* was sustained by the evidence.

As to the attachment, the indebtedness alleged in the affidavit does not correspond with that specified in the declaration. In the affidavit it consists of two demands, due at different specified future dates, while the declaration is upon a single demand due and payable on demand.

The plea of the declaration of *non assumpsit* does not conclude to the country, and technically no issue was tendered thereby. The parties having appeared generally in all the proceedings in the court below, and as irregularities have been committed on either side, we are of the opinion, not only that the judgment below ought to be reversed, but that the cause should also be remanded to the court below, with directions to grant leave to the plaintiffs to file a new declaration in accordance with this opinion, and thereupon to proceed by due course of law and practice to final judgment.

And it is so ordered.

BELL, J., concurred.

SUPREME COURT OF UTAH.

THOMPSON v. JACOBS ET AL.

Filed February 24, 1883.

WORK ON MINING CLAIM, WHEN MAY BE DONE.—Prior to the act of congress of May 10, 1872, there was no law of congress requiring annual labor to be done on mining claims in order to hold them. When that act speaks of the amount of work to be performed or improvements to be made each year, it means each year from and after its passage. Consequently, work done on a mining claim prior to May 10, 1872, cannot be considered the first, or any part of the first, annual expenditure required by that act, and the several amendments thereto.

APPEAL from a judgment of the second district court, entered in favor of the plaintiff. The opinion states the facts.

P. Denny and *J. G. Sutherland*, for the appellants.

Marshall & Royle, for the respondent.

EMERSON, J. The respondent brought ejectment against the appellants to recover a mining claim called by him the Forest Queen. By consent the case was tried by the court without a jury. Upon the findings of fact and conclusions of law found and filed by the court, a judgment was entered in favor of the respondent, from which the appellants appeal, claiming that upon the facts found, they are entitled to judgment.

The record in the case was not printed, but the briefs of counsel contain all the findings necessary for the purpose of this review, and are as follows:

1. That on the first day of January, 1875, Edward W. Thompson, the plaintiff, entered upon a piece of ground in the Lincoln mining district, in the county of Beaver and territory of Utah, and located the Forest Queen mine, the premises described and claimed by the plaintiff in his complaint, by erecting a monument of stakes and stones at each corner of the location, and one at each end of the center line, and also a center monument, and placed on each a copy of the location notice, and marked each monument so as to indicate which or what monument it was, and within twenty days thereafter filed said notice for record in the office of the recorder of the Lincoln mining district, as required by the by-laws of said mining district.

* * * * * * * * *

7. That in each of the years 1880 and 1881, the defendants caused at least one hundred dollars' worth of annual work to be done on the mine.

8. That upon the twenty-third day of March, 1871, the Grundy claim or lode was located; that on the twenty-ninth day of May, 1871, the Hudson claim or lode was located; on the twenty-eighth day of August, 1871, the Elizabeth claim or lode was located; and the location notices of these *three* claims were filed for record

within the time, and were recorded in the time required by the by-laws of the Lincoln mining district, and that said locations were valid.

9. That the Homestake mine includes within its limits, and is a re-location of the Forest Queen, and the Forest Queen includes within its limits the Grundy, Hudson and Elizabeth lodes or claims.

10. That upon the Elizabeth lode the work and labor required to be done, in order to hold and secure a claim or lode by or under the by-laws of the Lincoln mining district within sixty days from and after the filing of the location notice for record, to wit, " for each claim of two hundred feet there shall be sunk a shaft or tunnel not less than two feet in depth; said shaft shall contain not less than twenty square feet, surface measurement," was done.

11. That within sixty days of the time of filing the location notices of the Grundy and Hudson lodes for record, the work and labor required to be performed thereon by the by-laws as aforesaid, was done upon each of said lodes or claims by the locators thereof, or their assignees.

12. That the labor performed and improvements made upon the Grundy by its locators or their assigns after the location thereof, and before the first day of January, 1875, were worth and were of the value of two hundred dollars.

13. That the labor performed and the improvements made upon the Hudson by the locators thereof and their assigns, after the location thereof and before the first day of January, 1875, were worth and of the value of one hundred and fifty dollars.

14. That the labor performed and improvements made on the Elizabeth claim by the locators thereof and their assigns, after the location thereof and before the first day of January, 1875, was of the value of fifty dollars.

15. That the Grundy, Hudson and Elizabeth lodes or ledges were each of one thousand feet in length along the vein.

16. That there was not upon either the Grundy, Hudson, or Elizabeth lodes or ledges ten dollars' worth of labor performed or improvements made for each one hundred feet in length of said respective lodes or claims, after the tenth day of May, 1872, and before the first day of January, 1875, as required by section. 2324 of the revised statutes of the United States (2d edition of 1878), and the act of congress, approved June 6th, 1874, entitled "An act to promote the development of the mining resources of the United States," passed May 10th, 1872, and that the original locators of the Grundy, Hudson and Elizabeth lodes, or their heirs, assigns or legal representatives, did not on the first day of January, 1875, or at any time for several months prior thereto, do, or try to do, any work or labor upon either of said lodes or ledges.

17. That the discovery shaft and center monuments of both the Homestake and Forest Queen mines or locations were upon the Grundy claim.

The only question upon this appeal is whether work done on a mining claim prior to May 10th, 1872, can be considered the first,

or any part of the first, annual expenditure required by that act and the several amendments thereto.

Prior to the act of May 10th, 1872, there was no law of congress requiring annual labor to be done on mining claims in order to hold them. When, therefore, that act speaks of the amount of work to be performed or improvements made each year, it means each year from and after its passage. By the several amendments of March 1st, 1873, and June 6th, 1874, the time for making the first annual expenditure under the act of May 10th, 1872, was extended to January 1st, 1875.

The required amount of expenditure in labor or improvements not having been expended on either of the three mining claims mentioned in the findings at any time between the tenth day of May, 1872, and January 1st, 1875, they became relocatable on the last-named day.

The judgment of the court below is affirmed.

HUNTER, C. J., and TWISS, J., concurred.

PARLEY'S PARK SILVER MINING COMPANY *v.* KERR.

Filed February 24, 1883.

VOIDABLE PATENT TO MINING CLAIM, ATTACK ON.—A patent from the United States to a mining claim may be avoided in equity for fraud, mistake or misrepresentation practiced upon the government. The validity of such patent, however, cannot be questioned unless the facts constituting the fraud, mistake or misrepresentation are stated in the findings. Whether the United States government is a necessary party to an action to set aside a patent on such grounds, *quere.*

APPEAL from a judgment of the first district court, entered in favor of defendants.

The complaint in this action contains the following allegations: That the plaintiff is a New York corporation; that it is the owner, subject only to the paramount title of the United States, and in the possession of the Central and Lady of the Lake mining claims, particularly describing them by metes and bounds; that the defendant claims some interest or estate in said premises, or some part thereof, adverse to said plaintiff; but said claim of said defendant, as said plaintiff avers on information and belief, is without any legal or equitable foundation, and void; that the same is a cloud on said plaintiff's title, and an injury and damage to said plaintiff; that said plaintiff is greatly embarrassed in the use and disposition of its said mining claim, and they are greatly depreciated in value by reason of said adverse claim; that said defendant has not any estate, right, title, or interest whatever in or to said land and premises or any part thereof.

The complaint concludes with the following prayer:

1. That the defendant may be required to set forth the nature of his claim, and that all adverse claims of the defendant may be determined by a decree of this court.

2. That by said decree it be declared that the defendant has no estate or interest whatever in or to said land and premises; and that the title of said plaintiff is good and valid.

3. That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land or premises adverse to the plaintiff; and for such further and other relief as to this court shall seem meet and agreeable to equity, and for plaintiff's costs of suit.

The defendant, in his answer, denies that the plaintiff is the owner, or in possession, of either of the mining claims mentioned, and that the plaintiff has ever owned, or now owns, or has ever been, or now is, in the possession of such portions of the premises described in the complaint, and therein called the Central and Lady of the Lake mining claims, as are embraced in the Clara mining claim, a claim owned by the defendant; and admits that the defendant claims an estate and interest adverse to the claim of the plaintiff in so much of the premises described in the complaint as is embraced in the said Clara mining claim, and denies that he has made, or makes, any claim to, or claims any estate or interest in, the premises described by the complaint, excepting only that portion thereof embraced in the Clara mining claim, as the same is therein described; and alleges that before the commencement of this action he was, and still is, the owner in fee under a patent from the United States, and in the possession of the Clara mining claim, particularly describing it, from which it appears that there is a surface conflict between the Clara and both claims of the plaintiff. The answer concludes with the prayer that plaintiff's complaint may be dismissed, and all relief thereby prayed for be denied, and for costs, and for such other relief as may be proper.

The case was tried upon the following stipulation of facts, and no oral testimony was offered or taken in the case:

STIPULATION OF FACTS.

Facts agreed to and considered as if fully proved by plaintiff:

1. The Central mining claim was located August 19th, 1876, and exhibit "I" is a correct copy of the location notice.

2. The said mining claim was originally surveyed for application for patent August 2d, 1880, and application for patent soon after made by the plaintiff or its grantor. In such application there was omitted from the Central mining claim the area in conflict with the Lady of the Lake mining claim, and the application was for 3.89 acres of surface ground, colored on exhibit "3."

3. The Lady of the Lake mining claim was located July 25th, 1875, and exhibit "2" is a correct copy of the location notice.

4. Said Lady of the Lake mining claim was officially surveyed for application of patent on the 8th day of July, 1876.

5. Said mining claims and the Clara mining claim are correctly represented on the annexed or accompanying map, marked exhibit "3."

6. The Central mining claim and the Lady of the Lake mining claim, at the commencement of this action were, and still are, the property of and owned by the plaintiff, to the extent that the locators and their grantees could convey and give the title to the same, the plaintiff having succeeded to such interest as said locators and their grantees could grant. There was no actual possession of the conflict and disputed areas at the commencement of the action. But the plaintiff had possession, in accordance with mining laws and customs, of other parts of the Central and Lady of the Lake mining claims, and by virtue of such possession was also in possession of the conflict areas, if such conflict areas are rightfully a part of the Lady of the Lake and Central mining claims, and not the property of the defendant under his patent for the Clara mining claim. That the plaintiff and its grantors have done the work required by law, from year to year, to the commencement of this action, on the said Lady of the Lake and Central mining claims respectively.

7. The annexed copy (printed) of the by-laws of the Blue Ledge mining district, in which the premises in question are, and during all the time mentioned in this stipulation have been situated, is correct, and correctly states and shows the by-laws passed and adopted in said district, and all of them, and the dates when the same were adopted.

Facts agreed to, and considered as if fully proved by the defendant:

1. The Clara mining claim was located June 28th, 1872, and exhibit "A," annexed, is a correct copy of the location notice.

2. Said mining claim was officially surveyed for application for patent March 31st, 1876.

3. Application for patent under said notice and survey was made in the United States land office at Salt Lake City, Utah, April 28th, 1876; the application included an application for the Clara mill site.

4. The Clara mining claim was entered and paid for at said office February 20th, 1879.

5. The patent for the Clara mining claim was granted on the 6th day of February, 1880, under said application and on said entry, to the defendant, who had succeeded to the interest of the locators and their grantees, and the said claim as patented is correctly shown on plaintiff's exhibit "3." A copy of the patent may be annexed and made a part of the case, in this court, or on any appeal.

6. On the 27th day of June, 1876, and during the sixty days' publication of the notice of application for patent for the Clara mining claim and mill site, the owners of the Lake mining claim filed in the United States land office an adverse claim against said application for patent, and thereby made an adverse claim to the areas in conflict between the Lady of the Lake mining claim and the Clara mining claim and Clara mill site.

On the 25th day of July, 1876, agreements in writing were made between the owner of the Lady of the Lake mining claim and the

applicants for patent for the Clara mining claim and mill site, as follows: An agreement whereby the owners of the Clara mill site relinquished their application for patent for so much thereof as conflicted with the Lady of the Lake mining claim; and the owners of the Lady of the Lake mining claim agreed in consideration thereof to prosecute their application for patent for said claim with diligence, and when patent was obtained, to convey to the owners of said mill site, or their assignees, the area in conflict between said mill site and said Lady of the Lake mining claim, excepting and reserving, however, to the owners of the Lady of the Lake mining claim any mineral vein or veins under the surface of said conflict area, and also the right to mine and extract any minerals therein. And the owners of the Clara mining claim agreed not to protest the application for patent for the Lady of the Lake mining claim; and at the same time, the owners of the Lady of the Lake mining claim, as part of same agreement, made and delivered to the applicants for patent for the Clara mining claim, and also filed in the United States land office a written withdrawal, relinquishing their said protest and adverse claim against the application for patent for the Clara mining claim, and released to the United States and their grantees the lands and premises in conflict between the said Clara and the Lady of the Lake mining claims, the said conflict area containing forty one-hundredths of an acre, more or less.

7. That on the 4th day of May, 1872, it was known to the miners of the Blue Ledge mining district that an act of Congress relating to the location and extent of mining claims upon mineral lands of the United States had passed, or was about to be passed.

8. The premises in dispute being the conflict area between the Clara mining claim and the Lady of the Lake and Central mining claims, are of the value of more than one thousand dollars, and the area in conflict between the Central and Clara mining claims is of the value of more than one thousand dollars.

It is stipulated that the foregoing are all the facts in the case, and the case may be heard and determined therein, or on such of them as the court may hold material and admissible in evidence; each party reserving the right to object to the materiality and competency of any of said facts, as fully as he or it could do if proof thereof was offered at the hearing.

And the defendant now objects to the competency and admissibility of item seven in the plaintiff's facts, and any other facts or evidence offered with a view to attack or impeach the validity of the Clara patent, on the ground that these are not the proper parties to the action, or any foundation laid in the pleadings, or any legal or equitable ground set forth in the complaint to justify an impeachment of the patent title.

The court made and filed the following findings:

This action having been heretofore submitted to the court on the pleadings, stipulation of the parties as to the facts, and the argument of counsel; Messrs. Sutherland & McBride appearing as coun-

sel for the plaintiff, and Burnett, Harkness and Kirkpatrick as counsel for defendant; and the cause having been duly considered, the following findings of fact and conclusions of law are now made, to wit:

It is found that the facts are as stipulated by the respective parties in the stipulation now filed, and the exhibits thereto attached, and said stipulation as to facts is adopted by the court as a finding of facts. And as conclusions of law, it is found that the defendant owns and is entitled to the possession of the area in conflict between the Clara mining claim and the Central and Lady of the Lake mining claims, and that the plaintiff at the time of the commencement of the action did not own, and was not entitled to the possession of said conflict area, or any part thereof. That the defendant is entitled to judgment in accordance with these findings, and dismissing the plaintiff's action on the merits, and for costs of suit.

Judgment entered accordingly, from which plaintiff appeals.

Sutherland & McBride, for the appellant.

Burnett, Harkness & Kirkpatrick, for the respondent.

EMERSON, J. This is an action under the 254th section of the practice act. The complaint is in the most general terms, and simply avers that the respondent claims some estate or interest in the premises in controversy, or some part thereof, adverse to the appellant, which interest or claim, it is averred, on information and belief, is without any legal or equitable foundation and void, and that it is a cloud upon the title, etc., the usual formal allegation. The respondent pleads, and the agreed facts show, a patent to him from the United States, including the ground in controversy. In view of the facts set out in the agreed statement, the most that can be said as against this patent is that it is voidable, and not void.

Passing by the question whether an action can be maintained to set aside a voidable patent granted by the United States without making it a party, this complaint is insufficient to authorize the admission of evidence attacking the validity of the patent or to sustain a judgment or decree of the court annulling it. Such a decree would not be in accordance with any specific relief demanded by the appellant, and could not be included in the general clause for relief under the 149th section of the practice act, as it would not be consistent with the case made by the complainant, or embraced in the issues. Counsel for appellant say, in their brief, that "the object of the suit is to have an adverse claim annulled." The adverse claim is shown to be based upon a patent title from the government. No objection is made that the patent is void upon its face, or otherwise informal. The government certainly had the title; the patent is not unauthorized or prohibited by any law, and is between competent parties, and is voidable only in equity for some mistake, fraud or misrepresentation practiced upon the government: Kahn v. Old Telegraph M. Co., 2 Utah, 174. Granting that this may be done without making the party defrauded, the government, a party to the

action, the acts of fraud, misrepresentation, and the like, must be specified in the complaint, or it will not state facts sufficient to constitute a cause of action: Semple v. Hagar, 27 Cal. 183. As the members of the court are not prepared to pass upon the remaining point raised on this appeal, and as the one discussed is decisive of the case, the judgment of the lower court dismissing the action is affirmed.

HUNTER, C. J., and TWISS, J., concurred.

LOGAN CITY v. BUCK.

Filed July 26, 1883.

PROHIBITION OF SALE OF LIQUORS—CONSTRUCTION OF ORDINANCE.—The provision of the city charter of Logan City granting power to the city council by ordinance to "license, regulate, prohibit or restrain" certain persons, places and business, but which fails to state what acts may be licensed, regulated, prohibited or restrained, does not authorize the passage of an ordinance prohibiting all persons form selling, manufacturing, giving away or disposing of any spirituous liquors.

APPEAL from a judgment of the district court, entered in favor of the plaintiff. The opinion states the facts.

W. H. Dickson, for the appellant.

Sheeks & Rawlins, for the respondent.

TWISS, J. The proceedings in this case were instituted before a justice of the peace upon affidavit duly filed charging that the defendant on the "twenty-first day of July, 1882," within the corporate limits of Logan City unlawfully did sell and dispose of intoxicating liquors to the affiant, to wit, two drinks of whisky, for the sum or price of twenty-five cents, contrary to the provisions of an ordinance of said city prohibiting the manufacture and disposal of liquors, passed January 13th, 1879. There was judgment against the defendant, who appealed to the district court, where the defendant demurred to the affidavit or complaint, alleging as grounds of demurrer "that said complaint does not state facts sufficient to constitute an offense against any valid ordinance of Logan City; that the court has not jurisdiction to try said action." The demurrer being overruled, the defendant pleaded not guilty. Upon trial the plaintiff offered in evidence an ordinance of Logan City, to which the defendant objected, stating as grounds of objection that said ordinance and all parts thereof were incompetent, irrelevant and immaterial, for the reason that it was in conflict with the policy of the laws of the territory of Utah; that the city council of Logan City had no power or authority under the charter of said city to pass said ordinance, and that it was contrary to the laws and policy of the United States. The district court overruled the objections and allowed the ordinance to be received in evidence. There was a verdict of guilty and judgment thereon, a motion for a new trial was filed and overruled and appeal taken to this court.

The provisions of the city charter of the plaintiff, under or by virtue of which it is claimed the plaintiff was authorized to pass the ordinance alleged to have been violated by the defendant, are as follows: "The city council shall have power by ordinance" (section 31) "to license, regulate, prohibit or restrain the manufacturers, sellers or vendors of spirituous or fermented liquors, tavern-keepers, dram or tippling shop keepers, boarding, victualing or coffee houses, restaurants, saloons or other houses, or places for the selling or giving away of vinous or other liquors, whether ardent, vinous or fermented."

The provisions of the ordinance material to this case are: "It shall be unlawful for any person or persons to manufacture, sell or give away, or dispose of in any manner, any spirituous, vinous or fermented liquors or intoxicating drink within the corporate limits of Logan City."

The ordinance imposed as a penalty for its violation a fine and imprisonment.

The material question before us is, had the plaintiff, under the above-cited statutory provision, authority to pass this ordinance? Was the ordinance valid? Raising no question as to the power of the territorial legislature to authorize cities by grant of charter power to prohibit the sale of intoxicating liquors in their respective corporate limits, we proceed to the question, was such power granted to the plaintiff, or to its city council?

Cities are the creatures of the legislative will, and are created by express legislative enactment for the purpose mainly that the people within their territorial limits may thereby be enabled for their own interest and advantage to administer their local or internal concerns, or, in other words, that they may have the power of local self-government. The interests committed to the municipalities are numerous and complex and constitute an important element in our republican form of government. They possess and can exercise no power not conferred upon them. They have no original or inherent right of legislation, like the legislature of a state, but their authority is delegated and is limited by the terms of their organic laws, and to such acts as are necessary to enable them to carry into effect such powers as are expressly granted, and the objects and purposes of their creation: City of Lafayette v. Cox, 5 Ind. 38; Boothe v. Town of Woodbury, 32 Conn. 118.

Mr. Dillon in his work on municipal corporations, sec. 89, very clearly states the law as follows. He says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no other:

"1. Those granted in express words.

"2. Those necessary or fairly implied in or incident to the powers expressly granted.

"3. Those essential to the declared object and purposes of the corporation—not simply convenient, but indispensable. Any fair reasonable doubt concerning the existence of power is rendered

by the courts against the corporation and the power is denied. Of every municipality the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, nor make any contract, nor incur any liability, not authorized thereby. All acts beyond the scope of the power granted are void."

This doctrine is sustained by many authorities, among which are Minturn v. Minturn, 23 How. 435; Cass County v. McCree, 95 Ill. 286; Marian v. Moody's Exrs., 25 Iowa, 163; Thomson v. Lee County, 3 Wall. 327.

Although city ordinances must conform strictly to the statutes authorizing them, and no power is deemed to be granted except such as are within these rules, yet when the statute without ambiguity, with a clearness near to certainty, grants a power, it is not within the province of the courts to limit an ordinance within the power. The affidavit of complaint does not expressly allege that the defendant at the time he sold the whisky therein mentioned was of any one of the several classes of persons or was a keeper of any one of the several kinds of places named in the statute, but giving to the plaintiff's cause the benefit of the presumption that he was, and assuming, as we must, that the ordinance is not valid unless authorized by the statute, we will consider the section relied upon by the plaintiff for the purpose of determining the question of the case.

Undoubtedly the statute authorizes the city council by ordinance to license, or regulate, or restrain the persons, business and places therein named, but the grant of power to license, regulate and restrain is not a power authorizing prohibition. Power for the latter should at least be as clearly expressed as for the former purpose, and in both cases it must be reasonably free from doubt and ambiguity. Is the power to prohibit thus stated in the statute? I am of the opinion that it is not. If it is there, in what words or terms is it to be found, and what can an ordinance under it prohibit? I do not find in it words granting power to the city council to prohibit "the manufacturers, sellers or vendors of spirituous or fermented liquors" from manufacturing, selling or vending spirituous or fermented liquors. If the statute by force of construction is to be thus read and understood, we must interpolate words expressing a power not found in the language used. This we cannot do. If the word "prohibit" is to be applied to the several classes of persons, business and places named in the statute and the necessary words supplied to express clearly a power to prohibit the manufacturing, selling or vending of spirituous, fermented, ardent or vinous liquors by the persons and at the places therein named, a new section would have to be written, so different in terms and phraseology as to have but little resemblance to the one now under consideration.

Being of the opinion that the statute in question, if it does not utterly fail as a grant of power authorizing prohibition, is so obscure in terms as not only to admit of reasonable doubt as to the power, but to force it upon the mind, notwithstanding a desire to give to the ordinance every reasonable intendment in its favor, there is no

avoiding the conclusion that the district court erred in admitting as evidence the ordinance of the city, plaintiff, a violation of which, by the defendant, is the alleged cause of action against him.

There are other assignments of error, but as the decision of this question is decisive of the case, expression of opinion upon the others is unnecessary.

The judgment of the district court is reversed and the case remanded.

HUNTER, C. J., concurred. EMERSON, J., dissented.

PEOPLE *v.* REESE ET AL.

Filed January 15, 1884.

QUALIFICATION OF JUROR, CITIZENSHIP OF.—A juror must be a citizen of the United States. If he is not, a want of such qualification vitiates a verdict of conviction, where there has been no negligence or want of watchfulness on the part of the defendant in failing to discover the disqualification.

WAIVER OF QUALIFICATION.—Where a juror, in answer to a question put to him under the direction of the court, says he is a citizen of the United States, the defendant, if he has no reason to doubt the truthfulness of such statement, may examine such juror as to his other qualifications, without reference to his qualification of citizenship, and if it afterward appears that the juror was not a citizen, the objection to him on such ground will not be waived by failing to examine him as to his qualification in that respect.

APPEAL from a judgment of the district court, entered upon a verdict convicting the defendant of housebreaking. The opinion states the facts.

J. S. Boreman, for the appellant.

Z. Snow, for the respondent.

TWISS, J. The indictment in this case charges the defendant, Ellis Reese, and four others with the crime of housebreaking. Upon the trial there was a verdict of guilty.

The defendant filed a motion for a new trial based upon several grounds, one of which was that Joseph S. Morris, one of the jury before which the defendants were tried, was not a citizen of the United States. The affidavit in support of the motion also stated that neither of the defendants knew or had reason to believe that Morris was not a citizen, until after the verdict. These statements were not denied by the prosecution, but were admitted to be true. The juror upon his examination, under oath as to his qualifications, said he was a citizen of the United States. The motion for a new trial was overruled, and judgment was rendered on the verdict.

The defendants appealed to this court. The only question before us is, did the court below err in overruling the motion?

The act of congress approved June 23d, 1874, commonly known as the Poland bill, provides that the clerk of the district court in each judicial district, and the judge of probate of the county in which the district court is next to be holden, shall prepare a jury

list of two hundred names, citizens of the United States, from which grand and petit jurors shall be drawn. The criminal procedure act of the territory provides that "every male citizen of the United States is an eligible juror, who is over twenty-one years of age," and possesses certain other qualifications specifically stated. The jurors being drawn from this list prepared, in the light of these two statutory provisions a defendant may reasonably presume that the names of none but citizens of the United States are upon it, and we are of the opinion that when a man presents himself in court in obedience to a summons requiring him to appear as a juror, and in answer to a question put to him under the direction of the court as to his qualifications as a juror, says he is a citizen of the United States, and the defendant in a criminal cause charged with a felony has no reason to doubt the truthfulness of such statement, such defendant may examine such juror as to his qualifications under the territorial statutes without further reference to the primal or fundamental qualification of citizenship, although after the verdict he may learn that the juror was mistaken in his statement, and that in fact he was not a citizen and not thereby waive his right to a trial by a constitutional jury of twelve men possessing the qualifications of citizenship: Hill v. People, 16 Mich. 851; Quinn v. Halbert, 52 Vt. 365.

As there was not only no intention to waive this qualification, but no negligence or want of watchfulness on the part of the defendant which ordinarily would make a waiver of a right, we cannot hold that the facts in this case are such as should deprive the defendant of this important constitutional right.

The court is therefore of the opinion that the motion for a new trial ought to have been sustained and a new trial granted, that the judgment of the district court be reversed, the case remanded and a new trial ordered.

HUNTER, C. J., and EMERSON, J., concurred.

SALT LAKE CITY v. HOLLISTER.

Filed February 8, 1883.

MUNICIPAL CORPORATION, LIABILITY OF FOR GALLON TAX ON DISTILLED SPIRITS.—A municipal corporation is liable to the United States for the amount of the gallon tax upon spirits distilled with its funds, by its officers and legally constituted agents, acting for and in its name, when such spirits are sold and disposed of without paying the duties thereon, and the proceeds thereof are paid to, received and appropriated by the city, although all of such acts were unauthorized by the city's charter, and a part of them were in violation of acts of congress.

MONEY PAID UNDER PROTEST BY SUCH CITY IN SATISFACTION OF SUCH DUTIES cannot be recovered back.

APPEAL from a judgment of the district court entered in favor of the defendant. The opinion states the facts.

TWISS, J. The complaint alleges that the plaintiff is a municipality incorporated by a public act of the territorial legislature in 1850, and since then has continuously acted as such; the defendant is the United States collector of internal revenue for the district of Utah territory; that in June, 1876, the United States commissioner of internal revenue erroneously set down and assessed against the plaintiff a special tax of $10,760 upon spirits alleged to have been distilled by the plaintiff between the 2d day of March, 1867, and the 26th day of August, 1878, and not deposited in the bonded warehouse of the United States as required by law; that said tax list was placed in the hands of the defendant for collection, who demanded of the plaintiff the payment of said tax, and threatened that unless the same were paid he would seize upon and sell at public auction sufficient of the property of the plaintiff to pay said special tax, with interest and penalty; that on the 14th day of August, 1877, while the defendant so threatened, and was about to seize upon and sell the property as aforesaid, the plaintiff, protesting against payment of said tax or claim by defendant, notified the defendant that suit would be brought against him to recover the same, and that the plaintiff might not be dispossessed of its property by the defendant, paid to the defendant the amount of said tax claimed by him, amounting, with interest thereon, to $12,051.75; that the plaintiff appealed to the commissioner of internal revenue, praying that the tax be abated; that the sum so paid to defendant by plaintiff be refunded; that the commissioner has failed to render any decision on the appeal and prayer of the plaintiffs, or to cause said sum of money, or any part thereof, to be refunded or restored to the plaintiff, and prays judgment for the amount so paid to the defendant, with interest thereon.

The answer admits the municipal character of the plaintiff, the setting down and assessing a tax against the plaintiff upon spirits distilled by the plaintiff during the time and not deposited in the bonded warehouse of the United States, as alleged and set forth in the complaint; and alleges that a list containing the said gallon tax assessed by the commissioner of internal revenue of the United States was placed in the hands of defendant for collection, and avers that it thereby became and was his duty to collect the same; denies that the tax was illegally or erroneously set down or assessed against the plaintiff by the commissioner, and avers that the plaintiff, during all the time between March 2, 1867, and the 26th day of August, 1878, was actually engaged in distilling, producing and dealing in, as a distiller, the spirits so assessed as aforesaid, and received and appropriated the benefit arising therefrom; that the assessment of the gallon tax was made upon distilled spirits actually produced and distilled by the plaintiff, and upon which there had not been paid the gallon tax required by law, said spirits not having been deposited in the bonded warehouse of the United States by plaintiff, as required by law, and taken from said distillery by the plaintiff and sold and the proceeds thereby put into its treasury.

The defendant further answering says: "That the plaintiff during the time mentioned in plaintiff's complaint regularly reported and paid to the collector of internal revenue of the United States the gallon tax due upon a quantity of spirits distilled and produced by plaintiff, but neglected to report all of the spirits it actually produced and distilled and for and upon which the said gallon tax was due and owing to the United States, and that the tax so assessed as aforesaid is the tax upon the spirits produced and distilled in excess of the amount so reported by plaintiff and upon which no tax was ever assessed or collected to the time of the payment mentioned in plaintiff's complaint and answer;" admits that defendant did threaten to seize and sell the property of plaintiff to pay said tax, and that the plaintiff paid the defendant the amount of said tax with interest, but avers that he had no knowledge, information or belief for what reason plaintiff paid the same.

To this answer plaintiff demurred, alleging as ground of demurrer "that said answer does not state facts sufficient to constitute a defense to said action. The demurrer was overruled by the district court and the plaintiff electing to stand upon the demurrer, judgment was rendered for the defendant, from which jndgment the plaintiff appeals to this court.

Counsel for plaintiff claims that a municipal corporation is incapable of acting except within its corporate powers and by its authorized agents or officers. Wherefore, the averment that a city has done a certain act involves the assertion of two things: First, that it had the power under its charter to do it; and, second, that it has exercised such power. Unless the former of these be true, the latter is impossible. That the business of distilling or manufacturing spirits has ever been wholly foreign to the objects of the plaintiff's corporation and entirely outside of the scope of its corporate power as defined in its charter; that taking money from the city treasury and with it setting up and operating a distillery in behalf of the city, falsely reporting the city as a distiller, taking the money of the city to pay the illegal tax upon distilled spirits, selling spirits thus distilled and paying the money received therefor into the city treasury, are all acts of persons without authority, and the money used for the purpose of distilling spirits is a misappropriation of the city funds; that the charter of the city shields its inhabitants from the consequences of such acts.

As a general rule it may be said that a municipal corporation cannot by its agents, officers or city council bind itself by any contract outside of the scope of its power, or entirely foreign to the purposes of the corporation; that unauthorized contracts are void, and in action thereon the corporation may successfully interpose the plea of *ultra vires:* Dillon on Mun. Corp., 3d ed., sec. 457.

The pleadings in this case show neither a contract between the plaintiff and the defendant, nor between the city and any party under whom the defendant claims. But they do allege that from March 2, 1867, to August 26, 1878, the city was engaged in the

business of distilling spirits; that for a part of the spirits thus distilled she made regular reports to, and paid to the collector of internal revenue the gallon duties or tax due thereon; that the balance was not reported nor deposited in the bonded warehouse of the United States, nor the duties nor taxes thereon paid; that in the month of August, 1878, there was due to the United States the sum of $12,057.75 as the unpaid duties and taxes and interest thereon upon the spirits so distilled and not deposited in the bonded warehouse of the United States, the proceeds of the sale of which had been paid into the city treasury and appropriated by the city, and for the taxes upon that part of the spirits upon which no taxes had been paid, the defendant was about to distrain the goods of the plaintiff, when it paid the amount of duties or taxes claimed, for the return and recovery of which from the defendant this action is brought. There is no claim or pretense that all the acts pertaining to the production or distillation of the spirits, the sale or disposal of the same without depositing them in bonded warehouse, paying the proceeds of the sales thereof into the city treasury, and all business relating in any way to the same, were not done or directed by the agents, officers, servants or employees of the city, with her funds and in her name and interests.

Upon the admission made by demurrer, the questions before us are:

1. Was the city liable to the United States for the amount of the duties upon the spirits thus produced with her funds, by the officers and legally constituted agents acting for and in her name, and by them sold and disposed of without paying the duties thereon, and the proceeds thereof paid to, received and appropriated by the city; although all of such acts were unauthorized by her charter, and a part of them in violation of acts of congress?

2. Can she recover the money or any part thereof paid by her to the defendant under the protest and circumstances set forth in the complaint and answer?

Legal principles other than *ultra vires* of the plaintiff corporation are involved and form an important element in this action. When these spirits came into existence the law created a lien upon them which attached and became an incumbrance thereon; and the United States had an interest in them to the extent of the lien, which was a valid and existing legal claim: 13 U. S. Stats. pp. 243, 272; Burrough on Taxation, 620. It was the duty of the assessor or his assistant, upon obtaining knowledge that the duties upon these spirits had not been paid, and that they had been removed from the place where they were distilled, and not deposited in warehouse, to assess a gallon tax upon them against the distillers thereof, equal in amount to the duties and lien attaching thereto at time of distillation, and certify the same to the collector, who was required immediately to demand payment of such tax, and upon refusal or neglect of payment of such tax, by the distiller, to collect the same by distraint: 14 U. S. Stats. pp. 480, 481. The sale and transfer of these

spirits so long before knowledge thereof was had by the assessor or his assistant, make it morally certain that they were beyond the recognition or discovery of the revenue officers, and therefore the lien upon them became (if they could be presumed to be in existence) inoperative and of no effect as a means of revenue. By receiving the proceeds of the sales of these spirits into her treasury, the city became possessed with a large sum of money—the amount of the lien, which was justly due to the United States, and to which she had no legal or moral right; and money so received and appropriated by a municipal corporation is subject to the demand of its legal or equitable owner, by suit to recover it, to the same extent as if held by a private corporation, or a natural person. This liability arises not from any contract entered into or express promise made by the city, but from the general obligation to do justice, which is equally upon all persons, whether natural or artificial, for the fulfilling of which the law implies a promise which may be enforced by a suit at law. The fact that the provisions of the city charter do not authorize the acts by means of which she received the money does not enable her to successfully plead *ultra vires*, nor to withhold from the United States the proceeds of their unauthorized and, in part, fraudulent transactions: East St. Louis v. East St. Louis Gaslight and Coke Company, 98 Ill. 415; Grogan v. San Francisco, 16 Cal. 255; Thomas v. Port Huron, 27 Mich. (opinion of Cooley, J.), 323; Louisiana v. Wood, 102 U. S. 294; United States v. State Bank, 96 U. S. 30.

The liability of a city as a distiller is a question we need not necessarily discuss, as the foregoing reasons and authorities are in our opinion conclusive. But it may not be inappropriate to add that the power of taxation is a part of the government, incident to and co-extensive with its sovereignty; and every kind of property is subject to this power: Cooley on Taxation, 1, 2, 3. Because these distilled spirits were produced by means not authorized by law, they were none the less property subject to the duties and lien imposed by acts of congress. Although they were certainly not property of a municipal character necessary for conducting the public affairs of the municipality, yet they belong to the city; they were, so to speak, private property owned by the city in a commercial sense, for the sole purpose of gain or profit, and it is by no means clear that the city was not liable to the tax set down and assessed against her, when it was discovered that the original duties were withheld, and the spirits removed from the place of distillation, to a place other than a bonded warehouse of the United States: United States v. Railroad Company, 17 Wall. 322, 332–3.

If, upon refusing to pay the original duties and lien, and the removal of the spirits from the place of distillation, to a place other than a bonded warehouse, the city did not become liable for the amount of the gallon tax when assessed, she was, and did become so, from the time the proceeds thereof were received and appropriated by her.

We are all, therefore, of the opinion that the payment into the city treasury, and the subsequent appropriation of the money that was due to the United States as duties upon these distilled spirits, upon which the United States had a lien, was a wrongful act, as against the United States, and the appropriation by the city of such money was a wrongful use thereof, and that the amount having been paid by her to the plaintiff, although under protest, cannot be recovered back in this action.

The judgment of the district court is affirmed.

HUNTER, C. J., and EMERSON, J., concurred.

WESCOAT *v.* ECCLES.

Filed February 24, 1883.

APPEAL FROM JUSTICE'S COURT, DISMISSAL OF.—An appeal from a justice's court to the district court is perfected by the appellant's filing and serving his notice of appeal, filing the necessary undertaking, and making payment of the costs in the justice's court, and the cost of the transcript on appeal. The payment of a deposit for costs in the district court is not required by statute, and cannot be required by a rule of the district court. The dismissal of such an appeal for failure to make such deposit is error.

A PAPER IS FILED WHEN IT IS DELIVERED TO THE PROPER OFFICER, and by him received for filing, whether the same is indorsed as filed or not.

A COURT CANNOT BY RULE DEPRIVE A PARTY OF A RIGHT given him by statute.

THIS action was commenced in a justice court. On the trial in that court the plaintiff recovered a judgment for $275 damages and $7 costs, which was rendered by the justice October 28, 1881, and the defendant appealed to the district court on the seventh day of November, 1881. The appeal bond having been filed, notice of appeal served and filed, and the cost of the justice, including transcript, paid, the appeal was perfected.

The justice deposited, on the twelfth day of November, 1881, the files of the case in his court, with a transcript of the proceedings from his docket, with the clerk of said district court at his office in Salt Lake City, Utah. On the twenty-fifth day of September, 1882, the plaintiff filed in that court a notice of a motion, of which the following is a copy:

"Defendant and Messrs. Sutherland and McBride, his attorneys, will please take notice that plaintiff will, upon the records and files of said case, upon the twenty-eighth day of September, 1882, at 10 o'clock A. M., or as soon thereafter as counsel can be heard, move this honorable court, at the court-room thereof, for an order dismissing defendant's appeal herein, and affirming the judgment of the court below, on the grounds that the defendant has not perfected his appeal and caused his case to be filed and placed upon the docket of the court, as required by law and the rules of the court."

The following is a standing order of the district court, made by that court in 1880: "In all cases coming up to this court by appeal, from any judgment or order of the justice of the peace rendered thirty days before the commencement of a term of this court, it shall be the duty of the appellant to file the transcript from the justice's docket, and all papers accompanying the appeal, with the clerk of this court, and perfect the appeal within the first two days of the term, and it shall be the duty of the appellee to file with the clerk within twenty days thereafter, the answer or other pleadings in the case, and if the appeal shall be brought from any judgment or other order of a justice of the peace, rendered less than thirty days before the commencement of a term of this court, it shall be the duty of the appellant to file the transcript of the justice's docket and all papers accompanying the appeal, with the clerk of this court and perfect the appeal within the first thirty days of the term; and it shall be the duty of the appellee to file with the clerk within thirty days thereafter, the answer or other pleadings to the case. In default of compliance with this rule on the part of the appellant, upon application of appellee the appeal shall be dismissed, and in default of compliance with this rule on the part of the appellee, the judgment of the court below will be affirmed."

On the twenty-seventh day of September, 1882, the defendant filed a certified copy of all the files in this case from the justice's court, and also annexed thereto a certified transcript of the docket of said justice and paid the clerk five dollars as fees for filing the same and placing it on the calendar of this court. On the hearing of the plaintiff's motion in this court it was agreed by the parties that there was but one case and that the only difference between the two cases bearing the same title was that the case filed by the plaintiff contained the original files of the justice's court, with a certified transcript from the justice's docket, while the case filed by the defendant contained *copies of the original files* in the justice's court, and a certified transcript of the proceedings therein as shown by his docket, and that there was but one case pending between the parties. At the opening of the court at the September term, 1882, the defendant's counsel, in open court, in the presence of the plaintiff's counsel, on the call of the calendar for the setting of cases for trial, announced that the defendant was ready to try said case and desired it to be set for trial. The court set the case for trial subject to the plaintiff's motion to dismiss the same.

On the fourth day of December, 1882, the motion of plaintiff to dismiss the appeal on the ground of a want of diligence on the part of defendant in perfecting the appeal was heard, and the court having heard the argument of counsel *orders:* That the appeal herein be and is hereby dismissed, and, further, that the justice of the peace for the second precinct of Salt Lake City and county, Utah, be and he is hereby authorized to enforce the judgment hertofore rendered by his said court in said case, together with said plaintiff's costs in the appeal herein incurred and taxed at $15.

The foregoing is the substance of the statement upon which error is assigned. The appeal to this court is from the order of dismissal.

Sutherland & McBride, for the appellant.

M. M. Kaighn, for the respondent.

EMERSON, J. While the statement does not disclose the fact, yet it was understood upon the argument, and the court is otherwise aware of the fact, that it is customary with the clerks of the district court, in appeal cases from justices' courts, to demand from the appellant the payment of $5 as a deposit for his costs before they will indorse the filing on the papers sent up by the justice and docket the case. It was for the neglect, on the part of the appellant, to pay this sum, that the appeal in this case was dismissed.

There is no law authorizing the clerk to make or insist upon this demand. In civil actions he is directed to "require the party commencing the suit to pay in advance or secure by bond with security the payment of the probable amounts of the costs of said suit: C. L., sec. 2378. This provision evidently refers to suits commenced in the district court and cannot be made to apply to cases brought into this court by appeal from the justices' courts. And there is a very good reason why it should not. By sec. 582 of the practice act, before an appeal from a justice's court can be effectual for any purpose, the appellant must file an undertaking, with sureties, that he will pay all the costs on the appeal. This must refer to the costs in the district court, for he is required to pay the costs of the justice's court on taking the appeal. The clerk's costs in these cases are secured by the undertaking on appeal, and he has no right or authority to demand the payment of them, or any portion of them, in advance, in addition to the security the statute affords him.

The standing rule or order of the district court, quoted in the statement, does not, in terms, nor by any just legal intendment, refer to the payment of this sum demanded by the clerk. It refers to the *perfecting* of the appeal. All that the law requires of an appellant in order to perfect his appeal is to file and serve his notice of appeal, file the undertaking required, and make payment of the costs in the justice's court, and the costs of the transcript. He has nothing more to do, and having done this, under our statute, his right to a trial in the district court is as absolute as though he had commenced the case in that court. When the appellant has complied with the statutory requirements, it then becomes the duty of the justice to transmit the papers to the clerk of the district court, and when they are received by him, they are filed, whether he ever indorse the filing of them or not. "A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file:" Bouv. Law Dict., title File.

We do not propose to discuss the power of the district court to make rules for its government. It is not necessary for the decision of this case. It is proper, however, to state that no court can by a rule deprive a party of a right which is given to him by a statute.

The ground upon which the order of dismissal seems to have been made in the court below was a want of diligence in perfecting the appeal. The record discloses that before the motion was set to be heard, and months before it was finally heard, the appellant complied with the illegal demand made upon him, and at the hearing announced himself ready to proceed to a trial. This being the case even under the construction given to the standing rule, or order of the court, by the respondent, the motion should have been denied.

The decision of this court, however, is placed upon the ground, that the appellant having fulfilled all the requirements of the law, in order to perfect his appeal, his right to a trial in the district court, so far at least as concerns this motion, had become absolute, a right given by the statute of which he could not be deprived by a rule of court, much less by a custom of its clerk, requiring him to do something in relation to his appeal which the law does not enjoin upon him, as a condition precedent to his right to a trial. I know of no grounds upon which an appeal from a judgment in a justice's court can be dismissed by the district courts, except where there exists such an informality and disregard of the manner and form prescribed by the statute for taking and perfecting it, as render it ineffectual; in other words, no appeal.

The judgment of dismissal of the lower court is reversed and the cause remanded.

HUNTER, C. J., and TWISS, J., concurred.

CRISMON, Collector, Etc., v. TUFTS ET AL.

Filed February 24, 1883.

ACTION IN JUSTICE'S COURT INVOLVING VALIDITY OF TAX, CERTIFICATION OF TO DISTRICT COURT.—A justice's court has no jurisdiction of an action involving a question as to the validity of a tax. Sec. 537 of the practice act, so far as it provides that such action shall be certified to the probate court for trial, is void, for the reason that the legislature could not confer such jurisdiction on the probate covrt. The justice's court having no jurisdiction to try such action, and there being no law authorizing its transfer to another court, the justice should dismiss the same. He cannot certify it to the district court for trial.

APPEAL from a judgment of the third district court, entered in favor of the defendants. The opinion states the facts.

Zerubbabel Snow, for the appellant.

J. E. Rawlins, for the respondents.

EMERSON, J. The appellant is collector of taxes for Salt Lake county, and brought suit in a justice court against the defendants to recover the taxes assessed against them for the year 1875, 1876 and 1877. The defendant demurred and answered. The demurrer was overruled by the justice and is in no way involved in this appeal. The answer puts in issue the validity of the tax for each year named.

Upon the filing of the answer, the justice, at the request of the appellant's attorney, certified the case to the district court for trial. In the district court the respondents, appearing for that purpose only, moved to dismiss the case on the ground: First, that the court had no jurisdiction over the subject-matter of this action or of the parties hereto; second, that the justice had no power to certify the case to this court. This motion was sustained and the case dismissed, which is the only matter assigned as error here.

Sec. 537 of the practice act, relating to proceedings in justices' courts, provides that "the parties shall not be at liberty to give evidence upon any question * * involving the legality of any tax; * * nor shall any issue presenting such question be tried by the justice; and if it appear from the plaintiff's own showing, on the trial, or from the answer of the defendant verified by his oath, that the determination of the action will necessarily involve either of such questions, the justice shall suspend all further proceedings in the action, and certify the pleadings, or if the pleadings be oral, a transcript of the same from his docket to the probate court for the county, and from the time of filing such proceedings or transcript with the clerk of the probate court, such probate court shall have over the action the same jurisdiction as if it were originally commenced therein."

The legislature could not confer this jurisdiction upon the probate courts. This question has been set at rest by repeated decisions. That portion of the above section which provides that the justice shall certify certain causes to the probate court, and giving that court jurisdiction over them, is *null* and *void*. This, however, does not affect that portion of the section which, in express terms and unqualifiedly, forbids the justice from trying any such issues as are raised by the pleadings in this case: Lyman v. Martin, 2 Utah, 136.

The authority of a justice of the peace to certify any case to a higher court, or any other court, must be found in some provision of the law, or it does not exist. The only authority of this kind ever attempted to be given in this territory is found in the void provision above referred to. Sec. 3 of an act of congress, in relation to courts and judicial officers in this territory, simply changed the forum from which an *appeal* from a *final* judgment in a justice's court might be taken. Certifying a case to another court is not a final judgment from which an appeal can be taken. No attempt was made to *appeal* from the order of the justice in this case. The order certifying the case was not equivalent to or in the nature of an appeal. There being no law in this territory authorizing such a proceeding, a justice of the peace, finding himself without jurisdiction, cannot transfer the cause and the parties to it into the district court, as that is not a method which the law recognizes, by which the latter court may acquire jurisdiction.

When the sworn answer was filed in the justice's court, raising issues which that court was, by express provision of the statute, forbidden to try, or receive any evidence upon, he should have dis-

missed the case, as he would in any other case when he finds he has no jurisdiction.

If inconvenience and delay will result from this holding, as is argued by counsel, relief must be sought from the legislature, and not from the courts.

The judgment of the court below is affirmed.

HUNTER, C. J., and TWISS, J., concurred.

REICH v. REBELLION SILVER MINING CO. ET AL.

Filed February 24, 1883.

A PLAINTIFF IS NOT ENTITLED TO JUDGMENT UPON THE PLEADINGS, when any of the material allegations of the complaint are denied by the answer.

ACTION TO ENFORCE A TRUST, NECESSARY PARTIES TO.—Where the owners of several mining claims enter into an agreement for the consolidation of their respective claims and the formation of a corporation to which such claims are to be deeded, the stock of which is to be divided among them in certain proportions, in an action by one owner to enforce the delivery of the stock to which he is entitled, or for an accounting of the same, the corporation formed in pursuance of such agreement is properly joined as a defendant.

FINDING OF FACT, WHEN ESSENTIAL.—Under sec. 180 of the practice act in trials of issues of fact by the court, written findings of fact and conclusions of law, separately stated, must be made and filed before any judgment can be entered. Such findings are the foundation for the judgment, and are as necessary to precede it as a verdict in case of trial by a jury. In the absence of findings there is no presumption that the judgment is sustained by the evidence, when the issues are tried by the court.

APPEAL from a judgment of the district court, entered in favor of the defendants. The opinion states the facts.

Arthur Brown, for the appellant.

Woods & Hoffman, for the respondents.

EMERSON, J. In this complaint the plaintiff alleges in substance, that he was the owner of undivided feet in one of a number of mining claims, which the owners were desirous of consolidating in a corporation, and which were deeded to and formed the capital stock of the defendant corporation; that before, and in order to facilitate the organization of the company, he joined with others and deeded his interest to defendant Shields, in trust that he should deed the same to the corporation when formed, and should take the number of shares to which each was entitled in the name of each individual owner, according to their respective interests; that said Shields did deed to the defendant corporation, after its organization; that at the time of the incorporation of the defendant company, the terms of the trust deed to Shields were known to the incorporators; and then sets out the number of shares the owners of each set of mining claims, there being two groups of them, were to have, and which is not material to mention here; and then alleges that in the articles of incorporation no shares were allotted to him; that since the incorporation he has received seven hundred and fifty shares; that after taking out ten per cent. of the number of shares for working capital, according to agreement, he is yet entitled to a large number of shares; that he has demanded of the president of the corporation

to be informed as to the division of the shares of said corporation; that the information has been denied him; that a great proportion of the shares of the corporation have not yet been issued, but remain in the office of the defendant corporation unissued; and prays that defendant may disclose and discover what consideration certain persons named, who were the other owners in the group of claims in which the plaintiff was interested, paid for the shares of stock assigned them, and how many feet were owned by each in any of the mines so incorporated; that defendant may be compelled to issue to him 1,950 shares of its stock; or, in case of their inability, in consequence of sale or disposal, that plaintiff be allowed compensation for the same; and that defendant may be enjoined from selling, disposing or issuing any further shares of stock until the further order of the court.

The defendant corporation demurrred and answered at the same time. The demurrer was general, that as to that defendant it did not state facts sufficient to constitute a cause of action. The defendant Shields filed a separate answer. It is unnecessary to set out the answer. It is sufficient to say that in our judgment, each contained denials of at least some of the material allegations of the complaint.

The demurrer of the defendant corporation was sustained, yet the record discloses that the parties proceeded to a trial upon the complaint and *answer* as though there had been no demurrer. The issues were tried by the court, and without making or filing any findings of fact and conclusions of law; judgment was rendered for the defendant; and the plaintiff brings this appeal, alleging as error the sustaining of the demurrer, rendering judgment without findings, and claims that he should have judgment upon the pleadings. As to the latter, it is sufficient to say that material issues were raised by the answer, and hence he is not entitled to judgment on the pleadings.

The demurrer was improperly sustained. The complaint, especially in view of the relief asked, sets out a case with a sufficient degree of certainty to enable the defendants to know the precise grounds upon which it is asked, and states a case in which the corporation is a necessary party defendant. The shares of stock which the plaintiff claims he is entitled to are alleged to be in its possession, and he asks it to account to him for them and to be enjoined from issuing and disposing of them. The court by any order it might make could not reach the unissued shares of stock, except by making the corporation a party. If the appellant sustained by sufficient proof the allegations of his complaint, he is entitled to the relief asked. In the case made by the complaint the corporation and Shields are properly joined as defendants. Under the 180th section of the practice act, in trials of issues of fact by the court, written findings of fact and conclusions of law, separately stated, must be made and filed before any judgment can be entered. They are the foundations for the judgments, and are as necessary to precede any judgment as a verdict in case of trial by jury. Under our statute

there is no presumption in the absence of findings, when issues of fact are tried by the court without jury.

The judgment of the lower court is reversed and a new trial ordered.

HUNTER, C. J., and TWISS, J., concurred.

DAVIS v. UTAH SOUTHERN RAILROAD COMPANY.

Filed February 24, 1883.

WHERE THERE IS A SUBSTANTIAL CONFLICT OF EVIDENCE on a material issue, the appellate court will not reverse an order of the lower court granting a new trial.

NEGLIGENCE OF RAILROAD, ACTION TO RECOVER FOR.—In an action to recover damages for a loss occasioned by the negligence of a railroad company, when the complaint therein is framed to recover on the common-law liability of the company, the defendant's negligence must be proved. If the plaintiff fails in such proof on the trial he cannot abandon the action as brought and claim a recovery under a statute which makes the company liable as an insurer against a loss such as the one suffered by him.

CONTRIBUTORY NEGLIGENCE, INSTRUCTIONS AS TO.—Whether a plaintiff has been guilty of contributory negligence in placing his property, for the destruction of which an action is brought, in a house so constructed and situated as to be subjected to great risk through the ordinary operation of defendant's road, is a question for the jury. An instruction to the contrary, although erroneous, will not warrant a reversal, when it is evident that the jury disregarded it.

INSTRUCTIONS UPON ABSTRACT QUESTIONS OF LAW NOT APPLICABLE TO THE ISSUES and proofs are erroneous, but will not warrant a reversal unless the effect has been to confuse or withdraw the material issues from the attention of the jury.

THIS is an action by appellant to recover damages for the destruction of his wearing apparel and personal effects, which were in a room occupied by him in and as a guest of the Decker house. Said house was situated within about eighty feet from the respondent's track, and was on its right of way, by license and permission of the company. It, and its contents, including the said property of the appellant, were totally destroyed by fire, alleged to have been communicated by a locomotive engine of the respondent on the thirteenth day of April, 1880.

The portion of the complaint which is material on this appeal is in the following, viz.: "That on or about the thirteenth day of April, 1880, the defendant caused to be run over and upon said road, so along and by said house an engine of said defendant, whereby, by the negligence and unskillful and reckless management and control of the same by defendant, sparks were thrown from said engine, whereby and by means whereof fire was communicated to the said house, known as the Decker house, and to the room occupied by plaintiff, and to the property of plaintiff as above set forth, contained therein, and the same was thereby totally consumed and destroyed through the negligence and reckless conduct of defendant and its agents and servants. That all of said property was so destroyed by fire, communicated as aforesaid from the locomotive engine of defendant, without any carelessness, neglect or want of diligence on the part of plaintiff." The above is the only allegation in the complaint as to the cause of the fire.

The respondent's answer contained a specific and emphatic denial of the charged negligent, unskillful and reckless management of its engine. There were other denials, which are not material to mention here. A jury trial was had, which resulted in a verdict and judgment for the appellant for $265.85 and costs.

The respondent moved for a new trial, which was granted, and the appeal is from this order.

S. H. Lewis, for the appellant.

Williams & Young, for the respondent.

EMERSON, J. It was not error to grant the new trial, for the reason set out in the first part of the first assignment of error, which is that "the evidence is insufficient to justify the verdict, in this: the evidence failed to show that it was the negligence or fault of the defendant which caused the injury complained of."

It is evident the complaint was not framed with a view of a recovery under the statute, C. L., sec. 503, which, it is claimed, puts out of the question in such cases the negligence or want of negligence on the part of the railroad companies, and make them insurers of property, along their line, against fire communicated from their locomotive engines. If such was the design of the pleader, he is very unfortunate in the language chosen to express his cause of action. The form adopted by him is that of a common-law action for negligence. The words charging negligence and unskillfulness is a material part of the allegation, and must be proved as alleged. They are the words which characterize and give form to the action. It is true, all forms of action are abolished by the code, but the pleader is required to state facts which constitute *the* cause of action, not facts which constitute *a* cause of action differing from the one to be established by the evidence.

But the appellant claims that he may now, and without amendment, abandon the case he made by his complaint, and recover by force of and in accordance with the provisions of the statute. This is not allowable under the 147th section of the practice act, because it would not be granting relief consistent with the case made by the complaint, and embraced within the issue, and would be to allow the appellant to recover under a different form of action from the one selected by him.

It would seem to me to be altogether too latitudinarian a doctrine even under the very liberal interpretation given to codes containing the exact or very similar provisions as our section 149, to allow the plaintiff after framing his complaint in language material and necessary for the form of action selected by him, on a failure to prove on the trial those material and necessary allegations, to claim that they are immaterial in another form of action, under a statute, for example, and shift his right to recover to that ground.

The idea that under the code the old forms of pleading and the technical distinction between the different forms of action, as they existed at common law, could be entirely abolished and lost sight

of, has never been realized. The court, in interpreting pleadings and administering relief under the code, is compelled to constantly keep them in mind. Notwithstanding the liberal rule of construction applied to pleadings under the code, I am aware of no cure or principle upon which a plaintiff may recover, not only upon facts not stated, but upon evidence which disproves those which are stated. The principle still remains that the judgment to be rendered by any court be *secundum allegata et probata:* Neudecker v. Kohlberg et al., 81 N. Y. 296; Tooker v. Amoux, 76 N. Y. 397. In the case at bar the appellant had a right to elect whether he should pursue the right given him by the statute or the common-law action for negligence. He chose the latter, and properly framed his complaint with that view, and in making out his case on the trial undertook to prove it. That he still adheres to it is apparent from the first sentence of his brief, in which he says: "This is an action for damages caused by the burning of personal property of the plaintiff by fire communicated from the locomotive engine of defendant, *which the plaintiff* alleges was the result of defendant's negligence."

The appellant relies upon the case of Anderson v. The W. & J. V. R. R., 2 Utah, 518, as deciding that proof of negligence is not necessary. In that case the court says that the action "seems to be brought" under the statute. If that was the fact, then it was not applicable to the case at bar. If the complaint in that case was framed like the one in this (and a point made in the brief of the appellant seemed to indicate it), then the court made an easy bridge over the difficulty presented by saying that it "seemed to be brought" under the statute, and the case should be overruled.

The appellant's proof of negligence was very meager and unsatisfactory, and was met by proof quite as strong, if not more convincing, of the entire absence of any negligent, unskillful or reckless management of the respondent's engine on the occasion referred to. To say the least, the evidence upon this point was conflicting. Where there is a substantial conflict of evidence on a material point, this court will not revise the discretion exercised by the district court in granting a new trial: Newton v. Brown, 2 Utah, 126.

It is claimed by the respondent that the instructions given to the jury are contradictory, and for this reason also the order granting a new trial should be affirmed. As we have, for the reasons above stated, determined to affirm the order of the court below, I shall not enter upon so critical an examination of the instructions as I otherwise would, but shall review them in a general way only.

The first instruction, but not mentioned in the record, was given at the request of the respondent, and is as follows:

"The proximity of the Decker house to the defendant's railroad track, and the material of which it was constructed, necessarily subjected it to great danger and risk of destruction by fire caused by the ordinary operation of defendant's line, and the fact that the plaintiff placed his property, for the loss of which this action is

brought, in the said house, exposed as it was to fire, was negligence on his part, and precludes his right of recovery." If this instruction was proper and correctly presented the law of the case, there was an end of the matter; no other instructions were needed or ought to have been given.

The balance of the instructions were confined to a definition and a statement of the consequences of contributory negligence on the part of the appellant As a statement of the law upon this subject, there is no serious objection to any of them.

The first instruction, above referred to, is erroneous. It in effect decided the question of the defendant's negligence as a question of law, and took the case away from the jury; and if it had been observed by them, nothing remained for them to do but to sign a verdict for the defendant. The general rule is that the question whether a party has been guilty of negligence or not is one of fact, and not of law. Although the facts as stated in the instructions were undisputed, they were not such as to take the question out of the general rule.

In Railroad Company v. Stout, 17 Wall. 657, the supreme court of the United States says: "Certain facts we may suppose to be clearly established from which one sensible, impartial man would infer that proper care had not been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decisions of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard—the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment there given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. * * * We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are indisputable, it is for the jury and not for the judge to determine whether proper care was given, or whether they establish negligence."

It is evident that the jury disregarded this instruction, and as it was erroneous, and given at the request of the respondent, he cannot be heard to complain of their action in this regard, or that it was contradictory to the instructions upon which they did find.

To the giving of the other instructions above referred to, the respondent excepted. The only vice noticeable in them is that they are not strictly applicable to the case then before the court; they do not fairly present the whole law of the case. So far as these instructions are concerned, the court gave the jury to understand that the appellant's right to recover was in no way dependent upon their

finding that there was negligence on the part of the respondent. There was no instruction upon this feature of the case. When the court of its own motion instructs the jury, and it appears from the record that these instructions were so given, they should be so framed as to make them applicable to the case made by the pleadings and evidence.

It is always error to instruct a jury upon abstract questions of law not applicable to the issues and proofs in the case in which they are given, but this error will not furnish sufficient ground for granting a new trial, unless the effect has been to confuse or withdraw the material issues from the attention of the jury.

The judgment of the lower court granting a new trial is affirmed.

HUNTER, C. J., and TWISS, J., concurred.

WALL v. DODGE ET AL.

Filed February 24, 1883.

REPAYMENT OF REDEMPTION MONEY—COSTS AFTER DISMISSAL.—In the lower court plaintiff recovered judgment for costs. Both parties appealed. On appeal this judgment was reversed, and at the defendants' request the action was dismissed. Pending the appeal, no supersedeas bond having been filed, plaintiff issued execution on his judgment for costs, and levied the same on certain mining property of the defendants, which was sold and bought in by the plaintiff. Subsequently the defendants sold said property to one Lubbock, who redeemed it from the plaintiff. After the judgment of the supreme court reversing and dismissing the action had been certified to the lower court, such court, on motion of defendants' counsel, taxed the defendants' costs, and ordered the plaintiff to pay back to Lubbock the amount paid by him on redeeming: *Held*, that the lower court had no power to award such costs, or to make such order, as it no longer had jurisdiction of the case after the dismissal by the supreme court; and even if it had jurisdiction, it could not, on such motion, order the repayment of the money paid by the redemptioner.

APPEAL from the second district court. This action was brought by the respondent in the second district court for the sole purpose of obtaining an injunction restraining defendants from mining in or removing ore from the Kinner mining claim owned by the plaintiff. The defendants, owners of the Neutral mining claim, by answer, set up that the ground from which they were taking and threatening to take ores was a part of that mining claim; that the boundary line between the two claims, which adjoined each other, was in dispute, and the prayer, among other things, was to have this boundary line and their title to said mining claim settled.

On the trial the whole question as to the title of the respective parties and the boundary line between the two claims was gone into. By the decree an attempt was made to definitely settle the respective rights of the parties. Both parties were enjoined, each from working in certain described ground. And it was further ordered and adjudged that the plaintiff should have and recover costs to the amount of $1,034.65.

Both the parties took an appeal to this court. On the hearing on the appeals, this court, on the twenty-eighth day of February, 1880, reversed the decree and judgment of the lower court, and

at the request of the defendants' counsel dismissed the case without sending an order down to the lower court for that purpose. Pending the appeals, no supersedeas bond having been filed by either party, the plaintiffs caused an execution to issue on his judgment for costs, and caused the same to be levied on the said mining claim of the defendants, and on the twentieth day of August, 1879, bought the same at a sale under said execution for the sum of $1100.40.

About the first of November, 1879, the defendants sold and conveyed said Neutral mining claim to one H. S. Lubbock. On the sixth day of February, 1880, said Lubbock, as grantee of the defendant, redeemed said mining claim from the execution sale by paying to the plaintiff the sum of $1,216.86. After the judgment of reversal and dismissal entered in the supreme court had been certified to the district court on the twelfth day of July, 1880, the latter court on motion of defendants' counsel, based on the affidavit of Lubbock setting out his purchase and redemption as above stated, taxed the defendants costs at the sum of $1,000, and gave them an execution therefor against the plaintiff, and further ordered the plaintiff within thirty days to pay to the clerk of that court, or to the defendants' attorney, the sum of $1,216.86, the amount paid to him by said Lubbock. From this order and judgment awarding costs to the defendants and execution therefor, the plaintiff prosecutes this appeal.

Sutherland & McBride, for the appellant.

Bennett & Harkness and *P. Denny*, for the respondent.

EMERSON, J. The judgment of the supreme court was an actual dismissal of the cause and was as final and effective before its action was certified to the district court as it was after: Reynolds v. Hosmer, 45 Cal. 628. At the time this motion was made the case was not in court; it had been dismissed and thus terminated. If the judgment had been reversed and the case remanded with directions to dismiss it, the judgment of this court being upon the ground of a want of jurisdiction in the lower court, that court could not properly render judgment for costs, there being no statute authorizing it: Fett v. Fett, 19 Wis. 193; Blackwood v. Jones, 27 Id. 498.

The court evidently treated the proceeding upon this motion as one for restitution, and costs incurred by the defendant in the course of litigation and not received by the plaintiff would not be within the purview of such relief. The court below had no jurisdiction to make the order in relation to the payment of the $1,216.86, for, as above stated, there was no action pending in which such a proceeding could be had. The order could not have properly been made, even if this court had remanded the case for further proceedings. If the sale was valid at the time it was made, the plaintiff in the execution having become the purchaser, it was liable to be set aside upon a reversal or modification of the judgment by this court in accordance with sec. 337 of the practice act, or by the court below if the case

had been remanded and restitution made to the defendants of the thing lost *in specie*. If the property had come into the hands of a *bona-fide* purchaser, so that it could not be restored *in specie*, they would be left to their action for damages or compensation: Farmer v. Rogers, 20 Cal. 335; Reynolds v. Harris, 14 Cal. 668. But the court cannot properly give damages or compensation on a motion as was done in this case. It is evident this motion was made in the interest and for the benefit of Lubbock. His affidavit fails to show how the defendant had lost anything or been in the least damnified. They have not paid the plaintiff anything and he holds nothing received from them. Lubbock is a stranger to the action and this motion cannot be made by him or in his behalf. Whether he may not have relief by some other form of proceeding, we are not called upon to determine.

The judgment of the court below is reversed and the order is set aside and held for naught.

HUNTER, C. J., and TWISS, J., concurred.

TUFTS, Administrator, Etc., v. TUFTS.

Filed February 28, 1884.

CANCELLATION OF DEED PROCURED BY FRAUD.—Every person who signs, executes and acknowledges a deed, is presumed to know the contents and legal effect thereof. But where a deed is executed by reason of false and fraudulent respresentations as to its contents, and where it is falsely read to the grantor, and by reason of such false and fraudulent representations and in ignorance of its contents the grantor executes the same, such deed may be annulled and canceled, and parol evidence is admissible to show such facts.

FINDING THAT A CERTAIN DEED WAS OBTAINED BY REASON OF FALSE and fraudulent representations on the part of the grantee, *held*, supported by the evidence.

APPEAL from a judgment of the district court, entered in favor of the plaintiff. The opinion states the facts.

Sheeks & Rawlins and *W. H. Dickson*, for the appellant.

A. Brown, for the respondent.

TWISS, J. This is a suit to annul and set aside a warranty deed made by Elmira P. Tufts to the defendant, Eldridge Tufts, on the twenty-fifth day of June, 1882, of certain property therein described, situated in Salt Lake City, known as the Colorado house. Since the trial in the district court, Elmira C. Tufts, the original plaintiff, has died, and the present plaintiff, Don. C. Tufts, has been appointed administrator of her estate, and has duly qualified as such.

The complaint contains allegations to the effect that the defendant had proposed to the deceased plaintiff that they would mutually enter into an agreement that she should thereby convey to the defendant the property in controversy, and that he should convey to her all of his real estate in Salt Lake City, "with the proviso in said agreement that whosoever of said plaintiff or defendant dies first, the survivor should take possession of, have, own and hold to his or her own use and benefit forever the whole real estate owned

by both, and no title was to pass from either until his or her death, as the case might be." That the defendant, in the month of June, 1882, further promised the deceased if she would execute an agreement, which he then had and read to her, in effect similar to the proposed agreement above described, that he would build for the plaintiff, at his own expense, a nice brick house upon a lot of land belonging to him and adjoining the lot described or conveyed in said deed and give her a life lease of the same, "to use for her own benefit," free from any and all expenses to her during her natural life, the said brick building to be commenced by defendant as soon as the plaintiff would sign said written agreement at the time drawn up by him. "Plaintiff (further) alleges that all said talk and actions of defendant was for the fraudulent design of procuring plaintiff's said real estate as his own property, and that he never intended to, and never at any time did, execute such an agreement, but did intend to obtain a warranty deed and the possession of said plaintiff's real estate, without giving her any consideration therefor. Plaintiff alleges that, relying upon the statements and arguments of said defendant, she signed and executed what she supposed to be said agreement as had been theretofore, to wit, June 26th, 1882, drawn by defendant and read to her by said defendant as embodying their said intentions, but which she has since learned was a warranty deed from said plaintiff to said defendant, conveying said real estate of plaintiff hereinbefore described, from said plaintiff to said defendant. And that plaintiff, believing and relying upon the false and fraudulent statement then made by defendant, and believing said paper which she was about to sign to be the agreement or will which had been theretofore read by her and written by defendant, June 26th, 1882, then signed and executed said warranty deed;" that defendant never paid any consideration for said warranty deed; that he obtained the same from her without her will or consent of any kind whatever, and caused the same to be recorded in the office of the recorder of Salt Lake county; that since discovering the fraud of said false deed, she has made demand upon said defendant to reconvey to plaintiff her said land and premises, which defendant refused to do; that the deceased was at the commencement of this suit, and always had been, the lawful owner of said real estate; that "defendant has not commenced to build the brick house on said lot as he promised plaintiff to do, nor given or executed any agreement giving the plaintiff a life lease on any of his land, or on the property heretofore owned by the plaintiff as aforesaid;" and prays judgment that the said warranty deed from plaintiff to defendant be decreed to be fraudulent, null and void, and that the defendant be required by the decree of this court to convey to said plaintiff all right, title and interest he may have acquired in said real estate, and for cost of suit. The answer denies every material allegation contained in the complaint.

Upon the trial, before the court without a jury, there were some six or seven witnesses upon one side and the other, besides the de-

ceased plaintiff and the defendant. The findings of fact and conclusions of law by the court are as follows·

1. That on the 5th day of July, 1882, and for a long time prior thereto, the plaintiff had been the owner in fee simple and in possession, and entitled to the possession, of the following-described tract of land, as set forth in the complaint, to wit: being a part of lot (5) in block fifty-three (53) of plot "A" of Salt Lake City survey, bounded and described as follows: Commencing at the northwest corner of said lot five (5), and running south seven (7) rods; thence west seven (7) rods, to the place of beginning, containing forty-nine (49) square rods of ground.

2. That at the date aforesaid the defendant sustained toward the plaintiff the relation of son to mother; that the plaintiff was seventy years of age; that the plaintiff reposed great confidence and trust in the defendant, who had been theretofore attending to business for her, and in former years they had lived together even after the defendant became of age.

3. That on the said fifth day of July, 1882, the defendant procured from the plaintiff an absolute deed of said described tract of land, which deed was afterward, on the 10th day of July, 1882, recorded in the office of the county recorder of Salt Lake county, Utah, in book F of deeds and transfers, pp. 575, 576.

4. That at the time of the execution of said deed plaintiff did not know that it was a deed of her property in question, but believed it to be a life lease of property belonging to the defendant, upon which she was agreeing to assist in building a house; that prior to the time of the execution of said deed, there had been negotiations between the said plaintiff and the said defendant to the effect that the plaintiff should assist defendant with money to build a house upon lands of his own; and that after such negotiation had taken place she directed the defendant to prepare the proper papers; that defendant, instead of preparing the papers directed by plaintiff, prepared a warranty deed of the land in question, and procured the signature of the plaintiff thereto; that the same was not read to the plaintiff, and she did not know the contents thereof; that there was no consideration for the same passed between the parties, and that the plaintiff signed the same under the belief that it was a paper relative to a life lease to her of the said land of the defendant, upon which said building was to be erected; that the signature of the plaintiff to the said deed was procured by the fraud of the defendant; that the defendant never has attempted to build any such house as was contemplated by the agreement for the life lease.

5. That the plaintiff, since the execution of the said deed, has remained in the possession and control of the property in question; that prior to the commencement of this suit the plaintiff caused demand to be made upon the defendant that he reconvey the property to her.

I find as conclusion of law that said deed set forth in the complaint from the plaintiff to the defendant for the land aforesaid was

procured by fraud and that the same should be canceled and set aside; that the plaintiff is entitled to the possession of and title to the said land and premises; that the plaintiff is entitled to a decree, that the said defendant do within five days after demand upon him, execute and deliver to the plaintiff a deed duly acknowledged of the aforesaid premises; that in case of his failure so to do, such order and decree shall stand as a cancellation of the said deed from the plaintiff to the defendant, that the same is canceled, set aside and declared null and void; that the plaintiff is entitled to recover of the defendant her costs in this behalf expended, and judgment is hereby ordered accordingly.

The law presumes that every person who puts his name to and executes a deed knows the contents of the instrument to which he puts his seal and before some magistrate acknowledges with solemnity the instrument as his act and deed; and that he knows the legal effect of it. But in a case where it is charged that a deed is executed by reason of false and fraudulent representations as to its contents, and that it was falsely read to him, and that by reason of such representations and reading he executed it in ignorance of its contents, then the validity of such deed may be inquired into and impeached by oral testimony, and if it is sufficient in strength to carry conviction to the mind of the jury or of the court sitting as a jury, of the truth of the charge, the effect may be that the solemn deed of the party be annulled and held for naught: Eaton v. Eaton, N. J. L. 108.

This principle of law is universally recognized and is necessary to protect the unwary, weak or ignorant from the cupidity of the unscrupulous sharper whose efforts to enrich himself at the loss or ruin of others is restrained only by want of opportunity, and a wholesome sense of the power and efficacy of the law to protect and avenge the injured, redress his wrongs and punish the guilty.

We are all of the opinion that the court below could, upon the testimony before it, find for the plaintiff upon all of the issues and that the record shows no error, and therefore the judgment of the district court is affirmed.

HUNTER, C. J., and EMERSON, J., concurred.

LEAVITT *v.* OXFORD AND GENEVA SILVER MINING COMPANY.

Filed May 19, 1883.

NOTES OF CORPORATION, POWER OF DIRECTORS TO AUTHORIZE.—The board of directors of a corporation has power to appoint two of its members a committee for the purpose of making and delivering the notes of the corporation to such stockholders as have debts against the company. If such committee, in executing the trust imposed upon them, exceed their authority, the corporation is not bound by their unauthorized acts.

MEETING OF DIRECTORS—NOTICE OF—PRESUMPTION.—In the absence of any law on the subject, a meeting of the directors of a corporation is presumed to have been held after due and sufficient notice thereof to all the directors, unless the contrary affirmatively appears.

WHAT CONSTITUTES A QUORUM.—At common law the major part of a board of directors constitutes a quorum, a majority of which may decide any question upon which they have power to act.

NOTE GIVEN TO DIRECTOR, VALIDITY OF.—A promissory note of a corporation given to one of its directors, in pursuance of the unanimous vote at a meeting of the directors, is not invalid because such director was present and voted for the same, if without counting his vote the same was authorized by a majority of a quorum of the directors.

NOTES OF CORPORATION—ITEMS INCLUDED IN—STATUTE OF LIMITATIONS.—A resolution of a board of directors empowering its committee to "make and deliver to the several stockholders who have loaned money to this company, and for the liabilities of this company, the company's notes for such loans and liabilities," does not authorize the committee to include, in a note so given, money paid by a stockholder, prior to the incorporation of the company, for the purpose of developing property which afterwards is conveyed to the corporation, and for which he receives certain shares of stock; nor money paid by the stockholder, in pursuance of a resolution of the company calling for a voluntary assessment, for the purpose of developing the company's property. Such resolution does not prohibit the giving of a note for an indebtedness barred by the statute of limitations.

APPEAL from a judgment of the district court. The opinion states the facts.

Sutherland & McBride, for the plaintiff.

Arthur Brown, for the defendant.

TWISS, J. This is an action on a promissory note alleged to have been made and delivered by the defendant, a corporation created under the laws of Michigan, to the plaintiff. The following is a copy of the note.

"$7,984.13. Office of the Oxford and Geneva Silver Mining Company of Utah, Aug. 6, 1880. Thirty days after date, the Oxford and Geneva Silver Mining Company of Utah promise to pay to the order of Alvah E. Leavitt, seven thousand nine hundred and eighty-four and thirteen one-hundreth dollars, with interest at ten per cent. per annum. Value received.

"The Oxford and Geneva Silver Mining Company of Utah.

"By J. B. SCOTT, president.

"D. S. Holbrook, secretary."

The complaint alleges that the defendant was at and prior to the date of the note, and also at the commencement of this action, owner of real estate and property of other kinds in this territory and had an agent in charge thereof. The answer denies that defendant made the note, that J. B. Scott and D. S. Holbrook, or either of them, were authorized, as agents or otherwise, to make or deliver the note, and also denies that the defendant owed the plaintiff at the date of the note, the sum of money for which it was given. And for a further or affirmative answer, the defendant says that the plaintiff is a stockholder, director, and vice-president of the defendant corporation, and familiar with all of its resolutions. That the plaintiff pretending and claiming that the defendant was indebted to him, prepared a statement of account showing such alleged indebtedness, which contained items claimed by plaintiff to have been advanced by him to the defendant, but which were in fact advanced by him to the firm of Scott & Brown before the organization of the defendant corporation on the twenty-eighth day of June, 1873, and also the items of account that were on the day of the date of the note

barred by the statute of limitations of the state of Michigan, in which state the note was made and delivered, and that the same and other items were also barred by the statute of limitations of this territory. That the president and secretary, Scott and Holbrook, had no authority to include in the note the items barred by the statute. That said statement of account also contained items of account that were not advancements of money, but were moneys paid by plaintiff to the defendant in payment of an assessment made by the defendant upon 3210 shares of capital stock held by the plaintiff in the defendant company, upon which forty cents per share were assessed in February 4th, 1874, by a resolution of said company. That these items were incorporated in said note by mistake of Scott and Holbrook. That the items hereinbefore described as being included in said note were not existing indebtedness against said corporation at the date of the note, and that said note was executed without authority, and is null and void.

The statutes of Michigan provide that the "stock, property and affairs of such corporation shall be managed by not less than three nor more than nine directors, as the articles shall determine." The articles of association of the defendant corporation provide "that there shall be seven directors, who shall have full power to manage the stock, property and affairs of the corporation." At a meeting of the directors of the defendant on August 2, 1880, four of them, constituting a quorum, were present, one of whom was the plaintiff, the following resolution was unanimously adopted:

"*Resolved*, That the president and secretary of this company are directed to make and deliver to the several stockholders who have loaned money to this company the notes of this company for such loans and liabilities, and that the same be made payable thirty days from date, with interest at ten per cent."

By the statutes of Michigan and the defendant's articles of association, as well as by the common law, the defendant's board of directors is its dominant body—the executive power of the corporate entity, which acts solely by and through them in the prosecution or transaction of the business for which it was created. Their power is not a delegated authority, in the sense in which the rule applies to agents or attorneys who have certain specified powers conferred upon them, but no others, and therefore have no power which they can delegate to others. When the transaction of legitimate business properly before a board of directors can be facilitated by the appointment of one or more of their members for that purpose, they have power to make such appointment: Burrill v. Nahant Bank, 2 Met. 163; Fleckner v. Bank of the United States, 8 Wheat. 355; Lester v. Webb, 11 Allen, 34; President Northampton Bank v. Apron, 11 Mass. 288.

The resolution of the board of directors did not create, nor was it intended to create, any liability on the part of the corporation. It simply made the president and secretary of the defendant, two of the directors, a committee for the purpose of making and deliv-

ering the notes of the defendant to the several stockholders holding the debts and liabilities therein described. This act was within the scope of the power of the board of directors, and apparently in good faith. It was fair and just in terms and spirit to all parties—the corporation, the stockholders, and to the particular stockholders holding claims against the defendant. Although it is solely and by the direct agency and under the supervision of the directors that the business of a corporation is transacted, yet they can only act within legally authorized limits; their unauthorized acts do not bind the corporation. And the same principle applies to their agents.

If Scott and Holbrook, in executing the trust thus imposed upon them, exceeded their authority, the corporation, their principal, is not bound by such unauthorized acts. The plaintiff being one of the four who constituted the meeting of the directors which adopted the resolution, it is claimed by the defendant that the resolution was, as to the plaintiff, invalid, and therefore the note sued upon of no validity or value.

The articles of association are silent as to when the meetings of the directors shall be held, as to the necessary notice, the manner of calling them, and as to what number shall constitute a quorum, but they give the directors "full power to make and ordain all by-laws." There is no evidence of any by-law on the subject. Therefore, if there was a common-law quorum present at the meeting, there is no presumption that due notice was not given, but, on the contrary, in such case the legal presumption is that the notice of the meeting was legally sufficient, or that due and legal notice thereof was given to all of the directors, unless it affirmatively appear that such was not the case: Lane v. Brainard, 30 Conn. 565; Sargent v. Webster, 13 Met. 497; Wells v. The Railway White Rubber Company, 19 N. J. Eq. 402; Edgerly v. Emerson, 23 N. H. 555.

We now come to the question as to what constitutes a quorum, and whether the presence and vote of the plaintiff and his interest in the subject-matter invalidated the resolution as to him. At common law where the corporate power is vested in a body consisting of a *definite* number of persons, as a board of directors of a certain specified or definite number, and where the meeting of the directors is a regular or stated one, of which all are required to take notice, or a special one of which all have been legally presumed to have been duly notified, the major part of such board of directors constitutes a quorum, a majority of which decides any question upon which they have power to act: Sargent v. Webster, 13 Met. 497. Upon this question Chancellor Kent says: "There is a distinction taken between a corporate act done by a select or definite body, as a board of directors, and one to be performed by the constituent members. In the latter, a majority of those who appear may act, but in the former case a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule on the subject, and if any corporation has a different modification of the expression of the binding will of the cor-

poration, it arises from the special provisions of the act or charter of incorporation:" 2 Kent's Com. 293; Buell v. Buckingham & Co., 16 Iowa, 283; Hayward v. Pilgrim Society, 21 Pick. 270.

In the light of these authorities, there being no issue or charge of fraud or want of good faith on the part of the plaintiff, with reference to his vote at the meeting of the directors, I see no reason why his presence and vote should nullify the unanimous vote of the quorum, or the vote of his three associate directors who were a majority of all present, and against the validity of which no charge was made. I am therefore of the opinion that the resolution was legally adopted: Angell & Ames on Corp. 233; Smith v. Spears, 47 Conn. 47; Twin Lick Oil Company v. Marbury, 91 U. S. 587; U. S. Rolling Stock Company v. Atlantic and Great Western R. R. Co., 34 Ohio St. 450.

The evidence shows that the mining property of the defendant was held and owned by Scott and Brown, but with the expectation, and for the purpose of conveying it to the defendant upon its incorporation; that while it was so held it was in some manner, not indicated by the record, divided into thirty shares, and each man that took a share was to pay $1,000 to Scott and Brown for the purpose of developing it, and when the corporation was organized, stock was issued to each person that had bought a single share or proportion of the thirty shares, in proportion to the number of one thousand dollar shares he had taken, and the same persons that were interested in the property and paid their proportionate part were the incorporators, and afterward stockholders in the defendant corporation. The plaintiff being one of the persons for whom Scott and Brown held the property, paid his proportionate share of the costs and expenses of developing the mining property, and the money so paid by him for this purpose, with interest to date of the note, was included therein, I am of the opinion that the money so paid or advanced by him was not a "loan of liability" within the terms or intent of the resolution, and therefore the committee named in the resolution did not have authority to include it in the note. It was not money loaned or advanced to the defendant. The plaintiff, in common with others, paid his just and proportionate share to Scott and Brown for the development of mutual interests, and when the corporation was formed and this property was conveyed to it, the plaintiff got the full benefit, in common with other stockholders, of the money by him and them advanced for promoting their mutual interests and common enterprise, and to the extent that the note was made up or composed of such items, there was a partial want of consideration. The record shows no act of the defendant indicating an intention of assuring any liability by reason of such advancements, and without undertaking to determine whether the corporation could legally assume and pay such claim, I am of the opinon that the amount of such items, included in the note, should have been deducted from it at the trial: 2 Sutherland on Dam. 114; 1 Parsons on N. and B. 211.

The evidence shows that the stock of the corporation was full-paid stock, and not assessable; that on the fourth day of February, 1874, there was a meeting of the stockholders, called according to the by-laws of the company, in which a majority of the stock was represented, and unanimously adopted the following resolution:

"That the stockholders of this corporation do raise and pay to the treasurer forty cents on each of their respective shares of stock, and that such of the stockholders as do not elect to pay the same are requested to deposit their stock with the treasurer, on and subject to the condition that such of the stockholders as do pay such sums shall have the privilege of taking such stock at the expiration of nine months from this date, on paying the cost to such stockholders of said stock, including assessments heretofore made (and paid by the said stockholders), with ten per cent. interest from this date, provided that any stockholder who deposits his stock and who shall pay said forty cents on each share as aforesaid, within sixty days from date, shall have his stock returned to him; and also provided such stockholders elect within ten days to pay said forty cents a share, or to deposit their stock aforesaid."

At the time the plaintiff owned 3,210 shares of the capital stock of the defendant company, and, in compliance with the resolution, paid the treasurer $800 and $250, which, with interest, were allowed to the plaintiff and included in the note. The defendant claims that the committee, by the inclusion of these items in the note, exceeded the authority conferred upon them by the resolution. This position, I think, is well taken. The resolution was, in effect, a proposition that the stockholders, according to their several and respective interests, "pay" to the treasurer the sum therein named for the use, benefit and purposes of the corporation, and the payment by a stockholder to the defendant of the required sum, or any part thereof, was as though he had made an assessment upon himself for the benefit of the corporation—the mutual good of all. The sum so paid became the money and property of the company, not by virtue of a "loan," but as a payment to the defendant, for the advancement or promotion of its interests, by which each stockholder received his proportionate share of the gain to the aggregate body of shareholders, which constituted a valid consideration for the money so paid.

The defendant claims that the committee, by including in the note items of account that had been due and payable the length of time required by the statute to bar an action thereon, exceeded their authority, as such items were not "an indebtedness against the company" at the date of the notice. If this position is correct, the aggregate amount of such items should have been at the trial deducted from the note.

The defense of the statute of limitations is a personal privilege, which the debtor may assert or waive at his option; but when asserted, it must be set up by some affirmative act, expressing an intention of relying upon it as a defense. Until such intention is expressed, which must generally be by demurrer or answer, the

demand is good, notwithstanding the statute; and when successfully pleaded is a bar to the remedy. It does not otherwise regulate or affect the debt. The expiration of the time, which enables the debtor to plead the statute as a defense to an action to recover a debt, does not operate as payment or extinguishment. The debt survives, although the debtor is enabled, if he so elects, to plead the statute and thereby defend an action brought thereon: Grant v. Burr, 54 Cal. 298.

There is no intention expressed in the resolutions of relying upon the statute as defense to any indebtedness of the defendant, and Scott and Holbrook were not invested with any express discretion or authority with reference to the statute of limitations as a defense to any demand against the defendant. They were "*directed* to make and deliver to the several stockholders who have loaned money to this company, and for the liabilities of this company, the notes of this company for such loans and liabilities." A debt within the statutory law is a good consideration for a new promise, although made by an agent, if within the scope of his power. "An acknowledgment made by an agent in respect to demands relating to concerns within the scope of his authority, is binding upon his principal:" Angell on Lim. 261.

It is to me quite clear that the inclusion of these items in the notes was not an unauthorized act, and therefore the value of the note, because the statute might have been successfully pleaded, to an action upon them, had one been commenced, is not thereby impaired.

For these reasons, sanctioned by many authorities, I am of the opinion that the court erred in instructing the jury that, "if the jury find that any of the items entering into the amount of the note in this case were barred by the statute of limitations in force in Michigan at the date of this note, the amount at which they were figured in the note should be deducted therefrom, as not being a legal liability under the resolution offered."

This instruction is erroneous in another respect. Instructions should be precise and certain to a particular intent, and the law applied to facts in evidence clearly expressed. Telling the jury that if they should find that any of the items included in the note were barred by the statute, the amount of such items should be deducted therefrom, is not an intelligible statement of the law applicable to the particular facts in evidence. Reference to the statute, although it may have been copied *in hæc verba* into the pleadings of the case, is not informing them what facts are necessary to bring the debt or demand within the statutory bar: Thompson on Charging the Jury, sec. 67.

The record presents a large number of assignments of error, but the foregoing is sufficient in principle, if correctly applied to the facts of the case, to determine all the material questions raised or argued by counsel.

The judgment of the district court is reversed, and the case remanded for a new trial.

EMERSON, J., concurred, and HUNTER, C. J., dissented.

DEE v. HYLAND ET AL.

Filed August 24, 1883.

CONVERSION OF HORSE—STATUTE OF LIMITATIONS.—Where a horse is wrongfully converted from its owner and afterward sold to a *bona-fide* purchaser, who uses it in an open and notorious manner, without attempting to conceal it, the statute of limitations commences to run in favor of such purchaser and against the owner from the time of the purchase, and not from the time when the owner discovers the whereabouts of the horse.

APPEAL from a judgment of the district court, entered in favor of the defendants. The opinion states the facts.

N. Tanner and *Hoge & Jonasson*, for the appellant.

R. K. Williams, for the respondent.

TWISS, J. This is an action for the recovery of the possession of a horse alleged to be the property of the plaintiff, with a prayer for judgment against the defendant for the possession of the horse, in case possession can be had; but if possession thereof could not be had, then, in such case, for the value of the horse.

Among other defences, the statute of limitations was pleaded. A trial by jury was waived, and the case tried by the court. Evidence was properly admitted at the trial, upon which the court found the following facts:

"The plaintiff purchased the horse in question in 1873, and used him until May, 1877, then put him out to pasture. The horse disappeared in June, 1877. Plaintiff spent several days with others in looking for him, and notified the sheriff of Weber county of his loss, and desired him to keep watch for him, and also notified his friends among ranchers and cattlemen. The plaintiff never saw the horse again until he saw him in the possession of the defendants in Ogden on the twenty-eighth or twenty-ninth day of September, 1881, at which time he demanded possession of the horse, and upon their refusal, commenced this action."

The defendants bought the horse of Parsons in March, 1878, and have used him on their ranch in Box Elder county ever since, just as they used their own horses. There has been no effort on their part to conceal the horse, neither has he been concealed, but their possession has been open and notorious. Parsons, of whom the defendants purchased, bought the horse of Kimball and Richardson prior to the tenth day of September, 1877, and Parsons' possession had also been open and notorious: and finds, as a conclusion of law, that the statute of limitations pleaded by the defendant had run against the claim of the plaintiff and that he is not entitled to recover the horse in this form of action, and that the defendants are entitled to the return of the horse, and in case return cannot be had, a judgment for its value.

This case is to be distinguished from those in which the action is based upon a fraud committed by the defendant upon the plaintiff, who, by reason of the fraudulent or wrongful conduct

of the defendant, never discovers the fraud, and has no knowledge of a right of action until after the period of limitation has passed, like First Massachusetts Turnpike Corp. v. Field, 3 Mass. 201; Bailey v. Glover et al., 21 Wall. 342; Atlantic National Bank v. Harris, 118 Mass. 143. In these and similar cases the plaintiff, by reason of the concealment on the part of the defendant, did not know of the injury or fraud committed until after the expiration of the statutory limitation; and the question as to the application of the statute was between the wrongdoer upon one side and the injured party on the other. It would seem in such cases that justice and a sense of common honesty ought to prevent a person from using this statute as a means of successfully practicing a fraud upon his victim, unconscious of the wrong perpetrated upon and concealed from him.

In the case at bar the plaintiff knew he had lost possession of his horse, but did not know whether it was dead or alive; and if alive, whether it had strayed or been stolen, or where it was, or who, if any one, had possession of it. While this was the state of facts as to the plaintiff, the defendants and their vendors purchased, held and used the horse in good faith, making no effort to conceal it, either from the plaintiff or any other person; their possession had been notorious more than three years before the plaintiff knew who had the horse, or made a demand for its possession. Which of these parties, plaintiff or defendant, both innocent and without fault, must be the loser?

It is not claimed that the horse was impounded and sold as an estray under the statute; the conclusion is, therefore, inevitable, that some person, after the horse was turned out to pasture by the plaintiff in June, 1877, wrongfully converted it to his own use before it was sold to Kimball and Richardson in the following September, and although the horse was honestly purchased by the defendants and their vendors, yet the possession and use of it by them was a wrong upon, and in violation of the rights of, the plaintiff, from the time they respectively received it, for which he had a remedy by action at law, for an unlawful conversion to their use: Gilmore v. Newton, 9 Allen, 171; Truds v. Anderson, 10 Mich. 357.

Does the fact that the plaintiff did not know who had the horse, nor where it was, affect the rights of either party to this action, as to the statute of limitations pleaded as a bar? The statute contains no exception exempting plaintiffs who are ignorant of the facts necessary to give them a right of action from its limitations, and there is none implied by law, unless that ignorance is occasioned by some improper conduct of the defendant: Smith v. Newly, 13 Mo. 159.

Where there is no proof of fraud on the part of the defendant, the general rule is that the time of limitation runs from the time of the commission of the wrongful act, or the right of action accrues, and not from the time of the knowledge of the act by the plaintiff, there being no proof of any wrongful conduct on the part of the defendant, by means of which that knowledge is concealed from the

plaintiff: Addison on Torts, 1164; Jordan v. Jordan, 4 Green, 175; Thomas v. White, 3 Littell, 177.

Wells v. Halpin, 59 Mo. 92, was an action in the nature of replevin, and the only defense relied on was the statute of limitations. The court, quoting from Foley v. Jones, 52 Mo. 64, says: "It may be conceded that the statute does not protect plaintiffs who are ignorant of the facts necessary to enable them to bring suits, unless that ignorance is occasioned by some improper conduct on the part of the defendant," and then proceeds as follows: "This is now the uniform construction and no reason is perceived warranting a departure from it."

The same doctrine is maintained in Wood on Limitations, 382, and numerous authorities are cited in its support.

The judgment of the district court is affirmed.

HUNTER, C. J., and EMERSON, J., concurred.

MEYER ET AL., Trustees, Etc., v. UTAH AND PLEASANT VALLEY RAILWAY COMPANY.

Filed January 17, 1884.

FORECLOSURE SALE, HOW ATTACHED FOR FRAUD.—A sale by the trustees of a railroad mortgage, under a decree of foreclosure, and in strict compliance with the terms thereof, will not be set aside on motion of a bondholder not a party to the record. If the trustees combine with others to defraud the bondholders, or any of them, or if they did not act in good faith, relief may be had in a suit properly brought for that purpose, in which all the persons interested are joined as parties.

APPEAL from an order refusing to vacate and set aside a foreclosure sale. The opinion states the facts.

Williams & Young, for the appellant, Price.

Bennett & Harkness, for the respondents.

TWISS, J. This suit is brought in the first district court by Louis H. Meyer and George A. Lowe, trustees, to foreclose a mortgage or trust deed given by the defendant upon its railroad and other property to secure the payment of a series of nine hundred bonds of one thousand dollars each, issued and negotiated by the defendant, and on the twenty-first day of February, 1882, judgment and decree was rendered foreclosing the mortgage upon the corporate franchises of the defendant, upon its railroad running from Provo city to the coal fields in Pleasant valley, in this territory, upon all of its rolling stock and equipments, and upon all its lands, hereditaments and appurtenances, including the interest of defendant in all coal lands and coal veins, and all buildings, offices, trucks and fixtures of every nature, and used in connection with said coal mine, owned by or in trust for the defendant, in townships twelve and thirteen, south of range seven east, in said territory of Utah, and formerly in San Pete, but now in Emery county. The plaintiffs Meyer and Lowe were by the said decree declared to be the lawfully constituted

trustees of said deed of trust, and as such, and upon the trusts therein mentioned, vested with the title to the properties, rights and franchises described in said deed of trust, and were authorized to sell the same. It also appears by the record that in an action then pending in said court, wherein William M. Sparkman was plaintiff, and the Utah and Pleasant Valley Railway and Thomas C. Platt were defendants, a judgment was rendered by the court, on the twenty-fourth day of April, 1882, decreeing that the east half of the southeast quarter of section eight, and the west half of the northwest quarter of section thirty-three, and the west half of the southwest quarter of section twenty-eight, and the southeast quarter of the northwest quarter, and lot No. five, and the south half of the northeast quarter of section six, all in township thirteen, south of range seven, east of Salt Lake meridian, containing 466.48 acres, more or less, be sold by a receiver, and that the plaintiff, Lowe, was appointed such receiver for that purpose; that the avails of such sale be applied in payment of such judgment; and further adjudging that the sale so made shall transfer and be a bar upon the defendant, the Utah and Pleasant Valley Railway Company, as to all right, title, interest, use, beneficial interest and right of possession of said company in and to the premises so sold; and also transfer and be a bar upon the defendant, Thomas C. Platt, as to all the right, title and interest acquired by him, or which he has or holds in trust or otherwise by or under the deeds to him from Goss and Cochrane.

It also further appears by the record that the sale so decreed was made by the said receiver on the eleventh day of July, 1882, for the sum of $40,000 to William M. Sparkman, he being the highest bidder, and that being the highest sum that was bid for the same; that he made payment for the same by paying cash to the amount of $135.25; that the balance thereof, $39,864.75, was credited on a judgment in favor of said Sparkman against said railway company, pursuant to the directions of said decree. The record further shows that the mortgage or deed of trust to foreclose which this suit is brought, prescribes "that the said trustees, or either of them, may be removed by instrument of writing under the hands and seals of a majority in interest of the outstanding bonds secured hereby. * * That in case at any time hereafter, either of the said trustees, or any future trustee hereafter appointed, shall die, or resign, or be removed as herein provided, or by a court of competent jurisdiction, or become mentally incapacitated to execute the trust, a majority in amount of the holders of the then outstanding bonds issued hereunder, shall have the right and power by instrument in writing, under their hands and seals, to appoint a new trustee to fill such vacancy." That on the thirty-first day of August, 1881, William Sparkman, being the owner and holder of four hundred and eighty-two bonds, amounting in the aggregate to $482,000, exclusive of interest, and constituting a majority in number and interest of all the bonds, secured by the mortgage or deed of trust, removed

the said De Graaf and Wilkins from the office and position of trustees under said mortgage and deed of trust, and constituted and appointed the plaintiffs, Louis H. Meyer and George A. Lowe, to be and act as trustees under the said mortgage or deed of trust in the place and stead of De Graaf and Wilkins, removed as aforesaid, to take and hold the estate and trusts thereby created, declared or conferred, upon the like terms and conditions, and subject to the same rights and powers, duties and obligations as by said deed of trust or mortgage were conferred upon the persons named as trustees, and in all things to fully execute its trusts.

It also appears by the record, that pursuant to the judgment in this case the plaintiffs Meyer and Lowe, trustees, on the 12th day of June, 1882, sold all the property in this cause decreed to be sold, for the sum of two hundred and fifty thousand dollars, which was paid partly in cash and the remainder in bonds and coupons, pursuant to the decree of said court.

On the 18th day of September, 1882, Lewis M. Price comes into court by his attorneys and files a paper which in the record is called a petition, although it contains no prayer for relief, or any order or decree or judgment of the court, in which he states that he is the duly appointed and acting receiver of the Pacific National Bank of Boston, and that as such receiver he is the legal custodian and possessor of the property of said bank. That among the assets of said bank are ninety-nine first mortgage bonds of the Utah and Pleasant Valley Railway Company, of the denomination of $1,000 each, dated September 14, 1878, a part of the series of bonds described in, and secured by the deed of trust or mortgage, for the foreclosure of which this suit is brought.

That De Graaf and Wilkins, the original trustees named in the mortgage or deed of trust, were, on the 31st day of August, 1881, without notice and without cause, removed from said trust by Sparkman, who at the time claimed to be the owner and holder of a majority of the bonds, and on the same day he appointed and constituted the plaintiffs Meyer and Lowe to thereafter be and act as trustees under said mortgage or deed of trust, in the place and stead of De Graaf and Wilkins, theretofore removed.

He further alleges that Sparkman, in June and August, 1881, recorded judgments against the Utah and Pleasant Valley Railway Company, in two suits, particularly described, for the aggregate sum of $153,037.40; that in November, 1881, Sparkman brought suit against the defendant Utah and Pleasant Valley Railway Company, upon these judgments, and against Thomas C. Platt, as the holder of the legal title to certain coal lands belonging to the defendants, and in said mortgage and deed of trust theretofore conveyed to trustees as part security for said bonds; and by said last-named suit sought to have said coal lands sold and the proceeds thereof applied to satisfying the judgments last mentioned; that judgment by default was rendered, and plaintiff Lowe was by the court appointed receiver of the coal lands and property, with order

to sell the same, who, on the 11th day of July, 1882, sold said coal lands for $40,000, which was applied in part satisfaction of the Sparkman judgments.

Price further alleges that no defense was made to the bill of foreclosure, but default was made and judgment and decree was taken in accordance with the prayer of the complaint.

That on the twelfth day of June, 1882, in pursuance of said decree, said railroad property and coal lands were sold to Sparkman for the sum of $250,000, and that said property was purchased by Sparkman for and on behalf of the Denver and Rio Grande Railroad Company, which is now and ever since has been in the possession of same, using and operating it, and applying the proceeds thereof to its own use.

That George A. Lowe on the thirty-first day of August, 1881, at the time he was appointed trustee under said mortgage or trust deed, was, and ever since has been, and is now a stockholder, vice-president and director in the Denver and Rio Grande Railway Company, and its most active promoter in Utah. That the price paid for the railway franchise, property and coal lands was grossly inadequate, and that said property is worth at least double that sum, which was well known to Lowe and Sparkman and the Denver and Rio Grande railway company at the time of sale.

Price further alleges on his information and belief that the said plaintiffs have not proceeded in the execution of their trust in such a manner as to be most advantageous to the holders of said bonds, but on the contrary avers that for the purpose of advancing the interests of themselves, the said Sparkman and the Denver and Rio Grande Western Railway Company, they have conspired and colluded with said Sparkman and the officers and agents of said railway company, and the plaintiffs herein, to deplete the property of the said defendant, covered by the said mortgage, by subjecting a portion thereof, to wit, the coal lands aforesaid, to the payment of the said judgments in favor of Sparkman, in fraud of the rights of this petitioner, as such receiver, and the other holders of the said bonds not included in said scheme." That this petitioner resides in Boston, in the state of Massachusetts, and had no knowledge or information of the institution of this action until after the sale of the said property had taken place. And he further says that in case a resale is ordered he will bid or cause to be bidden for the said property the sum of $500,000. He further says that he is informed and believes and alleges the truth to be that John Sharp, of Salt Lake City, in said territory, is willing to and will in the event of a resale bid the sum last aforesaid for said property.

Upon this paper called a petition, the records and papers on file in this action, the report of sale, the papers on file in, and the records of the court in the cases of Sparkman v. Utah and Pleasant Valley Railway Company and Thomas C. Platt, a motion was made in behalf of said Lewis M. Price, receiver, etc., to vacate and set aside the sale of the property of the defendant made by the plaintiffs,

Meyer and Lowe, on the twelfth day of June, 1882, which motion was overruled, and the sale was confirmed by the court, on motion of the plaintiffs, per which order and decision of the court, Price appealed to this court.

The counsel for appellant, with much severity, criticise the displacement of said De Graaf and Wilkins, the original trustees named in the deed of trust, and the appointment of Meyer and Lowe in their place and stead. But the court in its decree specifically decrees "that the plaintiffs, Lewis H. Meyer and George A. Lowe, since the thirty-first day of August, 1881, have been and still are, the lawfully constituted trustees of said deed of trust, and vested as such trustees and upon the trusts therein mentioned, with the title to the properties, rights and franchises described in said deed of trust, and as such trustees are also vested with all the rights and powers granted to, and subject to the duties imposed on the original trustees and their successors, by said deed of trust."

In light of this extract from the decree or judgment, it is clear that the fault in this request, if any there be, inheres in the decree of the court, and not in the sale under such decree.

Counsel also criticise the transactions of the trustees in regard to the coal lands, claiming that it was their duty to see that the coal lands actually acquired by the defendant, as well as the net profits arising from working them, should be applied according to the terms of the mortgage. But it will be seen by examination of the notice and report of sale under the decree in this cause, that the sale was made in all respects pursuant to said decree; and that all the interest of the defendants in the coal lands was so sold, and therefore if any fault was committed as to this particular property, it inhered in the decree of the court, and not in the sale. It is true that by the decree of the court in the case of Sparkman v. The Pleasant Valley Railroad Company et al., the court rendered judgment against the railroad company for the sale of its interest in the coal lands. But if this decree was wrong (upon which we express no opinion) the wrong was in the judgment of the court, and not in making a sale under it. We think that neither that nor any of the other matters complained of by the appellant as to any decree of the court, could be remedied by a motion to set aside the sale made under and in pursuance of the decree of foreclosure, which is final until annulled or reversed: Bullard v. Greene, 10 Mich. 268; Crawford v. Fuller, 35 Mich. 57. We are therefore not required to examine any question growing out of the decisions of the court, other than the order of the court overruling the motion to vacate and set aside the sale for errors committed in *executing* the decree.

Errors in the decree, or committed by the court anterior to it, are all matters which were duly considered by the court, and a motion to set aside a sale made under the decree is not a correct way of reviewing the proceedings of the court, as there is no claim that the judgment and decree is invalid.

The district court having decided that Meyer and Lowe were trustees of the mortgage, they are to be regarded as such in all proceedings upon the motion; they are the legal representatives of all the bondholders, no one of whom is permitted by motion to interfere with the proceedings of the court. In Shaw v. Railroad Company, 100 U. S., C. J. Waite, in the opinion of the court, said: "The trustee of a railroad mortgage represents the bondholders in all legal proceedings carried on by him affecting his trust, to which they are not actual parties, and whatever binds him, if he acts in good faith, binds them." If the trustees combined with others to defraud the bondholders, or any of them, or if they did not act in the good faith required of them, a remedy might, doubtless, be had in a suit properly brought for that purpose, making all persons interested parties by proving the fraud in a trial on issues correctly framed; but a mere motion to vacate and set aside a sale, by a person not a party to the record, is an improper and inadequate mode of trying such important matters as are involved in these proceedings: Ward v. Clark, 6 Wis. 509.

We are of the opinion that the order of the district court, in overruling the motion to vacate and set aside the sale, and in sustaining the motion to confirm the sale should be, and is, affirmed.

HUNTER, C. J., and EMERSON, J., concurred.

PEOPLE *v.* HILL.

Filed February 22, 1884.

APPEAL FROM ORDER SUSTAINING A DEMURRER TO AN INDICTMENT.—An appeal lies on the part of the prosecution from an order sustaining a demurrer to an indictment when it is further ordered that the defendant be held in custody to await the action of the next grand jury.

ERRONEOUS REFERENCE IN STATUTE.—Subd. 2 of sec. 192 of the criminal practice act, providing that a defendant may demur to an indictment when it fails to comply with the requirements of sec. 152, will be construed as referring to sec. 151 when it is manifest that such was the legislative intent, and that the reference to sec. 152 was evidently a mistake.

A DEMURRER TO AN INDICTMENT IS SUFFICIENT that states that the same does not substantially conform to the requirements of sec. 151 of the criminal practice act, and under such allegation specifies that two of the essentials mentioned in sec. 151, to wit, certainty as to the offense charged and the particular circumstances, are wanting.

INDICTMENT FOR EMBEZZLEMENT BY A BAILEE.—The sufficiency of an indictment is to be tested by the requirements of the criminal practice act, and not by the rules of the common law. Under such act an indictment for embezzlement by a bailee is sufficient, which charges that the defendant, on a day and at a place certain, "having been intrusted as bailee by one Hill with two certificates of deposit of money in a certain bank, to wit, one for the sum of five thousand dollars and the other for the sum of four thousand dollars, both payable to the order of and both being the property of said Hill, did collect and receive thereon and therefor from said bank, and as bailee, was by said bank and said Hill intrusted to carry and convey from said bank to said Hill money to the amount and value of nine thousand dollars, proceeds of said two certificates; and said defendant being so as aforesaid intrusted as bailee with said certificates and said money to said amount of nine thousand dollars, the property of said Hill, afterward on, etc., at, etc., did fraudulently and feloniously convert the same and the proceeds thereof to his own use, contrary," etc. Such indictment does not charge more than one offense, and need not specify the nature of the bailment.

DISCHARGE OF PRISONER—RESUBMISSION TO GRAND JURY—APPEAL.—Neither an order refusing to discharge a prisoner, after an order sustaining his demurrer to the indictment, nor an order resubmitting his case to the grand jury, are appealable.

RESUBMISSION TO GRAND JURY, CONSTRUCTION OF SECTION AUTHORIZING.—Sec. 197 of the criminal practice act authorizing a resubmission of the case "to the same or the next grand jury," after a demurrer to an indictment has been sustained, does not limit such resubmission to the same grand jury that found the indictment, nor to the one immediately succeeding. Such resubmission may be made to the first grand jury that meets after the demurrer is allowed, although one or more grand juries have met and been discharged between then and the time when the indictment was found.

APPEAL from certain orders of the third district court. The opinion states the facts.

Zera Snow and *Arthur Brown*, for the people.

Sutherland & McBride, for the defendant.

EMERSON, J. The defendant was arraigned in the third district court upon an indictment for embezzlement, the charging part of which is as follows: The said Alexander S. Hill, on the eighth day of March, A. D. eighteen hundred and eighty-three, at the county of Salt Lake, in said territory of Utah, having been intrusted as bailee by one Lucy J. Hill with two certificates of deposit of money in the Deseret National Bank, to wit, one for the sum of five thousand dollars and the other for the sum of four thousand dollars, both payable to the order of, and both being the property of, said Lucy J. Hill, did collect and receive thereon and therefor, from said bank, and as bailee was, by said bank and said Lucy J. Hill, intrusted to carry and convey from said bank to said Lucy J. Hill, within said county, money to the amount and value of nine thousand dollars, proceeds of said two certificates, an exact description of which is to the jury unknown; and said Alexander S. Hill being so, as aforesaid, intrusted as bailee with said certificates and said money, to said amount of $9,000, the property of said Lucy J. Hill, afterwards, on the 12th day of March, 1883, at said county of Salt Lake, fraudulently and feloniously did convert the same, and the proceeds thereof, to his own use, contrary, etc.

To this indictment the defendant interposed a demurrer, upon the following grounds: first, on the ground that said indictment does not substantially conform to the requirements of secs. 150 and 151 of the code of procedure in criminal cases, as to the offense charged and the particular circumstances; second, that more than one offense is charged in the said indictment.

The demurrer was sustained, to which ruling the prosecution excepted. Thereupon the counsel for the defendant moved for an order discharging the defendant from custody, and the prosecution moved "for an order of resubmission to the grand jury, as provided by statute." The defendant's motion was denied and that of the prosecution granted, whereupon the following order was entered: "And it is further ordered and adjudged by the court that the case be resubmitted to the grand jury of this court, at the next sitting thereof, for further consideration and action by such grand jury, and that in the mean time the said Alexander S. Hill be and remain in the custody of the United States marshal." To all of which the defendant duly excepted.

I have been thus particular in reciting the order made subsequent to that sustaining the demurrer to demonstrate that the right of the prosecution to prosecute this appeal is in accordance with the doctrine laid down in the dissenting opinion in the case of People v. Ah Own, 39 Cal. 608, which, in my opinion, is a correct interpretation of the statute, our statute upon that subject being a literal copy of that of California.

The people appeal from the judgment sustaining the demurrer.

Sec. 192 of the criminal practice act points out what objections appearing upon the face of the indictment may be taken advantage of by way of demurrer. The defendant selects subdivisions two and three of that section with which to assail this indictment, and they are as follows:

"2. That it does not substantially conform to the requirements of secs. 150 and 152.

"3. That more than one offense is charged in the indictment."

Sec. 150 prescribes what the indictment must contain, viz.:

"1. The title of the action specifying the name of the court to which the indictment is presented and the names of the parties.

"2. A clear and concise statement of the acts or omissions constituting the offense, with such particulars of the time, place, person and property as will enable the defendant to understand distinctly the character of the offense complained of, and answer the indictment," and then gives a form for an indictment, which must be substantially followed.

"Sec. 151. It must be direct and certain as it regards:

"1. The party charged. 2. The offense charged. 3. The particular circumstances of the offense."

Sec. 152 prescribes what shall be done when a defendant is indicted by a fictitious or erroneous name, upon the discovery of his true name.

The reference to sec. 152, in subd. 2 of sec. 192, is manifestly a mistake and does not express the legislative intent. Considering the subject-matter of which they are treating, that intent can only find expression in sec. 151.

This statute being for the protection of the individual, it should not receive such a construction as would deprive him of any right. The intention of the legislature to give a defendant in a criminal prosecution the right to demur to an indictment for any or all the reasons mentioned in sec. 151 appearing on the face thereof, is manifest and it is our duty to carry this intention into effect, and so construe the words used as to make them refer to the section evidently intended.

Subd. 2 of sec. 192 will be read as though the reference were to sec. 151 instead of 152. Any other construction would lead to an absurdity and should be rejected. In the construction of a statute, if the meaning of the legislature is manifest, the intention will be carried into effect although apt words are not used in the act: Crocker v. Crane, 21 Wend. 211. And this rule ought and does go

to the extent of correcting errors and mistakes which are clear and obvious, and without which correction no effect could be given to the statute: People v. King, 28 Cal. 274; Ex parte Heady, 31 Id. 114.

The prosecution contends that the demurrer does not sufficiently specify the objections to the indictment to meet the requirements of sec. 193 of the criminal practice act. That section provides that the demurrer must be in writing, signed either by the defendant or his counsel, and filed. It must distinctly specify the grounds of objection to the indictment, or it must be disregarded.

The objection raised by the first ground of the demurrer is that the indictment does not substantially conform to the requirements of secs. 150 and 151, and under this allegation specifies that two of the direct and certain essentials mentioned in sec. 151 are not found in this indictment, viz.: subds. 2 and 3 as to the offense charged and the particular circumstances. This is a sufficient specification of the grounds of the objection and satisfies the mandate of sec. 193.

Having disposed of these preliminary matters, we come to the questions raised by the demurrer. By a reference to the first ground upon which the indictment is assailed, it will be seen that the specific objections raised by the demurrer are that the requirements of subds. 2 and 3 of sec. 151 are not met and complied with. Although sec. 150 is referred to in the demurrer, yet as the specification of the grounds of the objection required, sec. 193 does not refer to any of the requisites contained in sec. 150, it cannot be regarded as attacking the indictment for want of conformity to any of the requirements of the latter section, except so far as the provisions of subd. 2 of this section are inseparably connected with those of subds. 3 of sec. 151, all others are deemed to be waived by reason of the failure to specifically point them out.

The objection that an indictment does not substantially comply with the requirements of secs. 150 and 151, either one or both, must be taken by special demurrer specifically pointing out by apt and proper words what condition of the various subdivisions of those sections have been violated. It will not do to demur in the language of sub. 2 of sec. 192, and stop with that. The precise grounds must be pointed out: People v. Frilen, 58 Cal. 218.

There is no room for doubt as to the offense sought to be charged upon the defendant. If the indictment is sufficient to charge any offense, it is that of embezzlement, and can be none other. The language used and circumstances averred are applicable to no other offense. So that if it substantially conforms to the requirements of sec. 151, as to the particular circumstances of the indictment, it so far at least as the objection aimed at by this demurrer are concerned, sufficiently charges the crime of embezzlement.

Its sufficiency is to be tested, not by the rules of the common law, but by the requirements of the criminal practice act. Sec. 158 of that act declares that the indictment is sufficient if it can be understood therefrom among other things not called in question

here, "that the act or omission charged as the offense is clearly and distinctly set forth without repetition, and in such a manner as to enable the court to understand what is intended, and to pronounce judgment upon conviction according to the right of the case."

It is sufficient if the charge be stated with so much certainty that the defendant may know what he is called upon to answer, and the court how to render judgment. In other words, substantial justice should be more sought after than artificial nicety. The defendant, whether he be guilty or innocent, if he understands the English language, cannot fail to have understood when the indictment was read to him, that by it he is charged with the embezzlement of $9000, the property of Lucy J. Hill.

Even under the above liberal rule laid down by the legislature, as our guide in determining its sufficiency, it is the duty of the prosecution to so frame every indictment as to apprise the defendant, with a reasonable degree of certainty, of the charge preferred against him. The absence of a direct allegation of anything essential in the description of the substance, character or manner of the crime cannot be supplied by intendment. It is as much an essential requisite under our criminal practice act as it ever was, that all matters material to constitute the particular crime charged should be alleged with such positiveness and distinctness as not to need the aid of intendment or implication. All this is embraced in the fundamental declaration that it is the right of every person accused of a crime "to be informed of the nature and cause of the accusation." These rules do not require any hypercritical construction and interpretation of an intendment on the part of the court.

All that is required is a fair and reasonable construction and interpretation, that substantial justice may be meted out and society protected. While the court must not lose sight of the rule that every defendant in a criminal prosecution is to be deemed innocent until the contrary is proved, it ought not to blind itself against the equally sacred right of the peaceable and law-abiding portion of the community to be protected from those criminally inclined.

The straining of this rule in favor of persons charged with crime is bringing the administration of the laws against crime in this country into disgrace. It is having this effect upon the common ordinary mind in nearly all communities, and as a result we are frequently reminded that wronged human nature is seeking to right itself in acts of violence which are a disgrace and reproach to the enlightenment of the age. Courts should do their part toward correcting this state of things, and while obeying the fair construction of the rules of law, as well as the dictates of an enlightened humanity in sacredly guarding the rights of every person accused of crime, when brought before them, they should be equally careful that the legal rights and moral sense of the community receive no detriment through constant familiarity with impunity of crime by demanding artificial nicety rather than substantial plainness in

every step taken by those charged with the prosecution of criminal offenses.

It is claimed by the defendant that this indictment does not meet and satisfy the rules above referred to, and mainly because it is charged that he was "intrusted as bailee" with the property, without setting out the particular circumstances of the bailment. It is doubtless true that the prosecution sought to charge the defendant under sec. 2124 of the compiled laws, which enacts that "every person intrusted with any property as bailee * * * who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his use, is guilty of embezzlement.

I can see no reason why it is not sufficient to charge the offense in the language of the statute, or what difference it can possibly make to the defendant in an indictment for embezzlement as bailee, whether the bailment was to keep, to transport, to deliver, to dispose of. The essential thing in a concise definition of the crime of embezzlement is the fraudulent appropriation of another's personal property by one to whom it had been intrusted. If it should turn out upon the trial that the person charged with embezzlement had the right to appropriate the property to his own use, then no matter what the character of the original bailment, it would be a complete defense, the same as if, in a trial on an indictment for larceny, the goods charged to have been stolen should turn out to be the property of the defendant instead of owned by the person alleged. It has never been held that it was necessary to allege how a person became owner.

Mr. Bishop, in his work on statutory crimes, sec. 421, gives the form of the charging part of an indictment for embezzlement by a bailee, which he insists is sufficient, and which is as follows: "That J. S., etc., on, etc., at, etc., being then and there the bailee of one gold watch of the value, etc., of the goods and chattels, etc., did fraudulently and feloniously convert," etc.

In the following section (422) the learned author, commenting on the case of People v. Pagi, 19 Cal. 600, which reviews the case of People v. Cohen, 8 Id. 42, relied upon by the defendant in this case, uses the following language: "The court of this state (California), however, has gone further, and, contrary to the foregoing views, has held that it is not enough to charge the defendant, as in the foregoing form, with being bailee, but the facts and circumstances of the bailment must be set out. To the writer this does not seem, on principle, to be necessary, for the following reasons: First—Although the facts of the bailment is material, it is, in a certain sense, incidental, the offense consisting in the person who sustains the relation of bailee to the property, doing the forbidden thing. The gravamen of the charge is that this person "convert the same to his own use." It is not denied, and it cannot be, that it is sufficient simply to follow the statute in this part of the allegation; therefore *a portion* should be sufficient in the other parts. Second—The relation of

bailee is well known in the law, just as well known, though not quite so common, as the relation of owner. It is not necessary to allege how a man became owner of personal property, or to state the facts or the circumstances of the ownership. When one is charged with being owner, the allegation covers all necessary facts; in like manner, it should be held that when one is charged with being bailee the allegation covers all necessary facts."

The allegation in this indictment, that the $9,000 was the property of Lucy J. Hill, is just as material an allegation as the one that he was "intrusted as bailee." Nothing more is left to be supplied by intendment and implication in the one case or the other. The fact is, that nothing is left to be supplied in either. Each must be regarded as the allegation of an ultimate fact.

It has frequently been held that an indictment for embezzlement which charged that the defendant was the agent of the person whose property was charged to have been embezzled, and that he received it as agent, was sufficient without setting out in detail the nature and purpose of the agency. It is not perceived why a different rule should apply to "bailee" than to "agent." One is no less a general term than the other. The case of the Commonwealth v. Smart, 6 Gray 15, so confidently relied upon is not in point, because in that case the indictment undertook to set out the particular terms under which the property was intrusted to the defendant, and as the court say there was evidently an omission of a whole clause, which was necessary to determine the relation which the defendant bore to the prosecutor in reference to the property. The court were left entirely to conjecture as to what words were intended to be inserted. It is noticeable, moreover, that this case is not referred to by Mr. Bishop—although a decision from his own state—in his review of the subject now under discussion. The demurrer should not have been sustained upon this ground.

The second ground upon which the indictment is assailed by the demurrer is "that more than one offense is charged." This result is supposed to follow from the allegation that the defendant was intrusted as bailee with the two certificates of deposit. After reciting the facts that the money was collected on them and was intrusted to him as bailee by the bank and said Lucy J. Hill to carry from the bank to her, it proceeds: "Being so as aforesaid intrusted as bailee with said certificates and said money to said amount of nine thousand dollars, the property of said Lucy J. Hill, afterwards on the twelfth day of March, 1883, at said county of Salt Lake, fraudulently and feloniously did convert the same and the proceeds thereof to his own use," etc.

The only substantive offense charged in the indictment is the embezzlement of the money. All the acts alleged are parts of one and the same transaction which resulted in the commission of one offense, and that the embezzlement of the money. This is sufficiently made to appear in the indictment. The averments concerning the certificates do not constitute an embezzlement of them; they negative

that idea. The reference to the certificates in connection with the charge of the embezzlement of the money is surplusage.

The indictment is not bad for duplicity under sec. 153 of the criminal practice act.

The demurrer should have been overruled on both grounds.

The defendant appeals from the order of the court below, refusing to discharge him upon sustaining the demurrer. The record shows that the court, upon the motion of the prosecution, ordered the case to be resubmitted to the grand jury which should next meet after the order was made. I am satisfied that neither of these is an appealable order. The order refusing to discharge is in substance the order resubmitting the case which immediately followed it, and was right and proper if the order of resubmission was right and proper. It has been ruled, and no doubt correctly, that the statute does not give the defendant the right to appeal from such an order, and that it can only be reviewed on an appeal from the final judgment.

Subd. 3 of sec. 360, which allows a defendant to appeal "from an order made after judgment affecting the substantial rights of the party," applies only to orders made after final judgment, which of course could not be reviewed on an appeal from the judgment: People v. Clark, 42 Cal. 622.

This point was not raised on the appeal. It ought not, however, on that account, to be passed over in silence and this appeal allowed to become a precedent for others from like orders.

It is understood that the prosecution as well as the defendant desires a construction of sec. 196, under the provision of which the order appealed from was made. The section referred to enacts: "If the demurrer is allowed, the judgment is final upon the indictment demurred to and is a bar to another prosecution for the same offense unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the same to be resubmitted to the same or to the next succeeding grand jury."

It will be seen by the record that the defendant was indicted on the fourteenth day of April, 1883; was arraigned and filed his demurrer on the seventeenth day of May following. For some reason, presumably satisfactory to all parties concerned, the argument on the demurrer was postponed until the sixth day of October, when it was argued and submitted, taken under advisement, and finally disposed of on the tenth day of December, 1883. So that at the time the demurrer was allowed, the grand jury which found the indictment, and the next succeeding one to that, had been discharged. For this reason the defendant insists that the order of resubmission was erroneous, and consequently the order refusing to discharge the defendant was erroneous.

In our opinion, the words "next succeeding grand jury" refer back to the time when the judgment on this demurrer is made and entered, and the meaning is that if the order of resubmission is made it must be to the first grand jury that meets after the demur-

rer is allowed. This view is strengthened by the reference made in sec. 198, which provides that "if the court directs that the case be resubmitted, the same proceedings must be held thereon as are prescribed in secs. 187 and 188. These sections refer to the proceedings on a motion to set aside the indictment, and sec. 187 provides among other things, "if the motion is granted, the court must order that the defendant, if in custody, be discharged therefrom; or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the same be refunded to him, unless it directs that the case be resubmitted to the same or *another* grand jury.

If the construction contended for by the defendant should prevail, then in every case of a defective indictment it would only be necessary for the defendant to avoid arrest, or get the hearing or decision upon a demurrer postponed until after the discharge of the grand jury next succeeding the one which found the indictment, and he has placed as effectual a bar to any further prosecution for that offense as a trial and verdict would be.

We do not think this was the intention of the legislature; nor do we think the language used demands that we should so interpret it. Construing the sections referred to together, we think the plain intent is that in case the court should, for reasons satisfactory to itself, deem it advisable to resubmit a case to a grand jury, it should improve the first opportunity presented to do so, and not keep a defendant in custody or on bail for an indefinite length of time.

There is no absolute rule of construction that compels us to refer the clause "next succeeding grand jury," in sec. 196, to the nearest word that might be an antecedent. The relative may be referred to such antecedent as will give the clause a sensible and reasonable construction: 10 M. & W. 728.

The judgment of the court below in sustaining the demurrer is reversed and the case is remanded to the third district court, with directions to that court to overrule the demurrer and allow the defendant to plead to the indictment.

The order of the court below in refusing to discharge the defendant is affirmed.

TWISS, J., concurred. HUNTER, C. J., dissented from the judgment of reversal, and concurred in the judgment affirming the order of the court below.

SUPREME COURT OF WASHINGTON TERRITORY.

BRAGUE v. SCHOFIELD ET AL.

July Term, 1883.

"OREGON DONATION ACT," TITLE UNDER.—Under this act, by which there "is granted' to every man answering to a certain description, or if married, to him and to his wife in equal parts, a tract of land of specified area, upon certain prescribed conditions of selection, and in consideration of residence and cultivation for a certain period, the United States holds the position of seller and the donee that of a purchaser. As soon as the necessary selection has been made, and the prescribed residence and cultivation completed, the transaction is closed, so far as the sale is concerned. Final proof is no part of the consideration which the grantee gives, but is merely evidence to satisfy the land office that the right of the grantee is perfect, and entitles him to a patent. The act, and not the patent, works the transfer of title. The patent is formal and solemn evidence, and when issued relates back as of the date when a fit grantee, rendering full consideration, had appeared. Title under this donation act is always complete before a patent issues, and the patent issues by virtue of a title complete, and not otherwise.

THE SAME—PARTITION BY MINORS—ACQUIESCENCE—ESTOPPEL.—Previous to 1853, Amos Short, who was married, had duly selected, under the Oregon donation act, a tract of land, which is the subject-matter of the present controversy, and with his wife had resided upon and cultivated it in full compliance with said act, so as to entitle himself and wife to a patent, subject to survey by the United States surveyor. In 1853 he died, leaving a widow and children. All the requirements of said act had been complied with, and the widow and children of Amos Short held, prior to and in the year 1855, in undivided shares, all disposable interest in and to said tract of land, and were entitled to a patent therefor from the United States. In 1855 they agreed to make, and did make, a parol division or partition of this whole tract into halves; the east half was assigned to the widow, and the west half to the children. This partition was, of course, subject to the survey and division made by the surveyor-general, and to the division line which he might determine. The children, assuming that the west half belonged to themselves, proceeded in 1856 to make a partition of it and to determine their own shares in severalty. To this end, those who were of age applied personally, and those who were minors applied by guardian, to the proper probate court for a partition. Proceedings were thereupon had, by which the probate court, in form at least, decreed a partition of the west half among all the children. To this partition all of the children actually and willingly consented by each, either personally or by guardian, taking possession and control of his or her portion in severalty, and by mutually paying and accepting owelty sufficient to fully equalize all the allotments. In 1874 the United States surveyor-general divided the land between the widow and the heirs, and among the heirs themselves, in exactly the same manner in which they themselves had partitioned it in 1856. Under these partitions, G. H. Short, one of the minor children, became entitled to and possessed of a share of said west half, known as lot 7, which is the land in controversy. He held and used that lot as his own until 1865. In that year his guardian, acting under direction of the court of probate, sold said lot to the appellee, Schofield, for a fair price, which, under direction of the court, was applied in paying a mortgage upon the premises and other debts proved and allowed against said minor's estate. G. H. Short became of age in 1866. In 1878, twelve years after attaining his majority, during which interval he had not, by word or act, objected to any of the foregoing proceedings, he gave to the appellant's grantor a quitclaim deed of all his right, title and interest in the said donation claim; and about the same time the other heirs gave to the appellant's grantor similar deeds of their respective interests. At the execution of these latter conveyances, periods varying from eight to twenty-one years had elapsed since each one of the heirs had become of age, during which times none of them had made any objection to the various proceedings aboved described. Meanwhile the appellees have put upon the premises permanent improvements of great value. *Held*, that even if the proceedings in the probate court for the partition and for the sale were irregular, the said heirs were estopped by their long acquiescence, after attaining their majority, from objecting to the regularity and validity of the partitions which had been made, or of the sale of the land by order of the probate court; and that their quitclaims to appellant's grantor conveyed no right, title or interest in the premises.

APPEAL from a judgment of the district court. The opinion states the facts.

George H. Williams and *Leander Holmes*, for the appellant.

B. F. Dennison, for the respondent.

GREEN, C. J. The first step toward deciding this cause is to determine clearly the nature of what takes place between the United States and its donee, when proceedings are had under the Oregon donation act to establish title in the latter. By the act there "is granted" to every man of a certain description—or, if he has a wife, then to him and her, in equal parts, as shall be set off to them severally by the surveyor-general—a tract of land not to exceed a certain area, on condition that the same shall be selected in a certain way, and in consideration that it shall be resided upon and cultivated a certain length of time. This grant is subject, however, to the qualification that if the husband and wife have complied with the provisions of the act, so as to entitle them to the grant, and either of them before patent has issued shall have died intestate as to his or her share, the survivor and children or heirs of the deceased shall be entitled to the share or interest of the decedent, in equal proportions.

Throughout the transaction the United States holds the position of seller and the donee that of purchaser. As soon as the necessary selection has been made and the prescribed residence and cultivation completed, the transaction is closed as far as bargain and sale are concerned. Nothing remains but to assure the vendor, or the vendor's agents, the officers of the land office, that as matter of fact the grant has become effective, by meeting a fit grantee who has rendered the proposed consideration, so that they may furnish the grantee with good and sufficient evidence of his title. Final proof, so called, is no part of the consideration which the grantee gives, but is merely evidentiary matter, provided for the purpose of satisfying the land office that the right of the grantee is perfect and entitles him to a patent.

The act, and not the patent, is the instrument which makes the transfer of title. Its language is unmistakable, "there shall be and hereby is granted." One conveys, the other evidences title. The patent is but a formal and solemn piece of evidence, that all things essential to be done under the donation act before the passage of title have been done, and that therefore under the act title has actually passed out from the United States into the donee. Act and patent together fulfill all the functions of an ordinary deed of conveyance. The two together both convey and evidence title. The patent merely evidences and does no more; but the act evidences to a certain extent only, and then, over and beyond that, does alone and perfectly convey. When patent issues, it relates back to and combines with the act, as of the date when a fit grantee, rendering full consideration, appeared, and so as to form with the act a perfect muniment of title. Title under the donation act, therefore, is always complete before patent issues, and the patent issues by virtue of title completed, and not otherwise.

In the case at bar, the widow and heirs, if they have acquired any title at all, have got it under the donation act. Their patent so recites, and neither they nor any grantee of theirs can, while claiming under that patent, deny it.

They are estopped from saying, to the prejudice of any grantee of theirs, but that the husband and ancestor, Amos Short, deceased, duly resided upon and cultivated for the prescribed period the donation land claim known as his, or that by virtue of a full compliance with the essential requirements of the donation act his widow and children were, at the date of his death in January, 1853, entitled under the act to that land claim. Such being their situation, the great question of this case is: Has that title as to the parcel of land here in dispute passed, by reason of their acts, from them to the appellees? All provisions of the donation act necessary and precedent to the passage of title had been complied with prior to 1855, and the widow and children then held among them undivided, all disposable interest in the land. In that year or the next, as appears from the evidence, they agreed to, and did as far as they could, divide the claim into halves, an east half and a west half, assigning to the widow the east, and to the children the west. This, of course, was subject to whatever decision the surveyor-general might make in determining where the division line should be drawn.

Assuming that the surveyor-general would affirm or fall in with their decision, and that the west half would by him be set off to them, the children afterward, in 1856, undertook to procure a further division among themselves of that half. To effect this, those of them who were of age applied personally and those not of age by guardian to the probate court for a partition. Pursuant to, or connected with, that application a partition—at least in form—was made or sought to be made by the court. Considered as a judicial proceeding, it was doubtless void, except in so far as it engaged the court in supervising and sanctioning the acts of the participating guardians. But the formal partition all the heirs willingly made actual and substantial by each personally or by guardian spontaneously taking possession and dominion in severalty of his or her portion, and by mutually paying and accepting owelty sufficient fully to equalize all the allotments. Was it in fact, then, valid or void?

It is agreed by appellant that it was void, for three reasons: first, because the guardians acted without authority, and have never had their action affirmed by their wards since the latter became of age; second, because it was by parol and not by deed; third, because that half of the donation claim which the heirs undertook to subdivide had not yet been assigned to them by the surveyor-general.

As to the first objection, the assumption that the guardians acted without authority is not borne out by the record. They were in presence of that court which had peculiar and general jurisdiction over them; they were parties to the petition for partition among the children; they proceeded in the partition among the children on the basis of the previous partition between the widow and children, they acted throughout under the eye of their supervising court, and their action, after all was done, and with everything in full view and

fully understood, was solemnly ratified and confirmed by that court. If a partition be compelled, it may also be voluntary. In a voluntary partition proposing to set apart the shares of minors, those who have charge of the estates of the minors have power to act for their wards, under supervision of the court which has the estates in charge. Whether they act with due authority to bind their wards, can be seen by inspecting the record of the court. If they act with judicial authority, they bind their wards; otherwise not. Where the record shows that the matter which the court considered was within its jurisdiction, and all necessary parties were before it, there the action of the court, however irregular, is proof against collateral attack.

But, even admitting that the guardian acted without authority, the wards, on coming of age, were not absolutely obliged to reject what their guardians did. They had an election. Within a reasonable time they could affirm or disaffirm. If within a reasonable time after reaching majority they did not disaffirm, they thereby affirmed. In the case before us, their acquiescence since becoming of age has continued for periods varying from eight to twenty years. Having assented, for so many years of their majority, to both partitions, they are now forever bound by both.

To the second objection we answer that a parol partition, which has been actually consummated by possession and dominion in severalty, and which has been confirmed by long-continued acquiescence and by many changes of title, ought not to be, and will not be, disturbed in equity. There are cases holding that it affords a legal severalty, even in face of a statute requiring transfers of realty to be in writing or by deed. But we do not need to go that far.

Possession and dominion, initiated by consent, have been held adversely under these partitions for a quarter of a century. Guardians, under supposed authority of the proper supervising court, have undertaken to bind their wards' interests. Wards, on becoming of age, have affirmed by long acquiescence, and many of them by express acts, the doings of their guardians. Estates have passed for full values into the hands of purchasers. Costly improvements have been made in full faith of the stability of what has been done. The strongest possible interlacing equities now bind the parties to remain henceforth forever fixed in their relative positions.

To the third objection, the familiar principle applies that where one has, by bargain and sale, for valuable consideration which he has actually received and enjoyed, undertaken to dispose of a proprietary interest which he had not at the time, but afterwards acquires, his acquisition of it inures to the use of his quondam vendee.

If the action of the surveyor-general had been such that these heirs could never have, each of them, an undivided tenth of the west half to dispose of, then their partition would have turned out to be indeed an empty affair. But so it happened that the award of the surveyor-general to the heirs in 1874 exactly coincided with their appropriation for themselves and partition among themselves of 1856.

Their titles have fallen just along the lines and into the spaces, which, for mutual and valuable considerations, long ago paid and spent, they had intelligently and advisedly marked out and provided. To the meeting of their own minds it was only necessary to add the mind of the surveyor-general. In 1874, before their minds had drawn apart, his was added, and then, therefore, by relation of his a ward, back to 1856, no one yet dissenting, the partition, so far as this aspect of it is concerned, became perfected.

Under these partitions, Grant H. Short, one of the minor children, became invested with and possessed of a share of the west half, known as lot No. 7, which is the land in controversy. He held and dealt with this lot as his until 1865. In that year, while he was still a minor, his guardian, who was one of his brothers, acting under direction of the probate court, sold it to the appellee, Nicholas Schofield, for seven hundred and eighty-five dollars, a fair price for it. This sum was applied by direction of the probate court in payment of a mortgage debt upon the premises, and of other debts proved and allowed against the minor's estate. Next year, Grant H. Short attained his majority. After twelve years of silence, he, in 1878, gives to appellant's grantor a quitclaim deed of all his right, title and interest in the donation claim. About the same date, the rest of the children gave to appellant's grantor similar deeds as to their respective interests. Meantime appellees have put upon the premises permanent improvements of great value.

Now, the appellant contends that this last guardian's sale was void, for reasons reducible to two: first, because there was no certain description of the property to be sold in the petition for sale; and, second, because no notice was given, such as the order of court and the statute required; third, the proceedings before sale show irregularities. But they were not, in our opinion, such as open the decree confirming the sale to collateral attack. Enough is in the petition to show that the probate court was asked to act upon a definite matter within its proper jurisdiction. In all that it did from the petition to the decree of confirmation, it was a court of record acting within its proper sphere, and however erroneous in action, and however liable to be reversed in error, it is entitled to have its adjudication stand impregnable until so impugned. But if we regard the judicial proceeding as invalid, our attention is arrested by the fact that the ward and all others interested have let at least twelve years go by without offering to question it, during eight of which years every one of them has been of full age. Entire though tacit acquiescence for such a length of time is equivalent to most solemn express affirmance. From twenty-one to thirty-three years of age, in full possession of his faculties, well aware of all the circumstances, Grant H. Short has lived along, without allowing to escape him a single intimation disapproving the act of his guardian. The other children, during the same space, but for different periods of majority, have done likewise. They have thus, every one of them, thoroughly and forever estopped themselves from disavowing that act.

In conclusion, we will say that in our opinion the decision of this whole case may be satisfactorily planted on the doctrine of estoppel. If there be such a thing as estoppel, by failure to make objection within a reasonable time to doings done colorably in one's own name, and whereof he has had the benefit, and which are susceptible of being ratified because bearing fruits capable of being legitimately enjoyed, then this is the case, as seems to us, where the estoppel occurs. Appellant could at the most recover only the interests of the heirs not estopped. His case is strongest where he represents the minors, and among them it varies in strength in proportion to their length of nonage respectively after their father's death. But the youngest child was eight years of full age before he ventured, by quitclaim deed or in any other way, spontaneously or on solicitation, to object to what had been done for him by guardian at periods varying from thirteen to twenty-one years previously. The very youngest of these children has slept on his alleged rights too long to be heard now to press them in a court of equity.

Let the judgment of the district court be affirmed.

WINGARD, J., and HOYT, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 10,944.

PEOPLE *v.* TURCOTT.

In Bank. Filed March 22, 1884.

PRIVATE COUNSEL MAY BE PERMITTED TO ASSIST THE DISTRICT ATTORNEY in the trial of a criminal prosecution.

THE COURT MAY OF ITS OWN MOTION PREVENT THE INTRODUCTION of irrelevant testimony, although no objectton is made thereto by the opposite side.

INSTRUCTIONS, CONFLICTING SENTENCES IN.—Sentences in an instruction are to be read in connection with the context, and if the instructions as a whole, when so read, fairly and correctly present the law applicable to the case. the judgment will not be reversed merely because there is an apparent conflict between certain isolated sentences. This rule applied to an instruction as to the amount of evidence necessary to prove a justification of a homicide.

APPEAL from a judgment of the superior court for San Joaquin county, entered upon a verdict convicting the defendant of murder. The opinion states the facts.

S. L. Terry, for the appellant.

Attorney-General, for the respondent.

ROSS, J. The defendant was found guilty of murder in the first degree and sentenced to be hanged. The appeal is from the judgment. In his behalf it is contended, first, that the court below erred in permitting private counsel to assist the district attorney in the prosecution of the case. The practice of allowing district attorneys to have the assistance of other counsel in the prosecution of criminal cases has existed and been acquiesced in almost since

the organization of the state, and this practice seems to have been sanctioned by legislative action. In prescribing the course of the trial the legislature has provided by the second subdivision of sec. 1093 of the penal code, that the district attorney *or other counsel for the people* must open the cause and offer the evidence in support of the charge, and by sec. 1095, that if the indictment or information be for an offense punishable with death, *two* counsel on *each* side may argue the cause to the jury. We think the point not well taken.

It is next claimed that there was error on the part of the trial court growing out of this circumstance: One Mrs. Morath, during her examination, testified that on the evening of the shooting, and some time after it occurred, she saw a Mrs. McCann and her brother searching in the yard of deceased's residence, and that the brother raised up with a shotgun in his hand, which was taken from next the fence and near the gate; that this brother picked up the gun in a stooping position and walked to the back of the house, and two days afterward she saw a young man named Adams unloading the gun, and that he put it in two pieces. No objection was taken to this evidence by the prosecution, but the court interposed and said that it did not see the bearing of the testimony upon the case, and that therefore there was no necessity of proceeding further in regard to the gun. To this ruling defendant's counsel noted an exception, but made no response to the suggestion of the court that if he could show wherein the testimony in relation to the gun had any bearing upon the case it would be admitted. In its ruling in this particular there was no error on the part of the court below. In outlining his defense, the counsel for the defendant, in making his opening statement, put the defense upon the ground that at the time of the killing the deceased made a motion with his right hand as if to draw a revolver from his right hip pocket, and the defendant, believing his life to be in danger, thereupon fired the fatal shot; and such was the purport of the defendant's testimony. Under such circumstances, the testimony with respect to the gun was wholly foreign to the case.

It remains to consider defendant's objections to the instructions of the court below. Some of these objections need not be remarked upon. The objection chiefly relied upon by the defendant's counsel relates to the character of evidence the jury were told was required to show circumstances of justification or mitigation, and in this connection it is claimed that the tenth instruction, given at the request of the defendant, is in conflict with certain portions of the charge of the court. We have given to the charge and the instructions careful consideration, and cannot so hold. There are few cases in which isolated sentences may not be taken and so grouped as to present a conflict. But to do this is not permissible. The sentences are to be read in connection with the context, and the instructions, as a whole, and if, when so read, it appears that the jury was fairly and correctly instructed in the law governing the case, the judgment ought not to be reversed merely because there

may be an apparent conflict between certain isolated sentences. Now, looking at the tenth instruction given at the request of the defendant, it certainly cannot be said that he has any right to complain. It reads: "The defendant is not required to prove by a preponderance of evidence that the killing of Dietrich was justifiable. If from the evidence offered by the defendant taken by itself, or in connection with that offered by the prosecution, the jury entertain a reasonable doubt whether or not the killing was done under such circumstances as to constitute it justifiable, then the jury should find the defendant not guilty." The conflict claimed by counsel is between this instruction and that portion of the charge of the court wherein the jury was instructed that upon a trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justified or excusable; and this he may show by preponderance of evidence merely. Conceding that if this instruction stood alone the word *may* should be read *must*, it should not be so read when taken in connection with the other instructions of the court, in which the jury was distinctly told that circumstances of mitigation, excuse or justification need not be proved by a preponderance of evidence.

Such instructions were contrary to the ruling of a majority of this court in the case of the People v. Hong Ah Duck, 61 Cal. 387; but as the error was in favor of defendant he had no cause of complaint. The jury was told over and over again that the presumption of law was that the defendant was innocent until his guilt was established by evidence, that he was entitled to the benefit of any and all reasonable doubts, and could not be convicted of any degree of crime unless the jury was fully convinced by the evidence in the case of his guilt, beyond and to the exclusion of all reasonable doubt. We see no grounds for saying that the jury was instructed to the prejudice of the defendant in regard to the character or degree of evidence necessary to warrant his conviction.

The other objection urged by counsel is answered by the case of People v. Herbert, 61 Cal. 544.

Judgment affirmed.

McKEE, J., MYRICK, J., McKINSTRY, J., SHARPSTEIN, J., THORNTON, J., and MORRISON, C. J., concurred.

No. 9134.

LOGAN v. SOLANO COUNTY.

In Bank. Filed March 22, 1884.

COUNTY GOVERNMENT ACT OF MARCH, 1883, VALIDITY OF.—The act of March, 1883, entitled "An act to establish a uniform system of county and township governments," is not in violation of that provision of the constitution requiring every act to embrace but one subject, which subject shall be embraced in its title.

THE SAME.—The provisions of such act regulating the fees and salaries of the county officers, as classified therein, are not in violation of that provision of the constitution prohibiting the legislature from passing local or special laws affecting the fees or salary of any official.

COURTS HAVE NO POWER TO DETERMINE INTO HOW MANY CLASSES the legislature shall divide the counties of the state for the purpose of carrying out the provisions of the constitution.

APPEAL from a judgment of the superior court for Solano county. The opinion states the facts.

J. F. Wendell, for the appellant.

A. J. Buckles, for the respondent.

ROSS, J. Among the provisions of the present constitution of this state are the following:

"The legislature shall establish a system of county governments which shall be uniform throughout the state; and by general laws shall provide for township organization, under which any county may organize whenever a majority of the qualified electors of such county, voting at a general election, shall so determine; and whenever a county shall adopt township organization, the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein, shall be managed and transacted in the manner prescribed by such general laws:" Art. XI, sec. 4.

The legislature, by general and uniform laws, shall provide for the election or appointment, in the several counties, of boards of supervisors, sheriffs, county clerks, district attorneys, and such other county, township and municipal officers as public convenience may require, and shall prescribe their duties and fix their terms of office. It shall regulate the compensation of all such officers in proportion to duties, and for this purpose may classify the counties by population:" Art. XI, sec. 5.

It is also declared that the legislature shall not pass local or special laws "regulating county and township business or the election of county and township officers," or "creating offices, or prescribing the powers and duties of officers in counties, cities, cities and counties, townships, election or school districts," or, "affecting the fees or salary of any officer:" Art. IV, sec. 25.

In March, 1883, the legislature passed an act entitled, "An act to establish a uniform system of county and township governments:" Stats. 1883, p. 299. Among the provisions of the act is one classifying the counties by population for the purpose of regulating the compensation of the officers, and the compensation of the officers of the counties as thus classified is by the act fixed.

The validity of the act is assailed on several grounds. In the first place, it is said to violate that provision of the constitution which provides that every act shall embrace but one subject, which subject shall be expressed in its title.

As will have been noticed, the title is, "An act to establish a uniform system of county and township governments."

This title, we think, fairly expresses the subject of the act, and we are further of opinion that the act embraces but one subject. In another case under submission, in which the validity of this act is also in question, it is said in support of the point now under consideration, that the body of the act treats of two subjects, because provision is therein made for county governments, and also for the division of such counties into townships and for the election and compensation of justices of the peace and constables for such townships. But the creation of townships within a county, with the appropriate officers, like the division, of the county into school, road and supervisorial districts, with their appropriate officers, is but a part of the county government. This is an altogether different thing from the "township organization" spoken of in sec. 4 of art. XI of the constitution. A bare perusal of that provision makes this sufficiently plain, for it is there in terms declared that under the township organization that the legislature is directed to provide for, any *county* may organize whenever a majority of the qualified electors of such county, voting at a general election, shall so determine; and, further, that whenever a county shall adopt such township organization, the assessment and collection of the revenue shall be made, and the business of such county and the local affairs of the several townships therein shall be managed and transacted in the manner prescribed by the general laws providing for the township organization. (See also Ex parte Wall, 48 Cal. 318.) On the part of the appellant it is contended, further, that those provisions of the act of March 14, 1883, relating to fees and salaries of officers, come within the inhibition of that provision of the constitution declaring that the legislature shall not pass local or special laws affecting the fees or salary of any officer.

The provisions in question are a part of the general law establishing a uniform system of county and township governments. For the establishing and carrying on of such governments, officers are essential, and for such officers compensation must be provided. By the fifth section of art. XI of the constitution, the legislature is commanded to provide for the election or appointment in the several counties of all necessary officers, to prescribe their duties, fix their terms of office and regulate their compensation. Certainly, there is no more appropriate place for such provision and regulation than in the act establishing the government of which the officers form part. The constitution further expressly provides that the compensation of all such officers shall be regulated in proportion to duties, and for the purpose of so regulating the compensation the legislature is authorized to classify the counties by population. The act in ques-

tion, for the purpose of regulating the compensation of the various officers authorized by its provisions, establishes forty-eight classes, whereas there are in the state but fifty-two counties; and it is insisted that in establishing so many classes the legislature in some way violated that provision of the constitution authorizing the classification of counties in proportion to population. Counsel argues this proposition as if the constitutional provision was that the legislature should regulate the compensation of the officers of the various counties, townships, etc., in accordance with its classification by population. But this is not at all so. The requirement is that the compensation shall be regulated in proportion to duties, and as a means of doing that the legislature is authorized to classify the counties by population. How can the courts say how many classes it is necessary for the legislature to establish in order to carry out this command of the constitution? If they can say that forty-eight classes are too many, they can say that thirty-eight or twenty-eight are. The proper determination of that question of necessity depends upon a variety of considerations which are for the legislature and not for the courts. The authority existing, it is not for us to say that it was improperly exercised. The legislature is a co-ordinate branch of the state government and the courts should never declare its acts invalid unless clearly in conflict with the constitution. We see no such conflict in this case.

Judgment affirmed.

MYRICK, J., MCKINSTRY, J., SHARPSTEIN, J., and MORRISON, C. J., concurred.

No. 12,924.

PEOPLE v. WOODS.

Department One. Filed March 22, 1884.

LARCENY—NAME OF OWNER OF STOLEN PROPERTY.—Where a defendant is indicted and convicted for the larceny of the property of one H. W., a new trial should not be granted because the true name of such owner was H. W. B., when it appears that he was known by both names, and there was no doubt as to his identity.

APPEAL from an order of the superior court for the city and county of San Francisco, granting the defendant a new trial. The opinion states the facts.

Attorney-General, for the appellant,

Leander Quint, for the respondent.

ROSS, J. Defendant was indicted and tried for the larceny of $105, the personal property of one Henry Williams. On the trial the person to whom the money was alleged to have belonged was examined as a witness, and testified, among other things, that his name was Henry Williams. In due course the defendant was convicted, and afterwards moved for a new trial, on the ground of newly discovered evidence, the alleged newly discovered evidence consist-

ing in the fact that the owner of the stolen property was not Henry Williams, but was Henry Williams Brocken. In support of this motion the person spoken of as Henry Williams was permitted to testify in the court below that his true name was Henry Williams Brocken, and that he was so known by his friends and associates. He admitted, however, that he sometimes used the name Henry Williams in correspondence. And further: "I gave the name Henry Williams instead of Henry Williams Brocken, because I did not wish my own name to go into print." The court below granted defendant a new trial. In this there was error. The testimony on which the order was based itself shows that the person from whom the money was stolen was sometimes known as Henry Williams, and so held himself out. There was no doubt as to his identity.

Order reversed.

McKEE, J., and McKINSTRY, J., concurred.

No. 7911.

SNEAD *v.* LITTLE.

Department Two. Filed March 26, 1884.

FINDING AS TO PARTNERSHIP HELD SUPPORTED BY THE EVIDENCE.

APPEAL from a judgment of the superior court for Solano county, entered in favor of the defendant, and from an order denying the plaintiff a new trial.

Wendell & Kelly, for the appellant.

Jos. McKenna, for the respondent.

The COURT. If the defendant and the plaintiffs testate were partners, the judgment and order appealed from must be affirmed. The court found that they were partners, and we think the evidence sufficient to justify that finding.

Judgment and order affirmed.

WEST COAST REPORTER.

WHOLE No. 15. · APRIL 10, 1884. VOL. II. No. 7.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

RIPARIAN PROPRIETORS AND RIPARIAN RIGHTS ON PRIVATE STREAMS.

Colorado. This statutes of this state, in their latest revision, also contain an elaborate system of rules concerning the use of water for irrigation, which resembles in its essential features that of Montana. It will be sufficient for my purposes to give a brief abstract of its provisions, quoting the exact language only of those which are fundamental.[8]

§ 1711. "All persons who claim, own or hold a possessory right or title to any land or parcel of land within the boundaries of the state of Colorado, where these claims are on the bank, margin, or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water of said stream, creek or river, for the purposes of irrigation, and making said claims available, to the full extent of the soil, for agricultural purposes."

§ 1712. When any such person as mentioned in the last section "has not sufficient length of area (*sic*) exposed to said stream to obtain a sufficient fall of water to irrigate his land, or that (*sic*) his farm, etc., is too far removed from said stream, and that he has no water facilities on those lands, he shall be entitled to a right of way through the farms or tracts of land which lie between him and said stream, or the farms or tracts of land which lie above and below him on said stream, for purposes hereinbefore mentioned."

§ 1713. The right of way given by the last section only extends to the construction of a ditch or canal sufficient for the purpose of carrying the water required.

§ 1714. If the amount of water is not sufficient to furnish a constant supply to all the community using a ditch or canal, provision is made for allotting it to different consumers on alternate days or times.

§ 1715. If the owners of tracts of land refuse to allow ditch-owners a right of way, the right may be obtained by condemnation, under the power of eminent domain.

[8] Gen. Stat. of Colorado (1883), pp. 560-587, §§ 1711-1812.

§§ 1716-1720. Special provisions regulating the use, maintenance, repair, etc., of ditches.

§ 1721. The ditches herein provided for are for irrigation only.

§ 1722. In case of a deficiency in the supply of water, provision is made for regulating its *pro-rata* distribution among the consumers entitled. Additional sections provide for the formation and management of public irrigation districts; for the defraying the expenses of constructing, maintaining, repairing, etc., the ditches therein; for the regulation of the water supply and distribution; for the rates of charge, etc.

§§ 1762-1801. An elaborate system is provided for the adjudication of rights of priority among different appropriators, partly by means of special proceedings, and partly by means of ordinary actions.[9]

Another portion of these statutes authorizes the formation of corporations to take and convey the water of streams for mines, mills, irrigation, etc.[10]

§ 309. Such corporations "shall have a right of way over the line named in their certificates [of incorporation], and shall also have the right to run the water of the stream or streams named in the certificate through their ditches." *Proviso*, that water shall not be diverted from any stream to the detriment of any person or persons who may have priority of right.

Idaho. The general laws of this territory contain "An act to regulate the right to the use of water for mining, agricultural and manufacturing and other purposes."[11] A portion of this statute is the same in substance, with some variations in the detail, as the provisions hereinbefore quoted from the civil code of California, while the remainder follows the system prevailing in Colorado and Montana.

§ 1. The right of the use of the water flowing in any river, creek, canyon, ravine or other stream, may be acquired by appropriation, and as between appropriators, priority in time shall, subject to the provisions of this act, secure a priority of right.

§ 2. The appropriation must be for some beneficial purpose, etc. § 3. Appropriator may change the place of diversion, etc., if no injury is done to others. § 4. Notice to be given, substantially as in California. § 5. Work must be commenced within sixty days, etc., and prosecuted to "complete diversion," etc. § 6. "Complete diversion" defined same as "completion" in the California code. § 7. When work is completed, the right relates back to the time of giving notice. §§ 8 and 9. Ditches, appropriations and claims heretofore made are protected.

[9] Gen. Stat. Col. (1883), p. 571.
[10] Ibid., pp. 198-201, §§ 305-315.
[11] Gen. Laws of Idaho (1881), pp. 267-273, §§ 1-19.

These provisions plainly do not differ in any material manner from those of the California civil code. The following sections contain the essential elements of the Colorado and Montana legislation:

§ 10. "All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, shall be entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed."

§ 11. When any such person, etc., has not sufficient frontage on a stream to afford a sufficient fall for such a ditch, or when his land is back from a stream and convenient facilities for irrigation cannot otherwise be had, he "shall be entitled to a right of way through lands of others for the purposes of irrigation." *Proviso*, that he shall keep his ditch in good repair, and shall be liable to the owner of the land which it crosses for injuries caused by overflow or neglect or accident.

§ 12. If the owner of the land refuses a right of way, the same may be obtained by condemnation, upon payment of the conmpensation as fixed. § 13. Provisions for ascertaining and fixing such compensation by appraisers. § 14. Persons, etc., having land adjacent to any stream may place in its channel or on its banks rams, etc., to raise the water above the level of the banks; and a right of way for conducting such waters across the lands of others may be acquired in the manner prescribed in the last two sections. §§ 15, 16. Provisions as to maintaining and keeping in repair the ditches; not to do damage, etc. § 17. All rights acquired previous to this act are not affected thereby. § 18. When the water is not enough to fully supply a whole community or neighborhood, it must be distributed among them according to the local customs as established and as recognized by the courts. § 19. If a ditch is constructed in order to sell the water for irrigation, persons shall be entitled to said water, at the usual rates, in the following order, viz.: First, all persons through whose land the ditch runs, in the order of their location along the line of the ditch; second, after the last named, then those on either side of the ditch—those at the same distance each side being equally entitled, etc. Excessive use by any one is prohibited.

Another statute is entitled an act for the regulation of irrigation.[12] This statute provides for the creation of water or irrigation districts, and for the election of a "water-master" in each; and minutely prescribes his duties of superintending the ditches, their repair, the distribution of water among consumers, etc.

Dakota. A recent statute of this state adopts the fundamental notion of the Colorado, Montana and Idaho legislation; but extends the right

[12] Gen. Laws of Idaho, pp. 273-275, §§ 1-6.]

of appropriation equally to all beneficial purposes as well as that of irrigation.[13]

§ 1. Any person or corporation having title or possessory right to any mineral or agricultural land, shall be entitled to the use and enjoyment of the water of any stream, creek, or river within the territory, for mining, milling, agricultural, or domestic purposes; but this shall not interfere with rights previously acquired.

§ 2. Such persons may have a right of way across the lands of others under the same circumstances as prescribed in the Colorado, Montana, and Idaho statutes. § 3. This right of way shall only extend to the construction of a suitable ditch, or canal, etc. § 4. All controversies between different claimants of water shall be determined by the dates of their respective appropriations.

§ 5. "The water of the streams, rivers, and creeks of this territory may be made available to the full extent of the capacity thereof, for mining, milling, agricultural, or domestic purposes, without regard to deterioration in quality or diminution in quantity, so that the same do not materially affect or impair the rights of prior appropriators."

§ 6. If the owner of land sustains injury by a ditch constructed across it, under § 2, the ditch-owner shall be liable to him in damages therefor. § 7. Relates to the abandonment of ditches or appropriations. § 8. Prescribes penalties for violation of foregoing provisions.

One remarkable feature of this statute is that, unlike those of Colorado and Idaho, it makes no provision whatever for obtaining a right of way for a ditch across the lands of another owner, by condemnation. It seems to permit an appropriator to construct his ditch across the lands of another, without the latter's consent, without any compensation ascertained and paid, and without the necessity of any proceedings for a condemnation. The only provision for the benefit of such land-owner seems to be a right to recover damages, if *any injury* is caused by the ditch. Such legislation is, to say the least, remarkable. It seems to be a plain invasion of the rights of private property, an evident violation of the constitutional prohibition against depriving a person of his property without due process of law, and taking private property for public use without just compensation. That such a provision is invalid seems hardly to admit of a doubt.

New Mexico. In this territory the use of water for the purposes of irrigation is made paramount to all other uses, for milling, manufacturing, and the like. The general laws contain an elaborate system of legislation for the construction and maintenance of public and private "acequias," or irrigating canals. This system is embodied in the stat-

[13] Sess. Laws of Dakota of 1881, pp. 266-274.

utes of several successive legislatures, and is evidently borrowed from the Mexican law.[14]

§ 1. "All inhabitants of the territory of New Mexico shall have the right to construct either private or common [*i. e.*, public] acequias, and to take the water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose land said acequias pass a just compensation taxed for the land used." Provision is made for appraising and fixing the amount of such compensation, in cases of dispute, by appraisers to be appointed by a probate judge. [It may be remarked that these early statutes were originally enacted and published in the Spanish language. The translation found in the last edition of the general laws, from which these sections are quoted, is extremely literal, and sometimes fails to adopt the precision and certainty of expression usual in our English and American statutes.]

§ 2. "No inhabitant of said territory shall have the right to construct any property to the impediment of the irrigation of land or fields, such as mills or other property that may obstruct the course [*i. e.*, flow] of the water; as the irrigation of the fields should be preferred to all others" [*i. e.*, to all other uses].

§ 4. All owners of tillable lands shall labor on public acequias, whether they cultivate the land or not.

§ 9. "All rivers and streams of water in the territory formerly known as public acequias or ditches are hereby established and declared to be public acequias or ditches."

The foregoing quotations sufficiently indicate the essential nature of this system, without going into any further detail. Subsequent portions of the statute make provision for the election of "overseers" in different precincts, and define their duties in managing the acequias and in distributing the water supply. Ample provision is made for maintaining the ditches and for keeping them in repair by public labor, etc.

Arizona. The legislation of this territory somewhat resembles that of New Mexico, except that the use of water for mining purposes seems to have a preference over that for all other purposes, even for irrigation.

The fundamental principle that the water of streams, etc., are public, incapable of private and exclusive ownership, is declared in the territorial bill of rights.[15] Art. 32. "All streams, lakes, and ponds of water, capable of being used for purposes of navigation or irrigation, are hereby declared to be public property, and no individual or corporation shall have the right to appropriate them exclusively to their own private use, except under equitable regulations and restrictions as the legislature shall provide."

[14] General Laws of New Mexico (1880), pp. 13-23, embracing acts of 1851, 1852, 1861, 1863, 1866 and 1880, concerning "acequias," or irrigating canals.

[15] Comp. Laws of Arizona (1877), p. 27, Bill of Rights.

The use of water is regulated by the provisions of a chapter concerning acequias or irrigating canals.[16]

§ 3240. All rivers, creeks and streams of water are declared to be public, and applicable for purposes of irrigation and mining.

§ 3241. All acequias at present established shall be continued.

§ 3242. All inhabitants of this territory who own or possess arable or irrigable land shall have the right to construct public or private acequias, and to obtain the necessary water for the same from any convenient river, creek or stream.

§ 3243. Such acequias may be run through the land of another when necessary, the damages by way of compensation to be fixed by assessors appointed by a judge, etc.

§ 3244. No interference shall be permitted with these acequias by dams and other structures, except when used for mining purposes as otherwise provided. The use of water for mining purposes seems to have preference over all other uses, even when the latter have been actually established; but parties using water for mining purposes must pay compensation in damages for injury thereby caused to irrigating canals (acequias) already existing. There is no such detailed system of regulations for the acequias as exists in New Mexico.

Wyoming. The legislation of this territory is the same in substance, and almost identical in language, with that of Colorado, heretofore described.[17] §1. Any person or corporation having the title or the possessory right to any tract of land within the territory is entitled to the use of the water of any stream, etc., for purpose of irrigation, and of making the land available for agriculture, etc. §§ 2–9. To that end, such person, etc., may have right of way across the lands of another for a ditch; such right of way may be acquired by condemnation, the compensation therefor being fixed by appraisers; when the supply of water is not sufficient to furnish a full amount to an entire community, it is to be apportioned among them; owners or occupants bordering on streams may place rams in the channel or on the banks in order to raise the water, and may have a right of way to conduct such water; prior vested rights to the use of water are protected; provision for keeping ditches, etc., in good repair, etc. *J. N. P.*

[TO BE CONTINUED.]

[16] Comp. Laws of Arizona, p. 538.

[17] Comp. Laws of Wyoming (1876), pp. 377–379, §§ 1–12.

CIRCUIT COURT, DISTRICT OF OREGON.

WILLIAMS v. McCORD ET ALS.

Decided March 26, 1884.

PATENT FOR "REVOLVING DIP-NET."—The patent issued to Thornton F. Williams on August 2, 1881, and numbered 245,251 for an "improvement in revolving dip-nets," declared void for want of both invention and novelty, the same having been invented and put in operation by Samuel Wilson at the Cascades of the Columbia in the spring of 1879, from which machine the said Williams, in the fall of that year and the spring of 1880, constructed his "revolving dip-net."

SUIT for an infringement of a patent, for an account and an injunction. The opinion states the facts.

D. P. Kennedy and *William B. Gilbert*, for the plaintiff.

H. B. Nicholas, for the defendant.

DEADY, J. This suit was commenced on January 12, 1883, and is brought against the defendants for an account and to recover damages for the wrongful use by them of a certain "revolving dip-net," alleged to have been invented by the plaintiff, and for an injunction to restrain them from the further use thereof.

The bill alleges that the plaintiff, being the first and original inventor of such dip-net, on November 4, 1880, applied for letters patent thereon, which were duly issued to him on August 2, 1881, and numbered 245,251; that the defendants on March 1, 1882, without the consent of the plaintiff, constructed a "revolving dip-net on the south side of Bradford's island in the Columbia river, * * * embracing the improvement and invention described in said letters patent," and maintained the same "in operation during the fishing season of 1882," that is, from April 1 to August 1, to the damage of the plaintiff $100; and still continues to operate the same.

The defendants, answering the complaint, deny that the plaintiff is the original inventor of the net in question and that the same was not in public use when the plaintiff applied for his letters patent, and allege that said dip-net was fully described in *Harper's Monthly Magazine* for May, 1880; that Samuel Wilson of Dallas, Iowa, invented and put in operation on the Columbia river the dip net described in the bill in April, 1879, long before the alleged invention of the plaintiff, and that the plaintiff surreptitiously availed himself of said Wilson's idea and invention and obtained a patent for the same while the latter was engaged in perfecting it; but that neither said Wilson nor the plaintiff was the first inventor of said dip-net, and that the same had been in use in other places by other persons for the purpose of catching fish for many years before, specifying among others, sundry places and persons on the Catawba and Pedee rivers in North Carolina, where it had been in use, in some instances, for more than fifty years; that on January 4, 1882, the defendant McCord, being the first and original inventor of certain improvements in a fish-wheel, made application for letters patent thereon, which on May 16 of the same year, were duly issued to him and other defendants, as the assignees of said McCord, and

numbered 251,960, for an invention entitled a "fish-wheel;" that afterwards in 1882 the defendants licensed the "Snail-Wheel Fishing Company," a corporation duly formed under the laws of Oregon, the defendants being the officers and stockholders thereof, to conduct such a fish-wheel on the south side of Bradford's island, and that said corporation did construct and operate such wheel at said place during the fishing season of 1882, which is the same machine referred to and mentioned in the bill as being an infringement on the plaintiff's dip-net.

It appears from the evidence that fish-wheels or dipping-wheels have been used on various rivers in North Carolina for the purpose of taking shad and other fish that are in the habit of ascending the same, as alleged in the answer. The wheel consisted of an axle or shaft of four or five feet in length, resting horizontally upon two upright posts or forked timbers planted on either side of a sluice or chute in the river, into which were let three pairs of arms or bows from three to eight feet long, owing to the depth of the water, and equidistant from each other. These arms were made of tough wood, and bent forward at the outer end like a plow handle and covered with a netting of twine so as to constitute a "dipper," not unlike in appearance, according to the language of a witness, "the top of a falling-top buggy."

The wheel was turned down stream by the force of the current striking the back of the "dippers," one of which was always in the water, and into which the fish ascending the stream by that chute or sluice went, and were carried upward and backward over the shaft and lodged on an inclined trough made of slats placed between the inner ends of the arms, on which they slid down into a box or tank immediately outside of the inshore post.

In the spring of 1879 and prior thereto, Samuel Wilson, a carpenter, who was living at the Cascades of the Columbia, on the Washington side, conceived the idea of taking fish by means of a wheel driven by the current, and actually constructed one and put it in operation there by April, 1879, but on account of the health of kimself and family he returned to Iowa in May of that year, leaving his wheel in charge of James Parker, who took a few fish in it before the high water carried it away. Afterward, on March 2, 1882, Wilson applied for a patent on his invention of "a new and improved fishing-wheel," which was issued to him on September 12, 1882, and numbered 264,395.

In the specification it is described as "a wheel constructed with nets embraced in four or more sections thereof, to each of which nets an opening is made from the periphery or near it, and from which there is an escape passage from the center of the wheel, and at one side, to a chute leading to a cage-net, all so arranged that the wheel being located in a fishway to be rotated by the water flowing against it or by another wheel attached to the shaft outside of the fishway, the mouths of the passages into the nets of the wheel will open at the rear of the wheel to the fish ascending the stream, to be

entered by them as they attempt to pass under the wheel, whereby as that side of the wheel rises the fish will be caught, carried up, and shunted out through the aforesaid side central passages into the chute, by which they will be delivered into the trap-cage, to be taken out at pleasure, as hereinafter more fully described." The size of the wheel might vary from ten to forty feet, owing to the depth of the water; and the one constructed was about twenty feet in diameter.

As early as the spring of 1877 the plaintiff lived at the Cascades of the Columbia, on the Oregon side, and was engaged in taking fish there with the ordinary gill and dip-net, and has lived there ever since. It is asserted in his testimony that he "conceived" the idea of this revolving dip-net in the fall of 1878, and that he commenced to construct it then, but did not get the lumber in time to finish it for the fishing season of 1879, and therefore abandoned it or gave it up till the fall of that year, when he went to work on it again, and got it into operation in time for the fishing season of 1880, and afterwards obtained a patent for the same, as alleged in the bill.

In his specification the plaintiff describes his alleged invention as "a new and useful improvement in revolving dip-nets," and claims "as new" therein: (1) "The box-nets I, constructed with holes M at their inner ends, substantially as herein shown and described whereby the first [fish or nets?] are discharged as set forth; (2) the nets I secured to arms of shaft E, leaving an opening at the front, except at the inner part, for the inlet of the fish, and at the rear an opening for their outlet, as shown and described; and (3) the combination, with rotary wheel having nets I, with discharge openings M near the hub, and having the inner part inclined towards said openings, of a receptacle, J, arranged as shown and described."

But the decided weight of the evidence is that, in the fall of 1878, the plaintiff was engaged in getting together the material and preparing the timbers for a fish "trap" at the Cascades, and not a wheel or net, which he never completed, and is now falsely claiming to be the *conception* or beginning of his "revolving dip-net." And that, in the fall of 1879, he availed himself of his knowledge of Wilson's invention, thinking, it may be, that he had abandoned it, and constructed the machine for which he afterward obtained a patent.

In the May number of *Harper's Monthly* for 1880 there is a woodcut of the North Carolina wheel (p. 849), illustrating an article, "The Shad and the Alewife."

The Wilson wheel, either as patented by himself or the plaintiff, although in the main anticipated by the North Carolina wheel, was, so far as appears, constructed without any knowledge of the existence of the latter, and is an improvement upon it in some material particulars. But the plaintiff's wheel being a mere copy of Wilson's, with some immaterial changes in form and material, his patent is void, both for want of invention and novelty: Walker on Pat., secs. 23–52.

The wheel used and patented by the defendants is probably an improvement on Wilson's—particularly in the arrangement of the baskets or nets, whereby the fish are discharged below the shaft, and are less liable to be injured. But as the patent to the plaintiff appears to be void for the reasons stated, it is not necessary to consider that question.

But I cannot refrain from adding on behalf of the public that I think the best disposition that could be made of this controversy would be for the legislature to intervene in the interest of the fish of the future, and prohibit the use of these murderous machines anywhere in the waters of the state.

The bill is dismissed with costs.

SUPREME COURT OF COLORADO.

DOWNING ET AL. *v.* BARTELS.

Filed March 14, 1884.

TITLE TO A LOT IN THE ORIGINAL TOWN SITE OF THE CITY OF DENVER, entered by James Hall, probate judge of Arapahoe county, on May 6, 1865, by virtue of the act of congress for the relief of the citizens of Denver, approved May 28, 1864 (13 Stats. at Large, 94), can be acquired only in the manner designated by such act and by the territorial acts carrying the same into effect.

THE SAME—VALIDITY OF DEED FROM PROBATE JUDGE—ATTACK ON.—The validity of a deed to a portion of such town site, executed by the successor in office of such probate judge, in pursuance of the territorial act of February 8, 1872, cannot be attacked in a strictly legal action of ejectment, by evidence showing that the preliminary steps and conditions required to a valid conveyance had not been complied with by the grantee, prior to the execution of the deed, when the deed is regular upon its face and purports to have been executed to the person found to be entitled thereto under the laws of congress and the statutes of Colorado, and by the officer intrusted by the government with the legal title, and duly authorized to convey. In executing the authority vested in him by such act, the probate judge exercises judicial functions, and his voidable acts can only be impeached in direct proceedings to set them aside.

INSTRUCTION PARTLY CORRECT AND PARTLY INCORRECT.—An instruction is fatally erroneous which contains one correct and one incorrect proposition respecting the legal effect of the evidence, and which tells the jury that if the evidence sustains either proposition the verdict must be in a certain manner.

A FICTITIOUS GRANTEE RENDERS INOPERATIVE and void a conveyance purporting to be made to him.

APPEAL from county court of Arapahoe county. The opinion states the facts.

France & Rogers, for the appellants.

Blood & Bartels, for the appellees.

BECK, C. J. This was an action of ejectment brought by the appellee, H. Bartels, to recover possession of lot 6 of block 13, of the east division of the city of Denver. It was originally instituted against the defendant Anderson only, the complaint alleging that Louis F. Bartels, deceased, died July 27, 1874, seized in fee of said lot, and by his last will devised the same to the plaintiff, for and during her life, or until she again married; that she has not since married; that on September 1, 1874, while plaintiff was seized

in fee and entitled to possession, the defendant, without right or title, entered upon the lot, ejected the plaintiff and still withholds the possession from her.

Anderson answered, denying that Louis F. Bartels was in his lifetime seized of the property, and averring that said defendant entered upon the premises September 1, 1878, as tenant of his co-defendant, Caroline E. Downing, and has continued in possession to the present time.

Caroline E. Downing, who was made a co-defendant on her own motion, also answered, denying the title alleged in Louis F. Bartels, and the title and right of possession of the plaintiff, and averred that she, long prior to September 1, 1874, was seized in fee of the premises, and long prior to that date was in lawful possession thereof as the owner in fee.

The cause was tried by a jury, the trial developing the fact that both the plaintiff Bartels and the defendant Downing claimed title from the same source, viz., by deed from the probate judge of Arapahoe county.

The jury returned a verdict in favor of the plaintiff Caroline H. Bartels, on which judgment was entered that she recover the lot and premises in controversy, and that a writ of restitution issue therefor.

The lot comprised a portion of the original town site of the city of Denver, entered by James Hall, probate judge of Arapahoe county, on the sixth day of May, 1865, by virtue of the special act of congress, "for the relief of the citizens of Denver," approved May 28, 1864: 13 Stats. at Large, 94.

The plaintiff, to maintain the issues on her part, introduced the following conveyances, to wit: United States to James Hall, probate judge, patent for said town site, dated July 1, 1868, which recites the entry of the land in trust for the several use and benefit of the occupants thereof, according to their respective interests, under the act of congress aforesaid, and to his successors and assigns, in trust as aforesaid.

James Hall, probate judge, to Omer O. Kent, successor in office, same tract, March 16, 1867.

Omer O. Kent, probate judge, to Jacob Downing, successor in office, same tract, August 31, 1867.

Jacob Downing, probate judge, to Henry A. Clough, successor in office, same tract, except the executed part of the trust, September 23, 1869.

Henry A. Clough, probate judge, to Louis F. Bartels, the lot in controversy, by virtue of a sale in pursuance of the territorial act of February 8, 1872, and previous legislation, dated October 29, 1872.

It was then admitted that the plaintiff is the heir of Louis F. Bartels, deceased.

Objectons were made and exceptions saved to the admission of deeds from Downing to Clough, and from Clough to Bartels.

The defendant Caroline E. Downin
her part, introduced certified copies of
lot.

Jacob Downing, probate judge, to
1868.

Morris B. Foy to Samuel N. Hoyt, J
Samuel N. Hoyt to Jacob Downing,
Jacob Downing to Daniel C. Oakes,
Daniel C. Oakes and wife to Caroline
Which deeds were received in eviden

Defendant then offered in evidence c
ing conveyances:

A certificate of one share in Denver C
by E. P. Stout, president, and William
date March 31, 1859.

Deed from William Clancy to Willia
ber 1, 1859.

Deed from William Marchant to D.
1861.

All of which conveyances were reje
rulings saved.

The said defendant then introduced
dence, executed by James M. Strick
county, to Jacob Downing, dated Febr
tax sale for delinquent taxes of the yea

Testimony was introduced showing
small house partly upon this lot, late
that he executed a lease of the premis

The said defendant then offered to p
occupation of the premises in the fall
occupation thereof until 1875, when
defendant Downing, and that she contin
until the commencement of this suit,
thereof.

This offer was rejected as immateri
tion was reserved.

The plaintiff was permitted to intro
the purpose of impeaching the title
ing by mesne conveyances from Jacob
the ground that the deed executed
Morris B. Foy was not executed in con
gress and the acts of the legislature
execution of the trust vested in the
was also permitted to introduce evider
fraudulently issued by said probate ju
son as the said Morris B. Foy.

The jury were instructed substantial
duced by the plaintiff made out a
entitling her to recover.

purpose the city attorney or any citizen had a right to be present, and to suggest, by petition, that lots or lands had been omitted from the list, and that filings, which appeared to have been made on or before the ninth day of August, 1865, were in fact made after that time. Upon presentation of such petition, continues the act, "it shall be the duty of said probate judge to inquire into the same by such competent testimony as may be produced before him in that behalf, and if he shall be of opinion that such lots or lands have been wrongfully omitted, he shall thereupon include the same in such list, and proceed to advertise and sell the same."

In pursuance of said act, Probate Judge Clough prepared a list of lots for public sale, including the lot in controversy, and the latter was struck off and sold, as before stated, to said Louis F. Bartels.

In order to sustain the title thus acquired, it was necessary for plaintiff to show the invalidity of the prior conveyance by Judge Downing. For this purpose she was permitted to introduce testimony tending to show that the preliminary steps and conditions required to a valid conveyance had not been complied with prior to the execution of the deed by Judge Downing, also evidence to show that said deed was fraudulently executed, there being no such person as Foy, the grantee.

We think the court erred in permitting an inquiry to be instituted, under the pleadings in this case, into the question whether the necessary preliminaries had been observed prior to the execution of the deed by Judge Downing. It was strictly a legal action, no equitable issues being presented by the pleadings. The complaint contained no prayer for equitable relief, nor any allegations to notify defendant that the regularity of the incipient steps required to obtain a deed from the probate judge would be called in question. The deed was regular upon its face and purports to have been executed to the person found to be entitled thereto under the laws of congress and the statutes of Colorado. It was executed by the officer intrusted by the government with the legal title, and duly authorized by law to convey it. In such case a deed is not impeachable in a legal action for failure to comply with any preliminary requisites.

The doctrine of presumptions in favor of official acts obtains that the officer empowered by law to make the grant did his duty in all respects, and had required the grantee to show, by legal proofs, that he had complied with all rules and regulations necessary to be complied with to entitle him to the deed: 1 Phil. Ev. 604.

The execution and delivery of a deed to a portion of the Denver town site by the probate judge, under and by virtue of the several acts and provisions of law in relation to the subject, is analogous to the grant of a patent by that department of the government whose province it is to supervise the various steps and proceedings necessary to be taken to obtain the title. In such case, if there was an absolute want of power to issue the patent, as if the grantor had no title to the thing granted, or if the sale is not authorized by law,

the land having been reserved from sale, the title set up under the grant is void *ab initio*, and the fact may be shown in an action at law. But if the grant is merely voidable, it can only be impeached in an equitable action: Sherman v. Buick, 3 Otto, 209; Stoddard v. Chambers, 2 How. 318; Easten v. Salisbury, 21 Id. 426.

When, however, no defect of title or authority exists, but the land is subject to sale, it is held that the officers of the land department in the course of their duties exercise a judicial function, and their acts cannot be impeached in a collateral action.

Judge Field says in Smelting Co. v. Kemp, 14 Otto, 640: "In the course of their duty the officers of that department are called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility and weight. In that respect, they exercise a judicial function, and therefore it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive, when brought to notice in a collateral proceeding. Their judgment in such cases is like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument duly signed, countersigned and sealed, not only operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands under the law is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions attending it are not open to rebuttal in an action at law."

The same rule is held applicable to state grants or patents. In the case of Polk's Lessee v. Wendal, 9 Cranch, 87, Chief Justice Marshall makes the inquiry:

"Is it in any, and if in any, in what cases allowable in an ejectment to impeach a grant from the state, for causes anterior to its being issued?"

He then refers to the facts that laws provide safeguards for the protection of the incipient rights of individuals, and to protect the state from imposition as well; that officers are appointed to supervise the proceedings and to execute the grants under rules prescribing their duties, and his conclusion is expressed in these words:

"When all the proceedings are completed by a patent issued by the authority of the state, a compliance with these rules is presupposed. That every prerequisite has been performed is an inference properly deducible, and which every man has a right to draw from the existence of the grant itself. It would therefore be extremely unreasonable to avoid a grant in any court for irregularities in the conduct of those who are appointed by the government to supervise the progressive course of a title from its commencement to its consummation in a patent."

He holds that the remedy of one injured by violation of the law and rules of procedure, is in equity, and assigns the following reasons therefor:

"On an ejectment, the pleadings give no notice of those latent defects of which the party means to avail himself, and should he be allowed to use them, the holder of the older grant might often be surprised. But in equity the specific points must be brought into view; the various circumstances connected with these points are considered, and all the testimony respecting them may be laid before the court. The defects in the title are the particular objects of investigation, and the decision of the court in the last resort upon them is decisive."

Now, in the application of the foregoing principles to the case under review it is to be observed that the Denver town site was located upon lands belonging to the United States. Numerous claimants had located upon separate parcels thereof, built houses and otherwise improved the same, and became, under the law, entitled to conveyances. The government, instead of issuing patents to the several claimants, and instead of granting the tract to the territorial organization, transferred the title of the entire tract to the judge of the probate court of Arapahoe county, in trust for the parties entitled to conveyances. By the terms of the grant the probate judge was the officer and representative of both the federal and territorial governments in the disposal of these lands. He was invested with functions analogous and similar in character to those of the land department of the general government, or of the officers of the states charged with the same class of duties.

His duties involved the hearing and consideration of testimony concerning the rights of claimants, and passing upon its competency, credibility and weight. It also involved judicial trials before him, in certain instances, wherein he was required to render judgments, from which appeals might be prosecuted to the supreme court of the territory.

The congressional act of May 28, 1864, authorized said judge to execute the trust thus reposed in him, by the disposal of the lots and parcels of land in accordance with rules and regulations to be prescribed by the territorial legislature.

The legislative act of March 11, 1864, required him to convey the several parcels to the persons entitled, in law or equity, to the possession thereof, at the date of the entry of the town site, or to his, her, or their heirs or assigns. In certain instances he was required to summon adverse claimants before him, and after hearing their proofs and allegations, to determine the controversy between them. In such cases, if a person failed to appear before him when duly summoned, he was forever barred from asserting any right, title or interest in the grant.

By the legislative act of February, 8, 1872, he was invested with other and further judicial powers relating to said grant.

When a petition was presented, setting forth that the petitioner had acquired title in good faith, and without notice of defects therein, to lots or lands listed for sale under said act, and that the petitioner had built a house thereon, the probate judge was required to set the petition down for hearing; to impanel a jury of six men, if required by the petitioner, or by the city attorney, and if upon the trial the facts stated in the petition were found to be true by the court or jury, as the case might be, the premises were to be withdrawn from sale, and a deed executed to the petitioner. These examples show that the duties and powers of the probate judge were not merely ministerial, but that in executing the provisions of the congressional and legislative acts relating to this grant, he was constantly called upon and required to exercise judicial discretion and powers. As to any parcel of land, therefore, wherein the trust has been consummated by the execution of a deed, the same presumptions obtain, that all preliminary requirements have been complied with, and the same reasons exist for holding these presumptions conclusive and not open to rebuttal in actions purely legal, as exist in the cases of federal and state grants.

If a deed has been executed by the probate judge to one not entitled to it, the remedy of the injured party is a direct proceeding to set it aside, or for other equitable relief consistent with the facts and circumstances of the particular case. The deed of Morris B. Foy is not void upon its face. Non-compliance with the law on the part of the grantee renders it voidable only, and for these reasons we are of opinion that the court below erred in the admission of testimony to impeach the preliminary proceedings, and to contradict the proofs upon which the probate judge acted in adjudging the said Foy entitled to the deed.

The citation from Smelting Company v. Kemp, 14 Otto, 649, relied upon by counsel for defendants in error to support the rulings below, is not in point. The paragraph referred to mentions two instances in which it is proper, when patents are offered in evidence, to introduce the record of the initiatory proceedings: First, when there is a contest between two patentees for the same land, a patent takes effect from the date of the original proceedings to obtain title, and in such case they are referred to for the purpose of ascertaining which of the contestants took the first steps. The other instance was under a state statute, declaring a patent void, where no entry, as an initiatory proceeding, has been made. The ruling upon this point is that if the patent is silent upon this subject, it is competent to show that the initiatory step was not taken at all. But there is no warrant in the opinion for the position assumed in this case, that the record of the original and initiatory proceedings may be produced, and then contradicted and impeached in an action at law. On the contrary, the doctrine of the whole case is that the records of the original proceedings are conclusive in actions of this character. The language of the court is: "The judgment of the department upon their sufficiency was not, as

Gage. If plaintiff was hired as hotel clerk only, the defense clearly fails.

But there is another consideration which is decisive of the case. Defendant has proved no actual damages resulting to him from the plaintiff's inefficiency as a bookkeeper. The only testimony on this point is that of defendant and the witness Cramer. The defendant says he had to employ Cramer, a bookkeeper, to straighten up the books after plaintiff left him. Cramer says he found the books only partially posted, two days' business not being transferred to the books at all.

He then produced the books and showed by them what errors had been committed therein by the plaintiff, which were as follows: A mistake had been made in the account of M. Caulde & Co., but the amount of the error is not stated; on three pages the footings were incorrect; on four pages the balances were incorrect. There is no testimony that defendant suffered any loss on account of these errors, and the only testimony to found the claim of fifty dollars damages upon is Cramer's direct testimony, that it was worth fifty dollars to straighten up the books. He did not swear that he received that or any other sum for this service. His further testimony is that he is the bookkeeper of the hotel, having entered the employment of the defendant on November first, being the next day after plaintiff left, that he has been there constantly ever since, and that it did not take him long to remedy the defects in the books.

There is nothing to show that this work interfered with the full performance of the duties of his employment, or that any extra compensation was paid, or contracted to be paid, on account of this special work.

For aught that appears it was considered as attaching to his legitimate duties under the general engagement.

It is therefore unnecessary to discuss any of the legal questions which have been raised. If it be conceded that defendant would be entitled, upon a proper showing, to set off damages sustained against the plaintiff's demand, he has proved no damages.

The judgment will therefore be affirmed.

Judgment affirmed.

SIMMONS v. CALIFORNIA POWDER COMPANY.

Filed March 14, 1884.

ATTACHMENT LAW—AMENDMENT OF 1881.—The fourteenth subdivision of section one of the attachment act, as amended in 1881, providing that "in all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section," creates a new and distinct ground of attachment, additional to the twelve others enumerated in such act.

APPEAL from the county court of Arapahoe county. The opinion states the facts.

Markham, Patterson & Thomas, for the appellant.

Bulleck, Baxter & Dickson, for the appellee.

STONE, J. The sole question presented by the record in this case is whether the fourteenth subdivision of section 1 of the attachment act of 1881 constitutes a separate and specific ground of attachment, one in addition to those enumerated in section 92 of the civil code, of which the act of 1881 is amendatory.

The first paragraph of the section is as follows:

"No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of a district court, or in the office of the clerk of a county court in the state, or with the judge of said county court, where no clerk is provided, in cases where said courts have jurisdiction given to them by law, an affidavit setting forth that any person is indebted to such creditors, stating the nature and amount of such indebtedness as near as may be, and alleging any one or more of the following causes for attachment, to wit." Then follows an enumeration of such specific causes, beginning: "First—That the defendant is not a resident," etc.

Twelve causes are thus set forth as separate grounds of attachment, and then follows this paragraph:

"Thirteenth—In every case where any affidavit shall be made and filed as aforesaid it shall be lawful for such clerk to issue a writ of attachment, directed to the sheriff of the county, or to any other county as hereinafter provided, returnable like other writs or process in this act, commanding him to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of said debtor, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, with interest and costs of suit, in whose hands or possession the same may be found."

The amendatory act of 1881 re-enacts the whole of said section 92 of the code, verbatim, and adds the following, after the foregoing paragraph:

"Fourteenth—In all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section."

The meaning of this added subdivision of the section is the question in controversy.

Three possible constructions are suggested in the arguments of counsel in this and the other cases involving the same question:

First, that the language used provides no specific or added ground of attachment, but means simply that in the cases arising upon the classes of overdue indebtedness specified, attachment will lie, provided they are coupled with any of the preceding enumerated grounds of attachment that may exist in the given case. But this construction would render the paragraph wholly useless, for the reason that under the preceding section of the act of which this is amendatory (section 91 of the code), in case any of the twelve enumerated causes existed, attachment would lie upon any of these specified matters of overdue indebtedness, without the amendatory provision in question, and this latter would add nothing whatever to the law as it existed before the amendment. Since we must concede that the legislature intended some change in the existing law, by enacting the amendment, we are therefore forced to reject this construction, which would render the amendatory act, so far as it relates to the whole of said section 92, utterly useless.

The second construction contended for is that the amendment in question was intended to restrict the operation of the provisions of section 94 of the code, and to cut off the writ in all cases where the debt is not due. Section 94 is as follows:

"Actions may be commenced, and writs of attachment issued as prescribed in this chapter, upon debts or liabilities not yet due, if the affidavit states any of the cases mentioned in the preceding section [section 92], except the first, second and third subdivisions of said section, provided that any judgment obtained under the provisions of this section shall be with a rebatement of the interest from the time such judgment is rendered until the time at which said debt or liabilty would have become due."

This construction is not only a strained one, but is inconsistent with the amendatory act itself, inasmuch as the latter neither expressly nor impliedly repeals or modifies section 94. It in no way refers to said section, but, on the contrary, expressly declares the enactment to be an amendment to section 92, and hence its effect cannot be extended by construction beyond its declared object and purport, unless by necessary implication, which certainly does not arise out of either the language itself or the declared purpose, but is repugnant thereto.

The third and last meaning contended for, unless we say it means nothing at all, is that it was intended to create, and does so create, a specific and new cause of attachment in addition to those before provided and existing in section 92 of the code. The principal difficulty in giving the language employed this construction—a difficulty, I think, more apparent than real—consists in the awkwardness of the phraseology and mode of expression in framing the provision. It will be observed that the paragraph numbered

"thirteenth" of section 92 contains no cause for attachment, but sets forth the mode of procedure after the filing of the affidavit provided for in the first paragraph of the section, and the numbering of this latter paragraph of the section is simply a blunder or oversight in preparing, copying, or printing the act. The same oversight is perpetuated in the amended act of 1881, and the framers of the latter act being evidently misled by the former, numbered the added subdivision "fourteenth," instead of placing it immediately after the twelfth enumerated subdivision and numbering it thirteenth, and omitting the numbering of the closing paragraph of the section. Had this been done, the meaning would have been more evident. In addition to such correct placing and numbering, had the wording followed the phraseology of the other twelve stated causes of attachment, for example, "that the indebtedness of the defendant is upon an overdue promissory note, bill of exchange, other written instrument for the direct payment of money, or upon book account," there could have been no question as to the meaning.

It is argued, however, that the closing words of the paragraph, "the creditor may have a writ of attachment issue upon complying with the provisions of this section," render the whole subdivision obscure and meaningless, unless they may be construed to imply that in actions brought upon instruments and accounts of the character specified in the first clause of the sentence, attachment will lie, provided there is a compliance with the provisions of the section requiring affidavit of the existence of some one of the twelve causes enumerated. This construction we have already discussed and disposed of as untenable, because adding nothing to the previously existing law. We think this latter part of the paragraph under consideration can be reasonably construed to imply no more than a compliance on the part of the creditor with the requirement of the section touching the filing of the affidavit, and setting out therein all that is prescribed in the first paragraph of the section preceding the enumerated grounds of attachment as a foundation for the writ.

But even in this view we must concede that the words, "the creditor may have a writ of attachment issue upon complying with the provisions of this section," are altogether superfluous, such condition being already fully covered by preceding provisions of the act.

If, then, we reject these latter words of the provision as superfluous, we have left a provision which contains a meaning, and which can have but one rational meaning, considering its position and numbering in the supposed proper order of the enumerated causes of attachment, as well as considering the character of the provision itself, thus eliminated from the useless condition appended. The evident meaning, in this view, is that this numbered subdivision was intended to define a separate and additional cause of attachment, to wit: an indebtedness existing upon the overdue instruments and accounts specified. No other construction would give

the act any effect whatever other than already conferred by pre-existing statutes.

The settled canons of judicial construction require that possible interpretation to be given a statute which will render it effective, and effect the purpose of the legislative intent, if such intent can be reasonably inferred.

The argument against the harshness of the law entailed by such a cause of attachment is without force when directed to the judicial instead of the legislative department. We have no disposition to question the necessity, utility, or propriety of the provision as a ground of attachment, even were it within our province so to do.

If it be said that it entails hardship upon the debtor, it may be replied that to the legislative mind in enacting this amendment to the former statute it may have appeared that the absence of such a law had entailed greater hardship to the creditor. That such a law is not without precedent, the statutes of many states, for many years, sufficiently attest.

Stripped of unnecessary verbiage, and disregarding inaptness in phraseology and oversight in the numbering and position as not fatal to the evident intent and reasonably inferable meaning, we must hold the provision in question to intend and constitute a distinct, specific, and valid ground of attachment, additional to the twelve others enumerated in the act.

There being no error in the ruling and judgment of the court below, the judgment will be affirmed.

Judgment affirmed.

KELLERMAN *v.* CRESCENT MILLING AND ELEVATOR COMPANY.

Filed March 14, 1884.

JUDGMENT AFFIRMED ON THE AUTHORITY of Simmons v. California Power Works, *ante.*

ERROR to the county court of Arapahoe county. The opinion states the facts.

France & Rogers, for the plaintiff in error.

Bulleck, Baxter & Dickson, for the defendant in error.

STONE, J. The only question properly raised by the assignments of error in this case is the same as that in the case of Simmons v. California Power Works, just decided, and hence the reasons for the opinion of this court in that case are equally applicable to this. The constitutional question raised by counsel in argument relates to the civil code act of 1877, and not to the act of 1881, which is here involved. The judgment of the court below is affirmed.

Judgment affirmed.

PEOPLE, ex rel. ELLIOTT, v. GREEN.

Filed March 14, 1884.

ATTORNEY AT LAW—MALCONDUCT IN OFFICE—REMOVAL FROM THE BAR.—The judgment of the court in People, ex rel. Elliott, v. Green, 2 West Coast Rep. 311, adhered to, after an application for a rehearing.

PETITION for a rehearing in a proceeding before the supreme court to remove an attorney and counselor at law from the bar. The opinion states the facts. The opinion of the court upon the prior hearing is reported in 2 West Coast Rep. 311.

D. F. Urmy, Attorney-General, L. S. Dixon, and *L. C. Rockwell,* for the relator.

B. F. Rice, B. F. Montgomery and *T. A. Greene,* for the respondent.

HELM, J. The importance of this case, and novelty of at least one question presented, must be my excuse for restating upon this application our views somewhat in detail. The complaints embodied in respondent's petition concerning his treatment in this court are in our judgment groundless. He was given full notice of the charges preferred, and ample time to prepare his pleadings; the process of the court for procuring the attendance of witnesses was placed at his disposal; he was awarded a trial in open court, and the time was fixed to suit his convenience as well as that of relator; at the trial he was represented by able counsel, who managed his case with consummate ability; he was given the privilege of conducting the same in person; and after electing to leave the general management to his lawyers, he was permitted to address the court himself, upon the argument. Evidence supporting his allegations as to relator's oppressive treatment of third parties was excluded, but all proofs that were deemed proper, either in mitigation or in justification, were received and considered, and every doubt concerning the admission or rejection of testimony was resolved in his favor.

Upon this petition for rehearing, though an adjournment of the court for two weeks had taken place, he was, at his request, accorded the privilege of being heard by the judges at chambers in oral argument, both in person and by counsel. Throughout these entire proceedings the court has adhered to its resolution that errors committed, if any, should be in his favor and not against him.

And now, upon a candid and careful review of the case, we cannot see where a single right has been abridged, a courtesy omitted, or a reasonable request denied him. The relator in this case is judge of the second judicial district of the state. His petition, among other things, contains the following averments: That "about nine o'clock A. M. of said December 1st your petitioner and his daughter, a young girl about sixteen years of age, were riding along Curtis street, in the city of Denver, when they met Mr. Green, to whom your petitioner spoke and bowed politely, and, at Mr. Green's request, stopped, when the following colloquy, in substance, took place: Mr. Green said: 'Did you have that article published in

the paper about me?' To which your petitioner answered, 'No sir, I did not.'

"Mr. Green replied: 'If you did, an explanation has got to be made. I will not stand it. Perhaps your clerks caused it to be published at your instigation?' or words to that effect. Your petitioner again said: 'I have told you that I had nothing to do with causing that publication, and that is all I can say.'

"Your petitioner then started to drive on, when Mr. Green said: 'Wait a minute, I was going up to your house.'

"Your petitioner again stopped, and Mr. Green continued, addressing your petitioner, and intending thereby to embarrass and intimidate your petitioner in the discharge of his official duties, saying in substance: 'I shall publish the whole affair—how you got angry upon the bench; how you imprisoned those poor men, and took money out of their pockets. You ought to have given us an honest judge to try the case; you are a tyrant upon the bench, but when you are attacked upon the street you are a coward, and dare not defend yourself. I will make it hot for you, you cowardly puppy.'

"Mr. Green said much more to the same effect, using and repeating the most offensive and insulting epithets to your petitioner, concerning your petitioner's official conduct. During this abusive tirade, your petitioner did not reply, except remarking once or twice in a cool and indifferent manner: 'Very well, Mr. Green, publish as much as you please, and put it all in the newspaper, if you think it will do any good,' and then your petitioner drove on, leaving Mr. Green talking offensively and excitedly."

In answer to the foregoing, respondent admits that his conduct and language upon the street were "in substance as reported by said Elliott in said petition."

There is, therefore, no dispute whatever concerning the language used by both parties upon the occasion referred to; neither is there controversy about any of the attendant circumstances. Admitting all that is charged except as to his intention at the time, respondent declares that he was guilty of no official misconduct, and demands at the hands of this court vindication from the charge of malconduct in office.

The purpose of proceedings for contempt and those for disbarment, and the powers and duties of courts in connection therewith, must not be confused. The former may be termed a police regulation, or power for the protection of the court from present direct interference and annoyance in a trial or proceeding taking place before it; the latter is intended to protect generally the administration of justice, to save the legal profession from degradation by unworthy membership, and to guard the interests of litigants against injury from those intrusted with their legal business. The power to act in connection with the former is lodged in the court before or against whom the offense is committed; authority to proceed in the latter is possessed exclusively by the tribunal authorized to grant

licenses admitting to the profession; the former is punished by fine or imprisonment, and in many instances the proceeding is summary and largely *ex parte*. The sole penalty in connection with the latter is a prohibition from practicing in courts of record, and their judgment can only be entered upon notice of the charges preferred and a full hearing in defense, ample time for preparation being given, and all legitimate testimony being allowed and considered. A contempt may constitute ground for disbarment, but it by no means follows that the cause for disbarment must in all cases constitute a contempt.

Upon some of the questions connected with the subject of disbarment there is a conflict of opinion among the decisions. The tendency has been, and is, to exercise the power only in extreme cases, and upon the most careful and thorough consideration. A few of the authorities go so far as to denominate the attorney's right to practice his profession property, and to treat the same according to the full significance of that term. Whether this position be correct or not, the disposition of the courts to afford him all reasonable protection in the proper exercise of this right deserves and receives the hearty commendation of all just and intelligent minds. But courts ought not to forget, in their anxiety to shield the attorney, the duty they owe to themselves, to the legal profession in general, and to that portion of society with whom they directly deal. This case cannot be determined as a simple controversy between two individuals; the questions are of general importance and application. Every other judge and every other lawyer is almost as much interested as are relator and respondent. Individuals are lost sight of; the issue tried bears directly upon the relations existing between the bench and bar of the entire state.

Before admission to the bar, in Colorado, applicants are required to present credentials of good moral character and of intellectual fitness for the office. When admitted, they become sworn officers of the law. Each subscribes to an oath that he will "in all things faithfully execute the duties of an attorney and counselor at law, according to the best of his understanding and ability. Their tenure of office is for life or during good behavior. Every license is accepted with full knowledge of the unwritten condition annexed thereto—that for official misconduct it may be revoked at any time.

The power of revocation is by statute lodged in this court; and if upon a proper case we should hesitate to assume the grave responsibility, and perform the unwelcome duty, we would be untrue to our official oath.

Under this oath can we grant Mr. Green's request and vindicate him from all blame as a lawyer? Are we prepared to declare to the world that in this state every attorney who may imagine himself aggrieved by a judicial ruling may on account thereof insult the judge upon the street, using the vilest epithets and making the most violent threats concerning or affecting the past and future performance of his judicial duties? Nay more, are we willing to

admit that he may couple with such assault physical violence (for there is no distinction in principle between the two offenses, so far as this question is concerned); that he may repeat such assaults, verbal or physical, upon each and every adverse decision; and that no power exists to interfere with or to prevent these offenses by disbarment?

Ordinary civil or criminal actions are remedies utterly inadequate; their official relations bring the parties into continual contact; the judge is compelled to make rulings from day to day upon questions presented by the attorney; his rulings in that capacity are judicial findings for errors in which ample relief is provided; an insult or an injury inflicted upon him on account thereof is an insult or an injury to the cause of justice, and if by a lawyer, also to the legal profession.

If a judge and attorney meet outside the court-room and engage in an altercation about some matter in no way connected with judicial action, they are, and ought to be, upon precisely the same footing in all respects as other private citizens; but when the attorney utters the threat or makes the assault on account of a ruling or decision in court, the situation is widely different; his action has a direct influence upon the judicial mind; it is calculated to disturb and embarrass the proper administration of justice; the temple in which the lawyer is sworn to minister is not bounded by the walls of a court-room; his official oath is not a cloak to be worn only in presence of the court; and when he proves recreant to that oath by such willful misconduct toward the judge on account of his judicial acts as interferes with or impedes the dignified and proper administration of the law, or tends to do so, whether in the court-room or upon the street, *he is guilty of official misconduct.* Whether such misconduct justifies disbarment depends, of course, upon the facts and circumstances attending and surrounding each particular case.

But in this country, and in England also, the utmost liberty of speech is guaranteed by statute and enforced by the courts; the right to discuss all matters of public interest or importance is everywhere fully recognized; judicial decisions and conduct constitute no exception to the rule; the judge's official character, and his acts in cases fully determined, are subject to examination and criticism; in most of the states the office is elective, and it is proper and right that the people should be informed of the occupant's mental and moral fitness.

True, under the guise of criticism in the public press and otherwise, judges are often compelled to endure the sting of misrepresentation and calumny, with no other redress than an ordinary civil action; and doubtless it sometimes happens that their efficiency in office is thereby lessened, to the detriment and injury of the public service; but it is wisely considered better that these wrongs and injuries should be tolerated than that the sacred liberty of speech, printed or spoken, should be abridged by lodging an arbitrary power to interfere therewith in the hands of the court or judge, so long

as such criticism or libel is not designed to corruptly influence the mind of the judge in a cause still undetermined.

There is a marked difference between the attorney and the non-professional citizen; the former is as much an officer of the court as the clerk or sheriff; and his oath of office should lead him at all times and in all places to encourage and strengthen the judges and courts in the discharge of their official duties; but, so far as this liberty of speech in connection with judicial action is concerned, his official character in no way affects him; he may talk with his neighbors, and freely comment upon the judge's official conduct in matters no longer pending, and he may criticise the same through the public press; for such acts he will be answerable only as other citizens are.

But we have found no case, and respondent has cited none, which extends this privilege of comment and criticism to assault, verbal or physical, upon the judge in person.

If a case like the one before us were found, in which the court exonerated the attorney from official reproach, we should hesitate long before following it.

The assault upon the judge in person, the vile epithets and threats addressed to him, cannot be justified or excused under the right of criticism nor upon the plea of educating or informing the popular mind concerning his official acts. We may accept the law as stated by counsel for respondent in their able brief upon this petition for rehearing. We may say with them, that our power to disbar is confined to the statutory causes, and that it can only be exercised for malconduct *in office*; though both of these propositions are ably controverted.

In Beene v. The State, 22 Ark. 156, the court, per Chief Justice English, says:

"Conceding that it does not appear that the offense is embraced by the statute, yet if the plaintiff made a personal attack upon the judge on account of his action as such, * * * there can be no doubt that he deserved to be stricken from the roll for such flagrant misconduct, and that the circuit court has the inherent power to disbar therefor, though the offense be not embraced in the statute."

And in The People, ex rel. Hughes, v. Appleton, 105 Ill. 481, under a statute like our own, the court declared that "it is not to be held that there are no exceptions; that there are no cases where an attorney's misconduct in his private capacity merely, and not in his official capacity, may be of so gross a character that the court will exercise the power of disbarment. There is too much authority to the contrary to say that."

But it is unnecessary for us to dwell upon this subject, for the issue submitted for trial restricts us in this case to the question of inflicting the penalty for official malconduct.

We may accept counsel's further statement of the law, and admit that the malconduct must have been "designed and calculated to influence and affect the judge judicially in the discharge of his official duties."

With this law in view, let us briefly examine the specific acts and language of respondent above described and stated. An article had appeared in one of the morning papers reflecting upon the conduct of respondent in the district court the day before; the article was signed by no one, and the district judge, according to the evidence, had no connection whatever with the paper or its management. Respondent believed himself misrepresented and wronged; he also seems to have thought that relator was in some way responsible for the publication. With the paper in his hand, he sought out the judge, and made the verbal assault upon him. The article described a scene in court during the progress of a trial; it criticised Mr. Green's conduct as an attorney, and the wrongs inflicted thereby, if any, were in his official capacity; the threats made by him to relator were to publish proceedings with which his sole connection was that of counselor or attorney. The entire street transaction, therefore, grew out of, and had direct reference to, the judicial action of relator, and the official conduct of respondent.

Respondent claims that his purpose in seeking the interview was to procure from Judge Elliott a statement for publication which should redress the professional wrong inflicted upon him, and prevent the injurious consequences of the article to professional business; the object of the interview, therefore, was to benefit himself in his *official*, and not in his private, capacity. But these deductions are needless, for we have declared above that an attorney is bound by the solemn obligation of his oath to assist the court in its efforts to appropriately administer the law; and that when he is guilty of such willful acts toward the judge as are calculated to embarrass and impede these efforts, he is guilty of official misconduct. Hence the only question for consideration is whether respondent's language or conduct was "intended and calculated" to have this effect.

Let us see. His words to Judge Elliott were: "I shall publish the whole affair—how you got angry on the bench, how you imprisoned those poor men, and took money out of their pockets. You ought to have given us an honest judge to try the case. You are a tyrant upon the bench, but when you are attacked upon the street you are a coward and dare not defend yourself. I will make it hot for you, you cowardly puppy."

Respondent's language in calling relator a cowardly puppy, and declaring that he dare not defend himself when attacked upon the street, seems to indicate that he desired to engage relator in a common street brawl and fight. But this is so degrading and humiliating a view that we gladly accept his disclaimer of any such intention.

Passing this, therefore, and also the cruel charge against the judge of another court, who had kindly consented to try a troublesome case without the slightest obligation to do so, and what do we reasonably understand from the rest of the respondent's language? What does he mean when he says, "I will publish the whole affair; how you got angry on the bench," etc.? The "affair" re-

ferred to and the imprisoning and taking money were all occurrences in court; the threat was to publish these things and thus make it "hot" for Judge Elliott. What did respondent mean by declaring that he would make it hot for relator? Did he make these threats for the purpose of inducing relator to right the wrongs, fancied or real, inflicted by the newspaper article? Or was it his intention thereby to inform relator that he would disgrace him before the public; that by means of the press he would hold up to scorn and ridicule relator's judicial action, and that he would thus degrade relator's judicial standing, lessen the respect due to his position, weaken his influence and efficiency upon the bench and make it hot for him, *i. e.*, annoy and embarrass him in the discharge of his official duties?

It seems to us now, as it did when the former opinion was written, that there can be no reasonable doubt as to respondent's intentions when he uttered these words. We do not speculate as to whether the publication threatened, had it been made by respondent, would have produced these results. We are only considering respondent's intention and the reasonable tendency or consequences of his acts.

What effect were these threats calculated to produce? Obviously either to anger and exasperate or to intimidate the judge in the performance of his judicial labors. Judges are human; they have the same emotions and passions as other men; they are as sensitive about insult and injury after as before they begin wearing the judicial ermine. As much as the demand for integrity and ability upon the bench exceeds the demand for like qualities in private life, so much deeper is the sense of injury when these qualities in his official character are called in question. It is the judge's constant endeavor, as it is his duty, to rise in his judicial acts above the influence of passion or prejudice, and to put away from him while upon his bench all thought of personal wrong or injury; but until he is clothed with celestial atributes, he will not always be able to accomplish this desired end.

Whether respondent's threats and epithets were calculated to intimidate, or whether they tended to exasperate and anger, Judge Elliott, is a matter of but little moment; for in either event, their natural tendency was to annoy and embarrass him in the discharge of his official duties, and thus to interfere with the administration of justice in his court.

Upon the theory that respondent was angered by the newspaper article, and made the attack in a sudden heat of passion, we invited him to offer evidence in mitigation; but, considering his proofs, in connection with all the circumstances attending the transaction, we are unable to discover anything to materially palliate the offense; it was committed after he had been informed that the judge had nothing to do with the publication, and knew nothing about it until he read the morning paper. If, therefore, respondent uttered the epithets and threats to relator in a heat of passion produced by the

article, that passion was so unreasonable as to furnish no adequate excuse.

But it is sufficient on this subject to say that though three and a half months have passed since this transaction occurred, respondent still denies the slightest obligation on his part to offer any apology or reparation whatever to relator *as a judge*.

Respondent's view of the transaction is that it had no official character or significance whatever. In this view, as already shown, we cannot concur. But governed thereby he has throughout the entire proceedings, including his argument upon this rehearing, maintained the position that he displayed no want of official decorum, and that not the slightest discourtesy was offered to relator in his judicial character.

A word as to respondent's punishment and I shall have done. He alleges that it is "grossly oppressive and out of all proportion to the offense charged."

His construction of the law is that this court has no power to inflict any other penalty than disbarment; that under the statute we are compelled to disbar or to acquit him; his last words in argument were an expression of his personal perference for disbarment rather than any lighter judgment, and a demand for this, or acquittal.

We believe under all the circumstances, particularly in view of his unyielding attitude, that disbarment was not too severe a punishment for the offense committed; we certainly could not acquit him of all official blame.

Therefore, painful as the duty was, we acceded to his positive and persistent demand. We are unanimously of the opinion that the rehearing should be denied.

COHN *v.* PEOPLE, Etc.

Filed March 14, 1884.

FORGERY—INDICTMENT, SUFFICIENCY OF.—Under the latter clause of section 775 of the general statutes, an indictment for forgery is sufficient which charges that the defendant "did counterfeit and forge the handwriting of another to a certain promissory note, dated, etc., for the sum of, etc., with the intent to damage and defraud such person," etc. Such indictment need not set out a copy of the instrument upon which the forgery is predicated, nor charge the act to have been done falsely or feloniously.

THE SAME—EVIDENCE OF PASSING FORGED INSTRUMENT—INTENT.—Under such indictment evidence that the defendant uttered or passed the instrument forged, for the purpose of raising money thereby, is admissible, as tending to show the intent with which the handwriting was forged.

THE SAME—INSTRUCTIONS.—The court instructed the jury "that if they believed from the evidence that the defendant signed the name, claimed to have been forged, to the note in evidence, with the intention of obtaining money thereon, and did obtain money thereon," they should find him guilty. *Held*, that such charge was erroneous, because it omitted to instruct the jury that they must also believe that such signing was forged or counterfeited, and with intent to damage or defraud.

ERROR to the district court of San Juan county. The opinion states the facts.

H. O. Montague, H. B. Wilson and *Samuel Slessinger*, for the plaintiff in error.

D. F. Urmy, Attorney-General, for the people.

STONE, J. The plaintiff in error was tried and convicted in the court below upon the following indictment:

"The grand jurors selected and sworn within and for the county of San Juan, in the name and by the authority of the people of the state of Colorado, upon their oaths present that M. K. Cohn, late of the county of San Juan aforesaid, on to wit: the third day of January, 1882, at the county of San Juan and state aforesaid, did counterfeit and forge the handwriting of another, to wit: Lawsha Brothers, to a certain promissory note of the date of January 3, 1882, for the sum of $460, with the intent to damage and defraud the said Lowsha Brothers and Heffron & Johnson, and against the statute in such case made and provided, and against the peace and dignity of the state of Colorado."

Numerous errors are assigned as grounds for reversal of the judgment, only a few of which it is necessary to notice.

The indictment is objected to as insufficient for the reason that it fails to set out a copy of the instrument upon which the forgery is predicated, and because the act is not charged to have been done "falsely" and "feloniously."

The first clause of the statute upon which the indictment is founded declares that "every person who shall falsely make, alter, forge or counterfeit any record, * * * promissory note," etc., while the latter clause is as follows: * * * "or shall counterfeit or forge the seal or handwriting of another with intent to damage or defraud any person. * * * Every person so offending shall be deemed guilty of forgery:" Gen. Stats., sec. 775.

This indictment is drawn upon the latter clause of this section of the crimes act, and, as is seen, is framed in the language of the act, and hence it was not essential to use the words "falsely make," or to set out the instrument, as might possibly be required under the definition of the crime in the first clause; nor was the use of the word "feloniously" necessary. This term is employed in charging a felony, for the purpose of denoting the intent with which the act is charged to have been done. The clause of the act under which this indictment is framed expresses the intent necessary to constitute the offense, and hence renders superfluous the use of the term felonious. Besides, forgery was a misdemeanor at common law, the term felonious being alleged only in respect of crimes denominated felonious, which deprived the accused of the benefit of clergy upon conviction, and for this reason it has been held by the courts of several states that the term felonious need not be used in indictments for forgery, especially in states where by statute it is provided, as in this state (sec. 925, Gen. Stats.), that "every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the

terms and language of this code, or so plainly that the nature of the offense may be easily understood by the jury": Miller v. People, 2 Scam. 233; Quigley v. People, Id. 301; Butler v. State, 22 Ala. 43; Jane v. Commonwealth, 3 Met. (Ky.), 18; Peek v. State, 2 Humph. 77; People v. Olivera, 7 Cal. 403; Wharton's Crim. L., secs. 399, 400, 1419.

It is also assigned in error that the court admitted testimony as to the uttering or the passing of the instrument forged, while such passing or uttering was not charged in the indictment. There was no error in this, for the indictment having charged the offense under that clause of the statute expressing the particular intent constituting the criminal ingredients of the act, it was proper to show that the accused uttered or passed the instrument for the purpose of raising money thereby, in order to show the intent with which the handwriting in question was forged.

This at least was one mode, and a proper one, of establishing, or tending to show the particular intent expressed in the statutory definition of the offense: Wharton's Crim. L., sec., 1453b. There was no error in the refusal of the court to give the several instructions numbered 1, 2, 3 and 4, prayed on behalf of defendant. The only instructions given by the court to the jury were the two following, the first on behalf of the people, and the second on behalf of the defendant, to wit:

"If the jury believe from the evidence that the defendant signed the name of Lawsha Brothers, in San Juan county, Colorado, to the note for four hundred and sixty dollars, in evidence, with the intention of obtaining money thereon, and did obtain money thereon, you will find the defendant guilty, as charged in the indictment."

"The jury are further instructed that before they can convict the defendant, they must be satisfied beyond a reasonable doubt that he is guilty of the crime charged against him in the indictment; that such doubt must be reasonable and not captious, and that if the jury have any such reasonable doubt they must acquit the defendant."

The first of these instructions is not merely defective; it is palpably erroneous. It assumes to define the offense; to declare what facts establish the defendant's guilt; and in this it does not state the law of the case. It is scarcely necessary to remark that the facts thus stated, if true, would not necessarily constitute an offense under the statute, for one person may be authorized to sign the name of another. The statute makes the offense to consist in the forging or counterfeiting of the handwriting of another, with intent to damage or defraud some person.

Under the two instructions given, the jury were in effect directed to return a verdict of guilty, if they believed beyond a reasonable doubt that the defendant signed the name of another to a promissory note, intending to procure money, and procuring the same thereby, without instructing them that they must also believe that such signing was forged or counterfeited, and with intent to dam-

age or defraud some person. The mere intent to obtain money on the note was immaterial. It was the unauthorized signing, with intent to damage or defraud another, which made the act a crime under the definition of the statute. It cannot be said that the plaintiff in error was not prejudiced by such a plain misdirection to the jury, and with no other instruction to modify or cure it.

For this error the judgment must be reversed and the cause remanded.

Judgment reversed.

GREEN, Administratrix, etc., v. TANEY.

Filed March 14, 1884.

CROSS-COMPLAINT—JOINDER OF CAUSES OF ACTION—DEMURRER.—An objection to a cross-complaint on the ground that several causes of action are unlawfully joined must be taken by demurrer which specifically states the objection. If such demurrer is overruled, and an exception saved, the right to be heard thereon upon appeal is waived by afterward pleading over.

TRIAL BY JURY, CONSENT OF PARTIES TO.—A trial of issues of fact by a jury, which should have been tried by the court, is error. Such error is waived by the parties consenting to a trial by a jury.

FINDING OF JURY—WEIGHT OF EVIDENCE.—A verdict of a jury will not be disturbed on the ground that it is contrary to the weight of evidence, although the testimony of the greatest number of witnesses was opposed to such verdict, unless it appears that the jury acted so unreasonably in weighing the testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of doing justice.

APPEAL from the district court of Arapahoe county. The opinion states the facts.

Brown & Putnam and *Markham & Patterson*, for the appellant.

L. C. Rockwell, for the appellee.

HELM, J. Three questions are presented by the record and argued by counsel. Named in inverse order, they are, first, that the cross-complaint of Taney, who was defendant below, contained causes of action which could not be joined; second, that two issues, one legal and the other equitable, were submitted to the jury, and that so trying an equitable question was error; and, third, that the verdict of the jury was contrary to the weight of evidence.

It is questionable if there is anything in appellant's first objection, but we will not pass upon the subject for the reason that she is in no position to be heard thereon. The objection made, if well taken, would constitute a ground of demurrer, to be specifically stated.

A demurrer was filed to the cross-complaint, but no such ground was averred therein. Had appellant's intestate, Michael Green, who was plaintiff below, therefore preserved an exception to the ruling upon the demurrer, which he did not, this objection would not now be available. Besides had the demurrer properly presented the subject, and had an exception to the ruling been saved, the right to be heard thereon was waived by afterward pleading over. Appellant is in no better position as to her second objection above stated.

We are not called upon to say whether either of the issues presented to the jury was equitable, nor whether the finding upon either lays the foundation for an equitable judgment; the questions of fact connected therewith were not such as under our practice might by the court be submitted to a jury.

The record contains the following declaration: "And thereupon, *all parties consenting thereto*, it is ordered by the court that a jury come, to whom shall be submitted the following issues," etc., naming them. So it appears that Green expressly consented to the submission of both questions to the jury. By his so doing appellant is estopped from now challenging the regularity of the proceedings. Parties have the undoubted right to submit by agreement any issue or issues of fact, equitable or legal, to a jury for determination, and having done so they will not afterward be heard to complain.

The third and last objection of appellant rests entirely upon the weight to be given the evidence. Bearing directly or indirectly upon the vital question of fact in the case, Green offered the testimony of ten witnesses, including himself; Taney but one, and that one was himself. There at first appears to be some ground, therefore, for the surprise of the appellant concerning the verdict. The evidence is voluminous and we cannot discuss it in detail, but will proceed to state as briefly as we may our reasons for sustaining the action of both court and jury.

Green was an officer in the employ of the Denver and Rio Grande Railway Company. It was his business to superintend the operating of construction trains, and to some extent the track-laying when the road was in progress of construction.

Taney, appellee, was what is termed a boarding boss; he boarded at times many of the men at work under Green. The nine witnesses who support Green were, or had been, railroad employees, nearly all of them being wholly or partly under the control of Green. Taney at one time brought to Denver, and deposited in certain banks to Green's credit the sum of five thousand five hundred dollars. While there is much testimony concerning numerous other financial transactions between the parties, the vital question tried was the original ownership of this money. Green contends that it was his private funds, which he simply intrusted with Taney for the purpose of depositing in said banks, it being inconvenient for him to visit Denver in person. Taney asserts that it was his, and was deposited by him in payment and discharge of indebtedness, real or pretended, to Green. The jury, notwithstanding the large superiority in number of witnesses for the latter, must have found this issue of fact for the former.

After examining the testimony, we feel warranted in entertaining and stating the following conclusions in connection therewith:

First—As between Green and Taney, the jury was justified in believing the latter. While there are a few discrepancies in the testimony of Taney, in the main it is clear, straightforward and

positive. But Green's statements on the stand are conflicting and uncertain. It appears that he testified some months previous to the trial, at a preliminary hearing connected with the injunction, that he only gave Taney from two thousand eight hundred to three thousand one hundred dollars to deposit for him; on this trial he is certain the amount was five thousand five hundred dollars; he is sure of this, because he had it counted by another party, put into an envelope, and the envelope marked on the outside. Such a discrepancy as this was well calculated to prejudice his entire testimony with a candid jury. Had he taken the precautions now sworn to, it is incredible that he did not in January remember them, and also the exact sum of money handled. Such matters in connection with so large a sum are not often forgotten; and the party beneficially interested seldom fails to avail himself of them on the first and every succeeding opportunity. There could be no reconciling of the testimony of these two witnesses as to this transaction; if Green's statements were disbelieved, his whole case must fall.

Second—Many of the matters sworn to by the nine witnesses who appeared for Green were highly improbable. If they were true, Taney acted and talked in a manner utterly unworthy of a sensible or careful business man. In the language of the district judge who tried the case: "In order not to give a verdict for Taney they (the jury) must not only be prepared to say that he committed willful and corrupt perjury, but that he acted in a most indiscreet and foolish manner, in talking about the money he had upon his person, at San Antonio and other remote points in the state, midst crowds of persons, who, he might well suppose, might not only not protect him in his possession of the money, but who might be easily tempted to rob him of it."

Third—There were absurdities and inconsistencies in the testimony of these witnesses, which must have attracted the attention of the jury; and some of their statements were squarely contradicted by extrinsic evidence, which was doubtless accepted as true.

Fourth—The jury saw these men, noted their language, appearance and demeanor, upon the witness stand; and perhaps also had a personal acquaintance with some of them. They knew their relations, present and past, with Green, and probable interest in aiding him, or inclination to do so.

The weight of evidence does not wholly consist in its volume, nor in the number of individuals sworn. That is a most beneficent evidential rule which gives juries a large discretion in judging of the credibility of witnesses; which makes it peculiarly their province to discriminate between those who testify before them, and imposes upon them the duty of sifting the evidence, accepting the true and rejecting the false.

And this court will only interfere where, upon the whole record, it appears that the jury acted so unreasonably in weighing testimony as to suggest a strong presumption that their minds were swayed by

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rged. There is no prescribed form for making such claim of
exemption, and it might have been made orally in the justice's court.
It was made in the form of an affidavit by the defendant in the
attachment describing the property as the span of mules and harness
taken under the attachment writ and claiming them as exempt under
the statute. No notice of the filing of this affidavit was necessary,
any more than in making any other defense which the defendant
was entitled to make to the action.

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e dissolving of the attachment sued out by the
o is the plaintiff in error here. The objection to
e court in dissolving the attachment is based upon
reasons, to wit: First, that the affidavit claiming ex-
insufficient; second, because there was no notice given
aintiff of the filing of the affidavit claiming exemption;
because the claim of exemption, if any ever existed, was
; fourth, because the court had no jurisdiction of this
, the same not having come up on appeal, and that, therefore,
court erred in dissolving the attachment.

...rred to in section 12 of the attachment act of 1879 ...claimants of the property other than the defend- ...v called intervenors. The proceedings men- ...id act refer to the mode and manner of try- ...ght of exemption claimed when an issue

waiver of the exemption is that the ...achment upon other grounds and ...ng the exemption as a separate ... was no waiver of the right of ...mpt under the statute.

...t force. Upon appeal in ... existed in the justice's ...e *novo*, where the de- ...on, the same as any ...t is said by counsel for ...in the record shows that ...e due for the purchase price ..., and hence that had the court ...made upon the claim of exemption, ...ceeded in resisting said claim. It is ...nt is properly raised under any of the ..., but even if it is, we think it unavailing to the reason that he failed to make this point in ... The only ground upon which the plaintiff resisted ... exemption in the court below, when the motion to dis- ...e attachment upon the ground of exemption was before court, were the four specific grounds which we have heretofore set out and discussed, and the plaintiff having failed to present in the court below the fact that a part of the debt in the suit was the purchase price, or a portion thereof, for the property attached, as against the statutory exemption claimed, must be held to have waived this ground of objection to the motion, and cannot raise it for the first time in this court. The plaintiff, as assignee of the note and account sued upon, was the "real party in interest" within the meaning of the code of civil procedure, even though the consideration of the assignment may have been a payment to the assignor after recovery in the suit by the assignee: Cummins v. Morris, 25 N. Y. 625; Meeker v. Cleghorn, 44 Id. 349; Caulfield v. Sanders, 17 Cal. 569.

The jury were properly instructed upon this point by the instructions given on behalf of the plaintiff. The third instruction given on behalf of defendant, the giving of which is made a ground of error in the assignments, was inconsistent with that given upon the same point on behalf of plaintiff, and was also inconsistent with the facts to which it was intended to apply, and, therefore, objectionable; but that the plaintiff was not prejudiced thereby is evident from the verdict rendered in his favor, in accordance with the instructions given in his behalf.

This is none the less evident from the fact that the verdict was for a less amount than that sued for, since a large item in the account for the potatoes delivered to the defendant was in dispute and the testimony relating thereto directly contradictory, and as the jury were the judges of the credibility of the witnesses and the weight to be given to their testimony, we cannot say that the verdict was unwarranted, and the judgment of the court below will be affirmed.

Judgment affirmed.

SUPREME COURT OF OREGON.

STEWART *v.* PHY.

Filed February 13, 1884.

PAYMENT FOR SPECIAL PURPOSE—ACTION FOR MONEY HAD AND RECEIVED.—An action for money had and received lies to recover back money paid by a debtor to his creditor to be applied in satisfaction of a particular obligation, when the same is not so applied, and the obligation is otherwise discharged. It is not necessary in such action to allege a promise to repay.

APPEAL from a judgment of the circuit court, entered in favor of the defendant. The opinion states the facts.

J. A. Stratton, for the appellant.

Benham & Ramsey, for the respondent.

WATSON, C. J. The judgment appealed from is, in effect, that the complaint states no cause of action. The action was brought in the justice's court, and taken from thence to the circuit court by appeal. From the judgment in the latter court the present appeal was taken.

The complaint states in substance: That appellant, on September 21, 1881, gave respondent an order for six hundred dollars on Bamberger & Frank, of Baker City, as an advance, and to be applied and credited upon a contract then existing between them for the purchase of calves. That respondent obtained the money on said order, but failed, neglected and refused to credit the same, or any part thereof, except the sum of four hundred dollars. That said contract was therefore fully paid and satisfied by the appellant without any credit being given by the respondent for any portion of the six hundred dollars received from Bamberger & Frank on appellant's order, except the sum of four hundred dollars. The prayer is for judgment for two hundred dollars, with legal interest from September 21, 1882, and costs.

It appears from the allegations that the respondent has money belonging to the appellant to the amount for which judgment is demanded, in his hands, which he clearly has no right to retain from the appellant, and we think the action lies.

The respondent received the money for a particular purpose which was otherwise satisfied by the appellant, and it is his duty to repay it. It is no objection to a recovery in this action that appellant might have insisted on being credited with the whole amount received upon his order in the settlement of the amount due on the

contract for the purchase of calves. The complaint shows it was not so credited, and it was as competent for the parties to waive the credit at the time of the settlement as it was for them to agree to the application of the amount received on the order in the first place. It was not necessary to allege a promise to repay. The respondent's legal obligation to do so arises from the facts alleged: Glenny v. Hitchens and Horton, 4 How. Pr. 98. Nor is there any ground for the objection that the sum for which judgment is asked appears upon the allegations in the complaint to have been a voluntary payment. It is shown by these allegations to have been no payment at all. It was intended to be, but was never applied; and by the subsequent arrangement between the parties the contract to which it was to be applied was satisfied without it. We think the facts alleged in the complaint fully warrant the action, which is in the nature of an action for money had and received to the appellant's use, and that the holding of the circuit court was error.

The judgment is therefore reversed.

WILLIAMS v. GALLICK.

Filed February 13, 1884.

PROCEEDINGS SUPPLEMENTAL TO EXECUTION AGAINST A GARNISHEE are proceedings at law, and on an appeal from a judgment therein only those errors are reviewable that are assigned in the notice of appeal.

EXECUTION ON PLEDGOR'S INTEREST IN PROPERTY PLEDGED.—The interest of a pledgor in property pledged, with a limited power of sale for the protection of the pledgee, may be levied upon and sold under an execution against the pledgor. The pledgor holds the legal title to the property pledged, and not merely an equitable interest.

FINDING OF A REFEREE WILL NOT BE REVIEWED on appeal when there is evidence to sustain it.

SECONDARY EVIDENCE OF THE CONTENTS OF A CERTIFIED COPY OF AN ANSWER is admissible upon proof of the loss of the original and of such copy.

FAILURE OF A REFEREE TO FIND UPON AN IMMATERIAL ISSUE as to fraud is not error.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the plaintiff. The opinion states the facts.

Dolph & Simon, for the appellant.

William Strong & Sons, for the respondent.

WATSON, C. J. This is an appeal from a judgment against a garnishee in proceedings supplemental to execution, in an action at law. The facts essential to a proper understanding of the case are these:

In the month of July, 1879, Comstock and Pfluger, the principal debtors, transferred a large amount of personal property to William Gallick, the appellant, to secure him as accommodation indorser of their notes, to the amount of about twenty-six thousand nine hundred dollars, with power to sell so much of the property as might be necessary to discharge said notes at maturity and pay all expenses of keeping and disposing thereof, and the surplus of the property

or its proceeds to be delivered or paid over to them. Previous to this, however, on May 20, 1879, R. Williams, the respondent, had recovered judgment against Comstock and Pfluger for six thousand dollars, with interest from May 7, 1879, at twelve per cent. per annum and costs, in the circuit court of Multnomah county.

On January 21, 1880, respondent caused a notice of garnishment to be served on the appellant under an execution issued on said judgment. The latter gave the sheriff a certificate to the effect that Comstock and Pfluger had no property in his hands, and that he was not indebted to them in any amount whatever. Thereupon this proceeding supplemental to execution was instituted by the respondent. Appellant verified his answer to the written allegations of the respondent, February 17, 1880, and filed the same with his answers to the respondent's written interrogations on the 21st day of the same month. On August 10, 1880, he verified and filed his supplemental answer in which he claims that, prior to the service of the notice of garnishment upon him on January 21, 1880, he had indorsed two additional notes of Comstock and Pfluger, amounting in the aggregate to one thousand seven hundred and fifty dollars, under an agreement with them to hold the property for security, with power to sell, to pay off these notes, similar to the one previously entered into in regard to the notes first indorsed.

The issues made by the pleadings were submitted to a referee, who found that the property was simply pledged to the appellant, in the first instance, to secure him against the payment of the notes first indorsed by him for Comstock and Pfluger, with a power to sell said property, or sufficient thereof to pay all the notes so indorsed, and the costs and expenses of making such sale, the residue to be returned to them. He also found that the alleged subsequent agreement between the appellant and Comstock and Pfluger, with respect to the two, amounting to one thousand seven hundred and fifty dollars, was not made until after the service of the notice of garnishment, and that although in the name of the firm, it was executed by Pfluger alone, without Comstock's knowledge or assent. At the time the notice of garnishment was served on the appellant, he had a large portion of the property still in his hands undisposed of, and a large amount remained unpaid on the notes first indorsed by him, but previous to the trial before the referee he had disposed of all the property and discharged such notes, together with the expenses of selling the property, out of the proceeds. The referee took an account of the sales, expenses and payments in settlement of the notes first indorsed, from which he found that the amount received by appellant from sales, up to April 2, 1880, was sufficient to pay all that was due by the notes first indorsed, and the expenses of making such sales, and that the amount afterwards received by him from sales of the remainder of the property was two thousand four hundred and forty-four dollars and fifty-nine cents, from which nothing should be deducted as expenses of making such sales. The court below confirmed the

report except as to the expenses of sales after April 2, 1880, amounting to seven hundred and twenty dollars, which it allowed the appellant, and rendered judgment against him for the balance of one thousand seven hundred and twenty-four dollars and fifty-nine cents.

This is a proceeding at law, as has already been decided by this court: Knowles v. Herbert, 11 Or. We can, therefore, only examine the judgment appealed from upon the grounds assigned in the notice of appeal, and affirm, modify or reverse as we find the substantial rights of appellant affected by the errors alleged. The respondent, not having appealed from the judgment, msut be presumed to be satisfied with it: Code, 534. The referee found that the transfer of the property by Comstock and Pfluger to the appellant was a mere pledge for his own security; with a power to sell enough to pay off the notes indorsed by him at the time thereof, and the necessary expenses incurred in making such sale. This finding was not objected to by the appellant while the motion to confirm the report was pending in the court below. But if it had been, it could not be said that there was not sufficient evidence to support it, so as to render the order of the lower court, confirming the report, reviewable here on this ground. Whatever our conclusion might be from the evidence, if we were at liberty to consider it, we feel bound upon the record before us by the finding of the referee. We must, therefore, treat the transaction as he has found it to be, a mere pledge of personal property as security, with a limited power of sale for the further protection of the pledgee. In this view, Comstock and Pfluger had a leviable interest in the property, beyond question. They held the legal title, were the legal owners in fact, subject only to the incumbrance in the appellant's favor. The transaction did not involve any trust in favor of the creditors whose notes appellant had indorsed. They had no interest in it. The appellant's indorsement was their security, and the pledge was his security alone. Comstock and Pfluger and the appellant could have released the property from the charge at any time without consulting such creditors.

Section 279 of our civil code declares that all property, or right, or interest therein of the judgment debtor, shall be liable to an execution, except certain articles specifically exempted by the succeeding section.

Section 281, providing the mode of proceeding on execution where property has been levied upon by the process of garnishment in the hands of a third party, contains this provision:

"But if such property is in the possession of such garnishee upon a bailment, then unexpired, the sheriff shall sell the same, or the interest of the judgment debtor therein, according to the certificate, as other property."

The certificate referred to is the one required of the garnishee when the notice of the levy is served upon him. Under these provisions it cannot be disputed that Comstock and Pfluger had an interest in the property in the appellant's hands, subject to execu-

tion by the garnishment process. And such we believe has been the uniform construction of similar statutes: Burlingame v. Bell, 16 Mass. 381; Hastings v. Baldwin, 17 Id. 551; Sweet v. Brown, 5 Pick. 178; Foster v. Potter, 37 Mo. 525; Hearn v. Crutcher, 4 Yerg. 461.

Under the findings of the referee, by which we feel precluded, the question so elaborately argued by the appellant's counsel as to purely equitable interests being subject to garnishment upon execution, does not arise. In view of that finding we must hold the interest of Comstock and Pfluger as a strictly legal, and not an equitable, interest.

It is next contended on behalf of the appellant that the court below erred in sustaining the finding of the referee that the subsequent arrangement between Pfluger on behalf of Comstock and Pfluger and the appellant in regard to the two last notes indorsed by him, amounting to one thousand seven hundred and fifty dollars, was not entered into until after January 21, 1880, the date of the garnishment. This also was a simple question of fact and cannot be reviewed here, unless there was not sufficient evidence to justify it. Comstock testifies that he had no knowledge of this transaction until long after this date, and was not consulted in regard to it. Pfluger refuses to state positively that it took place before that date, and the appellant himself is hardly more definite.

The written instrument evidencing it is dated January 3, 1880, and yet the appellant's answers to the written allegations and interrogations served upon him after the garnishment by the respondent, and verified on February 17, 1880, while very full and explicit as to the first arrangement of July, 1879, give no intimation of the last one whatever. And it is not until the tenth day of August following that it makes its appearance in the supplemental answer.

Comstock and Thomas N. Strong both testify to the contents of a certified copy of an answer previously verified by the appellant in another action in which it was alleged that this last arrangement was entered into February 3, 1880. Both the certified copy and the original answer are lost, and the foundation for the secondary evidence was properly laid. We think the evidence was competent. The answer was a record and the copy certified by its proper custodian would have been competent evidence under the statute. Both being lost or destroyed without fault on the part of the respondent, secondary evidence of the contents of the certified copy was admissible: Howe v. Taylor, 9 Or. 288. Pfluger admits in his cross-examination that he made this last agreement with appellant because the garnishment had been served. It must necessarily therefore have been subsequent. We think the position taken by appellant's counsel, that there was no evidence to justify the finding, is clearly unwarranted. An issue was made by the pleadings as to fraud and collusion between the respondents and Comstock and Pfluger in obtaining the judgment under which the property in appellant's hands was garnished. The referee omitted to find on

this issue, and the appellant's motion to set aside the report upon this ground was overruled by the court below. This presents the last objection. But it follows from what has already been said that it cannot be sustained on this appeal.

The transfer of the property to the appellant, according to the finding of the referee, was a mere pledge to secure him against loss on his indorsements, and not an assignment to him for the benefit of the holders of such indorsement. Whatever interest he had in the property came to him through Comstock and Pfluger, or Pfluger alone, with notice of the respondent's right under the garnishment and subject thereto, and it belongs to him alone. He stands in the place of Comstock and Pfluger. If the transfer by Pfluger for the firm should be deemed the act of the firm, and as they could not resist the enforcement of the judgment out of their property on account of the imputed collusion and fraud between the respondent and themselves in its recovery, neither can the appellant who received the property from them after it had been garnished by the respondent, under such judgment.

We discover no ground upon which a reversal of the judgment would be proper, and therefore order that it be affirmed.

Judgment affirmed.

SUPREME COURT OF UTAH.

CAMPBELL ET AL. v. TAYLOR.

Filed February 13, 1884.

DEMURRER—AVERMENT OF LEGAL CONCLUSIONS.—A complaint need allege only facts sufficient to constitute a *prima-facie* cause of action. If superfluous matters are alleged as legal conclusions, an objection thereto cannot be raised by demurrer. The allegations of the complaint, omitting those objected to by the defendant, *held* to state a good cause of action, and to be free from ambiguity or uncertainty.

APPEAL from a judgment of the second district court, entered in favor of the defendants.

By leave of the court appellants filed an amended complaint, to which the respondent demurred and answered at the same time. The cause coming on for argument on the demurrer, it was sustained, with leave to the appellants to amend, which they declined and elected to stand by their amended complaint. Thereupon the court dismissed the complaint with costs against the appellants; whereupon they prosecute this appeal. The nature of the action is sufficiently set forth in the portion of the complaint copied below.

The complaint alleges that the appellants were the owners, entitled to and in possession, of a certain mining claim situated in Pinto Iron-mining district, Iron county, Utah, known and recorded as the Tip-Top, particularly describing it by metes and bounds and by reference to a section and township of the government survey, and further alleges that "said vein or lode bears iron and

other minerals, and said mining claims contain an area of 19.704 acres, and the whole thereof is in conflict and included within the boundaries of the Great Western Iron Mountain extension of the Mountain Peak mining claim, lode or vein, sought to be patented by the defendant from the government of the United States, situated in section 25, said township and range."

Plaintiffs further allege that "said Tip-Top vein, lode and mining claim is a re-location of a certain vein, lode and mining claim, located and known as the Excell lode and mining claim, bearing iron and other minerals, situated in said district, county and territory; and that the point of discovery, or discovery monument thereof, is and was the same, and identical with that selected for and established by the plaintiff as and for the Tip-Top lode and mining claim; and that the lode and area embraced in said Excell is about and substantially the same as embraced within the said Tip-Top lode and mining claim; and in fixing the boundaries, and in marking the claim upon the ground, and in making the monuments of said Tip-Top lode, vein and mining claim, the plaintiffs fixed upon and selected the same points for discovery and corner monuments that had been selected and fixed for the discovery and corner monuments for said Excell lode and mining claim, by the locator thereof, and which are the said discovery and posts aforesaid, repaired and rebuilt by plaintiffs, defining the lodes and boundaries of said Tip-Top lode, vein and mining claim as aforesaid, the words posts meaning the corner monuments of the claim. And that in making a record of the location notice of said Excell lode and mining claim, in and upon the mining records of said district, through inadvertence there was a mistake made in giving the course 'S. 23° 55′ W. from said initial point, along the said center 200 feet, set a post in a monument of stone for the center of the easterly end, making 1,500 lineal feet,' when the true course was and should have been S. 23° 55′ east. And also through inadvertence there was another mistake made in making the record of said location notice upon said record, in this, to wit: in saying in the record thereof, 'the above-mentioned monument, being the discovery of claim, is situated about N. 4° E., and about 2,380 feet from the S. W. corner of the S. E. quarter of section 25, township 36 S., R. 13 west, Salt Lake meridian, and about 1,780 feet north from the Chester No. 2,' the said figures 13 should have been 14 in said recordation, making the true range in which said Excell lode and mining claim was situated, and also the said Chester No. 2 lode and mining claim was or is situated, in said range 14, instead of range 13, as appears upon the record of its location upon the said mining records of said district.

"Said record of the notice of location of said Excell lode and mining claim, with the mistakes aforesaid, is in the words and figures as follows, to wit:"

Then follows a copy of the notice of location of the Excell signed by the respondent, following which the complaint proceeds:

"Plaintiffs further allege, on their information and belief, that if said Excell lode, vein and mining claim, or the said Great Western Iron Mountain extension of the Mountain Peak lode and mining claim, the latter more particularly hereinafter described, were, or either of them ever was, a valid mining claim or location, that the same and each of them were, by the defendant and his grantors and locators thereof, abandoned and forfeited, prior to the location thereof by the plaintiffs as the said Tip-Top lode, vein and mining claim; that the amount of labor and other conditions and improvements required by law were not done or made by said defendant or his grantors upon said Excell, or said Great Western Iron Mountain extension of the Mountain Peak lodes, veins and mining claims during each or any of the years since they or either of them were or was located, and the same and each of said lodes and claims were and was subject to re-location under the laws of the United States.

"And that on and prior to the 10th day of February, 1879, the premises hereinbefore described as the Tip-Top lode, vein and mining claim, and situated in the said Pinto Iron-mining district of Iron county, Utah, were vacant, unoccupied and unclaimed mineral land of the United States, and subject to location under the mining laws thereof, and that on or about the 10th of February, 1879, the said plaintiffs, being citizens of the United States over the age of twenty-one years, entered upon and explored said premises, found therein rock in place bearing iron, silver and other precious metals, and thereupon on or about said day located and appropriated for a mining claim for said mineral fifteen hundred linear feet of and along said vein or lode of mineral and surface ground, embracing said vein, lode and mineral, and six hundred feet in width for the length aforesaid, three hundred feet on each side of said mineral vein or lode. That said locators, on the day the claim was located, erected a monument at the discovery on said ledge or vein of mineral, iron, silver and other ores, and marked said mineral on the ground distinctly by monuments, so that its boundaries could be thereby easily traced, and posted at the discovery monument a written notice of said location, containing the subscription and names of the locators, and a full description of said mining claim, located by reference to natural objects and permanent monuments fully identifying the claim. That said locators have remained in the possession of said mining claim, and worked and improved the same in compliance with all the mining laws and customs, general and local, both of the United States and of the said Pinto district. The same was recorded on or about the 10th day of February, 1879, in the office of the recorder of said mining district, and now remains of record therein. That the defendant pretends to have, own and claims a certain alleged mining claim, which is by said defendant called the Great Western Iron Mountain extension of Mountain Peak mine or vein, bearing iron, containing as is alleged one thousand five hundred linear feet by six hundred feet in width, designated by the field

notes and official plat on file in the United States land office at Salt Lake City, Utah, on application for patent, as lot No. 47, township 36 south, range 14 west of Salt Lake meridian, and by defendant alleged to have been recorded in the recorder's office of Pinto Iron-mining district, Iron county, Utah, in book B, p. 143, and as part thereof own the said Tip-Top mine, mining claim or lode of plaintiffs. That defendant claims to be the owner of said Tip-Top mining claim and the mines and ore embraced therein, adversely to plaintiffs, and claims an interest or estate therein adversely to plaintiffs, and he denies plaintiffs' interest or right to said mining claim, or any part thereof, all of which claims or pretensions on the part of defendant are without right, unlawful and wholly unfounded. That in pursuance of the wrongful claim of defendant as aforesaid, the defendant, on or about the 15th day of January, 1880, made application for patent from the United States for said pretended Great Western Iron Mountain extension of Mountain Peak mining claim, No. 581, at the United States land office in Salt Lake City, Utah, and by the said application and survey accompanying the same included and embraced the whole of said Tip-Top mining claim and lode or vein and the property hereinbefore set forth, and wrongfully set up and claimed that said pretended Great Western Iron Mountain extension of Mountain Peak mining claim included the same and the same belonged to defendant. And plaintiffs further allege that said defendant well knew at the time he made his application for patent for said Great Western Iron Mountain extension of Mountain Peak mining claim, and long prior thereto, that plaintiffs were, during all of said time, the owners in possession and entitled to the possession of the said Tip-Top lode and mining claim, and all of the ores and metals included within its boundaries. That within the sixty days of publication of notice of said application for a patent, to wit: on or about the 6th day of April, 1880, the plaintiffs filed in said land office at Salt Lake City, under oath and in due form of law, their protest thereto, and their adverse claim to said Tip-Top lode and mining claim, and to all of the ores, metals and minerals embraced therein, the said ores and mining claim being embraced and included in the said alleged Great Western Iron Mountain extension of Mountain Peak mining claim of defendant, as described in said application for a patent, in which plaintiffs fully set forth the nature, boundaries and extent of their adverse claim, in compliance with the mining laws of the United States, and which contained a diagram of the conflict area of said claims and made by a deputy United States surveyor. That five hundred dollars' worth of labor has not been expended, or improvements made, upon the said Great Western Iron Mountain extension of Mountain Peak mine or claim, either by defendant or his grantors, nor any such sum or amount whatever.

Wherefore plaintiffs pray to be adjudged the owners, etc.

With his answer the respondent filed the following demurrer:

Said defendant, in addition to and in connection with his answer, says that he demurs to the amended complaint filed it this action—first, on the ground that it does not state facts sufficient to constitute a cause of action; second, that it is uncertain, ambiguous and unintelligible, in this, that the premises in question are stated to have been located in township 36 S. of R. 13 W., and yet are described and claimed to be situated in township 36 S. of R. 14 W., Iron county, Utah territory.

Marshall & Royle, for the appellants.

Sutherland & McBride, for the respondent.

EMERSON, J. The demurrer is not well taken upon either ground, and should have been overruled. The particular portion of the complaint relied upon by the respondent, in support of the first ground of his demurrer, is the paragraph immediately following the copy of the notice of location of the Excell. He insists that "the whole scope of the paragraph is a verbose general averment that the prior claims were abandoned and forfeited, and the consequent legal status of the premises; that there is no issuable fact stated therein; that such a general allegation of *abandonment* or *forfeiture* is but the statement of a legal conclusion.

The paragraph referred to is obnoxious to the objections urged against it, but it by no means follows that the whole complaint is bad. If this portion were entirely stricken out, there would remain a statement of facts sufficient to constitute a good cause of action, without omitting any material averment necessary to entitle the appellants to recover.

Without this paragraph, the complaint fully apprises the respondent of the grounds of the appellants' claim, and there can be no misapprehension as to the issues tendered, or to the matters to be litigated on the trial. This is the sole object of all pleadings. It is not necessary for a party to allege any more in pleading than will constitute, *prima facie*, a sufficient cause of action or defense; all beyond this is surplusage.

Without the portions objected to the allegations of this complaint constitute such a cause of action; the balance is surplusage. A demurrer is not a proper mode to rid a complaint of superfluous matter. There is no ambiguity or uncertainty in the respect mentioned in the remaining ground of the demurrer. The actual *locus* of the Tip-Top, the mining claim of the appellants, is stated in the complaint definitely and in terms easy of comprehension, and free from all reasonable doubt, which is all that is necessary: Salmon v. Wilson, 41 Cal. 595.

The judgment of the second district court is reversed, and the cause is remanded, with direction to that court to overrule the demurrer.

Judgment reversed with costs to the appellant.

The other justices concurred.

SUPREME COURT OF WASHINGTON.

BURCH, Administrator, etc., *v.* MCDANIEL ET AL.

July Term, 1881.

SALE OF PRE-EMPTOR'S POSSESSORY RIGHT BY ADMINISTRATOR.—An administrator is entitled to the possession of a tract of land entered under the pre-emption laws by his intestate, and may sell, under direction of the probate court, any right of possession of the land that may have fallen to him by virtue of his administration. Nothing contained in sections 2263 and 2269 of the United States revised statutes prohibits such sale.

ERROR to the first district court. The opinion states the facts.

Allen & Whitson, for the plaintiff in error.

Durham, Thompson & Hill, for the defendants in error.

GREENE, C. J. Plaintiff in error, as administrator, sued defendants in error in the district court for one thousand seven hundred and twenty-three dollars, a balance averred to be due upon a promissory note which had been given by them to the intestate. Defendant McDaniel answered, setting up a counter-claim of two thousand nine hundred and twenty-three dollars.

Plaintiff replied by alleging that he, as administrator, had sold to defendant for one thousand two hundred dollars, under direction of the probate court, the possessory right of intestate as pre-emption claimant in a certain tract of land and improvements, and that the sale was accompanied by an agreement between himself and McDaniel, afterward approved and confirmed by the probate court, that the price should be credited against the sum of two thousand nine hundred and twenty-three dollars, and reduce it to the amount demanded in the complaint.

On the trial plaintiff offered to prove the facts pleaded in his reply. Defendant objected. The district judge sustained the objection and excluded the testimony. As a result plaintiff lost his case. He therefore comes now into this court and seeks to reverse the judgment below, on the ground of improper exclusion of evidence. Whether he is entitled to this relief or not seems to us to depend upon the resolution of one simple question. Does there, on the decease of an intestate pre-emptor, whose title to the land he occupies is yet inchoate, any salable possessory right pass to his administrator? As a foundation for this question we have a concession by both parties before us that a pre-emption claimant has a possessory right in the land he claims, and that this possessory right is perfectly distinguishable from any title, complete or incomplete, which he may have or hope for to the land itself. It is further conceded that the former is salable and the latter is not, and this accords with decisions, state and national, too numerous to cite.

Bare possession of anything of value, of which exclusive possession may possibly and lawfully be had, is property and is valuable, and ordinarily the transfer or relinquishment of such possession is good consideration for a contract.

Unless an administrator as administrator is legally incapable of taking possession of a tract of land entered under the pre-emption laws by his intestate, or if in possession is obliged by law to transfer it to transferees which the law designates, we see no reason why he should not be regarded as having the power, under direction of the probate court, fully to dispose of any possession of such land that may have fallen to him by virtue of his administration.

Defendants in error refer us to certain provisions of the pre-emption laws, which they maintain preclude the administrator from any exercise of such a power. These provisions are contained in sections 2263 and 2269 of the United States revised statutes. Section 2263 declares that any sale of the land by the claimant, before patent issues, shall be "null and void." Section 2269 directs that in case of death of the claimant before perfecting title, it shall be competent for his administrator or one of his heirs to file the necessary papers to perfect the same, "but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned."

Here an intent is evident on the part of congress to prevent any right or interest in the land itself being transferred by the pre-emptor or his heirs to third parties until the title of the United States has been first divested; also an intent to preserve to the family of the pre-emptor who survive him—or, more precisely, to his heirs—the benefit of the money, time, toil and sagacity he has expended in the selection, entry, retention and improvement of the land. But we do not perceive that the statute presumes an unalterable desire on the part of the pre-emptor or heirs to acquire title, or forbids the abandonment of their possession at any time, and in any manner, and for any consideration their best interests may dictate. It is certainly optional with the ancestor to perfect title, or to abandon the premises. The same option certainly descends to his statutory successor. He can abandon to his advantage by assigning for value his possession.

They have the same possession and the same option of abandonment, and why cannot they in adandonment reap the like advantage? The statute is silent. But it is just as silent with regard to the ancestor as with regard to the heirs. Why, then, should not this statute, which is acknowledged to allow him, in its silence, the right to sell for value his possession, and in express terms brings forward the heirs to the same platform as himself for receiving the muniments of title—why should it not in its silence be held to permit to the heirs also, interested as they are in swelling the assets of the estate, a like beneficial sale? No good reason appears to us. We do not understand that the cases of Delay v. Chapman, 3 Or. 459, and Hall v. Russell, 3 Saw. 506, which have been cited by defendants in error, announce any doctrine inconsistent with this. Those cases arose under the donation law, and decide that the peculiar phraseology of that law indicates an intention of the government, upon

death of the donation settler, to deal thenceforth only and directly with the heirs. But the cases do not hold that those heirs have no possessory rights of which they could for their own benefit dispose. We think that the pre-emption statute, by naming the administrator as one who may proceed to perfect title in the heirs' behalf, clearly shows it to have been contemplated by congress that possession of the pre-emption claim would, on the pre-emptor's decease, fall where, under the jurisprudence of the states of this Union, bare possession of land would ordinarily fall, namely, to the administrator, and intended to put only one limitation upon the administrator in dealing with the possession, which limitation is, that he should, for all purposes of perfecting title, stand in possession as representing the ancestor for the benefit of the heirs, and not as representing him for the benefit of creditors and heirs alike. This limitation is identical in aim and spirit with the provision nullifying any transfer by the pre-emptor of interest in the land. Banks are erected by the statute on either side of the current of title flowing from the government, which prevent, as well after his death as during his lifetime, any diversion until a descent is effected directly into the channel of his own blood: Cochran v. McCoy, 33 Ala. 65.

Briefly stated, we conclude the law to be that the right of possession of pre-empted land, to which title is inchoate, passes on death of the pre-emptor to his administrator; that the right of possession thus acquired is subject to a trust which requires the administrator to proceed to perfect title in favor of the heirs, provided there are heirs, and the estate is in such condition as to enable him to do so, and the interests of the heirs, all things considered, so demand; that for the discharge of this trust he is answerable individually, and upon his bond, as for the performance of any other duty; that aside from this trust he is free to dispose of the possession for the best advantage of the estate; that no fraud of his in the premises will be presumed; and that where there no administrator, or when the administrator consents, an heir may perfect the title. If such were not the law, great and needless hardship would often ensue upon the death of pre-emptors who had not been so fortunate as to complete their titles. Pre-emption settlers are usually persons in moderate circumstances. With many of them daily bread is only bought with severe daily toil. Their living is cramped and painful, because they are poor. Rapid improvement of their farms means amelioration of their way of life. Their claims become their savings bank, and every excess of labor and material over what is necessary for livelihood is there deposited. Death takes the pre-emptor. His surviving family find themselves in possession of a few articles of furniture, a few animals—perhaps in all nothing but what must serve for immediate support—and besides these they have possession of his claim and his improvements. Now, what shall they do? Shall they go on and perfect the title which the husband and father had left unfinished? They may not be able; or it may not be advisable. In either contingency

what are they to do? Did Death sweep into one grave, so far as they are concerned, the builder, and all he built? Is he being gone, all gone? What he left is valuable. Is it only a carcass to gather vultures? Or can the mere possessory right be sold in this case, as in all ordinary cases, by virtue of common reason and common right, no express law speaking to the contrary? We hold that it can be so sold: Grace v. Hanley et al., 5 Cal. 486. Such being our opinion, the judgment of the court below must be reversed and a new trial granted, and it is so ordered.

WINGARD, J., and HOYT, J., concurred.

WOOD v. MASTICK ET AL.

July Term, 1881.

CONTRACT FOR SALE OF LAND—SPECIFIC PERFORMANCE.—A written agreement for the sale of land, which reserves to the vendor the privilege of foreclosing all the rights of the vendee, in case of the non-payment of the purchase price, may be specifically enforced by the vendor. It is not necessary for him to resort to the remedy of foreclosure.

DEMURRER TO COMPLAINT—OBJECTION TO OVERRULING, WHEN NOT WAIVED.—A plaintiff does not waive his objection to a wrongful ruling of the court in sustaining a demurrer to his complaint, by filing an amended complaint, when, in consequence of such ruling, judgment is given for the defendant.

PLACE OF TRIAL.—All actions for the causes mentioned in section 48, laws of Washington territory (1877), must be commenced in the county or district in which the subject of the action lies. The court of no other county or district has jurisdiction thereof.

ERROR to the third judicial district court. The opinion states the facts.

G. M. Haller, McNaught, Ferry & McNaught, for the plaintiff in error.

Struve, Haines & Leary, for the defendants in error.

WINGARD, J. On August 19, 1880, Charles E. P. Wood filed his complaint in the district court of the third judicial district of Washington territory, holding terms at Port Townsend, as vendor of certain real estate therein situate, in Snohomish county, in the third judicial district, against Seabury L. Mastick and Levi B. Mastick, vendees, alleging a contract in writing made by the parties on the 19th day of June, 1878, for the purchase of said real estate, the purchase price, two thousand dollars, to be paid to plaintiff June 1, 1879; said payment to be a condition precedent to the conveyance; also alleging due tender of a good and sufficient deed on June 1, 1879, demand for the money on said day, non-payment thereof, and readiness to convey on the part of plaintiff ever since, and at the time of filing the complaint, a deposit with the clerk of said court of a good and sufficient deed of said premises for the defendants, and due performance of all conditions on plaintiff's part, and prays judgment for the agreed purchase price.

To this complaint, after due personal service in Jefferson county, W. T., defendants appeared in the action and interposed a demurrer in substance that the complaint does not state facts sufficient to

constitute a cause of action, which demurrer was by the court sustained; whereupon plaintiff, saving his exceptions, filed his amended complaint addressed to the chancellor, alleging the same facts and praying specific performance, a judgment *in personam* for the agreed purchase price, and that said real estate be sold to satisfy the judgment, and for general relief.

To this amended complaint defendants filed their motion to dismiss the action for want of jurisdiction of the court over the subject-matter, which motion was by the court sustained, all relief in said court refused and final judgment entered dismissing the cause and assessing the costs against plaintiff, to all of which plaintiff duly excepted and seeks to have the same reversed. The contract was set out verbatim in the complaint and is as follows, to wit: Agreement made this nineteenth day of July, A. D. 1878, between S. L. Mastick and L. B. Mastick, the parties of the first part, and Charles E. P. Wood, the party of the second part, witnesseth:

First—That the said parties of the first part promise to buy of the party of the second part, in consideration that the said party of the second part agrees to sell all his right, title and interest of and to those two certain parcels of land situated in the county of Snohomish, territory of Washington, described as follows, to wit: first, eighty (80) acres known as the Lane claim, on Pillchuck creek; second, one hundred and sixty (160) acres on French slough, known as Frank Dolaris's claim.

Second—Said parties of the first part agree and promise to pay for said lands to the party of the second part, the sum of two thousand (2,000) dollars in United States gold coin in payment, as follows: The whole thereof on the first day of June, 1879, with interest thereon at the rate of one per cent. per month, payable on said first day of June, 1879, and also pay all taxes and assessments which hereafter may be laid or imposed for any purpose whatever on said land, and the money agreed to be paid herein.

Third—The said party of the second part agrees that upon the payment of said sum, interest and taxes, at the time herein stated, he will convey to the said parties of the first part, by deed, the said lands, in which deed his wife, Lizzie B. Wood, shall join, releasing dower.

Fourth—It is mutually agreed that the payment of said sum, interest and taxes, shall be a condition precedent to such conveyance, and that the non-payment of said sum within two days after the time provided shall render the moneys to be paid as aforesaid, at the option of the party of the second part, his heirs and assigns, due and payable immediately. No notice of such option shall be required, and in case of such non-payment, this contract and all rights of the parties of the first part may be foreclosed, and attorney fees shall be allowed to the amount of three per cent. upon all the amount remaining unpaid, which shall be a debt due and payable upon the filing of the complaint in foreclosure. No waiver of the time of payment shall be valid in favor of the parties of the

first part, except it is reduced to writing and subscribed by the parties hereto.

Witness our hands and seals this day and year above written.

Signed, sealed, stamped and delivered in the presence of Martin White, Samuel S. Murphy.

S. L. MASTICK, [SEAL]
L. B. MASTICK, [SEAL]
C. E. P. WOOD. [SEAL]

Did the court err in sustaining the demurrer to plaintiff's original complaint? In order to determine this question, it is proper to consider what the contract above mentioned is. We are of opinion that it is nothing more than an agreement upon terms, to sell, on the one hand, and to buy on the other, the land described—an executory contract, with a clause reserving to the vendor the privilege, in case of non-payment, of foreclosing *all the rights of the parties of the first part*—vendees—to which should be added and allowed attorney fees to the amount of three per cent. upon all the amount remaining unpaid. If the vendor had seen fit to foreclose these rights and keep the land, he might have done so; but he chose rather to enforce the contract of sale, and brought his suit accordingly. This, we think, he had a right to do, and having done so, his complaint should have been sustained and the demurrer overruled.

It is claimed by the defendants in error that the plaintiff by amending his complaint, after the defendants' demurrer to the original complaint was sustained, waived his right to object to any error in such ruling.

This rule has important exceptions, and the case we are considering falls within one of them. The judgment, in consequence of sustaining the demurrer in the court below, was for the wrong party: Powell on Appellate Procedings, 192, 193; Bliss on Code Pleading, sec. 14.

Except as tending to establish the practice, it is unnecessary in this case to consider the question of venue, or the jurisdiction of the court over the subject-matter in a suit to foreclose a mortgage. We are of opinion that all actions for the causes mentioned in section 48, Laws W. T., 1877, *must be commenced* in the county or district in which the subject of the action lies, and the court of no other county or district has jurisdiction, and in this case Snohomish county would have been the proper county in which to commence an action to foreclose, had the court below been right in holding the contract to be an equitable mortgage. This construction is aided by section 229, Laws 1877, p. 47.

Judgment reversed, and a trial *de novo* ordered.

GREENE, C. J., and HOYT, J., concurred.

OREGON RAILWAY AND NAVIGATION COMPANY *v.* GALLIHER.

July Term, 1881.

INSTRUCTIONS—REVIEW ON APPEAL.—Instructions given on the trial will not be reviewed on appeal when the transcript fails to contain all of the instructions, or a certificate that those portions included therein were all that were given upon the points covered thereby.

MOTION to dismiss a writ of error. The opinion states the facts.

Dolph, Bronough, Dolph & Simon, for the plaintiffs in error.

Harper & Langford, for the defendant in error.

HOYT, J. Defendant in error moves the court to dismiss this action upon the ground that the plaintiffs in error have not brought here a sufficient transcript of the record in the court below. Plaintiffs in error admit that the transcript is insufficient to warrant this court in passing upon any of the rulings of the court below which are assigned here as error, excepting the one in relation to certain instructions given to the jury upon the trial of the cause, but insist that enough appears in the transcript to enable this court to pass upon that question. But as the bill of exceptions signed by the judge does not contain all of the instructions given upon such trial, and fails to show, by any proper certificate therein, that those portions of the instructions included in said bill of exceptions were all that were given upon the points covered thereby, we are of the opinion that we cannot assume such to be the fact, and that, therefore, it is not competent for us to pass upon the question above stated without further information than we can gather from said transcript as it now stands, and no motion having been interposed for leave to file an amended transcript, the motion to dismiss must be granted, and it is so ordered.

GREENE, C. J., and WINGARD, J., concurred.

BAXTER ET AL. *v.* SCOLAND ET AL.

July Term, 1881.

DEFECT OF PARTIES IN ACTION AGAINST PARTNERSHIP.—In an action against a partnership a defect of parties, consisting in a failure to name the individuals composing the firm, is waived by theappearance of the defendants, without specifically objecting to the defect.

COSTS ON APPEAL FROM JUSTICE'S COURT.—Properly construed, section 522 of the civil practice act prohibits the district court to render a judgment for costs in favor of the appellant on an appeal from the justice's court, unless he recovers a judgment substantially more favorable than that from which the appeal was taken. Whether or not, in any particular case, the amount of enhancement or reduction is sufficient to make the judgment substantially more favorable depends upon the circumstances of each case, and is left to the discretion of the district judge to determine. As a rule, a reduction or enhancement of the judgment by a few dollars would not suffice to make it more favorable, within the meaning of the statute.

ERROR to the third district court. The opinion states the facts.

C. H. Hanford, for the plaintiffs in error.

Struve, Haines & Leary, for the defendants in error.

GREENE, C. J. This is a case brought in a justice's court by defendants in error to recover for services rendered on tide water by

'heirs, at request of plaintiffs in error. The action
rmably to one of the statutory methods, by the
claim and the issuance of a summons. The
S. Baxter & Co., but the summons issued to
. Brooks.
technical objection that possibly might
claim for being against a partnership
fendants appeared on the return day
ral complaint then interposed demurred
cts stated were insufficient to constitute a
at the complaint showed the cause of action
ntract. The court overruled the demurrer, de-
, issue was joined, trial was had, and judgment
ants for sixty dollars and costs was rendered.
al afterward, in the district court on appeal, resulted in a
against defendants for fifty-five dollars. The verdict being
d judgment not yet entered, defendants moved to dismiss the
tion for want of jurisdiction over the subject-matter of the action, and because the complaint failed to state facts enough to constitute a cause of action. Such lack of jurisdiction or insufficiency of the complaint, however, was not clear to the district judge, and he therefore denied the motion. Exception was taken to this ruling Then a motion was made by defendants for judgment in their favor for the costs made on the appeal. This motion was denied, an exception taken, and judgment entered for the amount of the verdict and all costs made in the district and justice's court.

There are three errors assigned, namely: First, the court erred in denying the motion to dismiss the action; second, the court erred in denying the motion for a judgment for costs of the appeal; and, third, the court erred in giving a judgment in favor of defendants in error. On the argument, two principal questions are presented, one of jurisdiction and one of costs. It is said that there was no jurisdiction in the court below, first, because the verified claim, naming the firm only, and not the individual partners, is not a good foundation of jurisdiction under our statute; and, second, because the oral complaint, certified from the justice's docket, shows a contract to do an entire round of service without showing in addition an entire performance or a waiver of performance. But it seems to us that all defect of parties defendant existing on the face of the verified claim was cured by the appearance of defendants in answer to summons, and by their proceeding to plead, without specifically objecting to the supposed defect. And we do not deem that the complaint sets up a contract that might not be satisfied by the limited amount of service that the plaintiff pleads. On the other main question—that of costs—we have more difficulty. It brings to us, and compels us to construe section 522 of the civil practice act, a section which was manifestly designed, in the wisdom of the legislature, to discourage unreasonable and vexatious appeals, but which is so inartificially worded as not plainly to expose the exact outlines of the

design. This five hundred and twenty-second section is of kindred matter with sections 510 and 514, as will be seen by placing the three together, as follows:

Section 510. "Costs shall be allowed the party in whose favor the judgment is rendered, except as is otherwise provided by law." Section 514. "In all cases where costs and disbursements are not allowed to the plaintiff, the defendant shall be entitled to have judgment in his favor for the same." Section 522. "In all civil actions tried before a justice of the peace, in which an appeal shall be taken to the district court, and the party appellant shall not recover a more favorable judgment in the district court than before the justice of the peace, such appellant shall pay all costs accruing after the appeal."

Now, if we suppose that the words "more favorable" are used in the five hundred and twenty-second section to express a change, however small in amount, in favor of the party appealing, then a moment's scrutiny of the accompanying language discovers two possible constructions, one of which was adopted by the district court, and the other of which is contended for here by plaintiffs in error. Plaintiffs in error are arguing that the section was intended to provide for every case in which a party appellant fails to get the judgment enhanced or reduced in his favor, while the judge of the district court concludes that the section was only meant to cover the case of a party who has obtained a judgment in his favor before a justice, and who, not content with the amount of it, seeks by appeal a larger award. Either of these constructions, if put in practice, would, it seems to us, often work unnecessary hardship.

In every case where an appeal effected no substantial change in the judgment appealed from, the appellee would be unjustly a sufferer, in having been compelled to resist it and await its termination, a still greater sufferer if compelled to pay the costs of it, and the victim of yet more aggravated wrong if he were the one whom the successive judgments showed to have been from the first in the right of the litigation. After very careful consideration, we are persuaded that neither the construction of the plaintiffs in error, nor that of the judge of the district court, is the true one. Both these considerations are strict, and contrary to that liberal rendering which is prescribed by section 763 of the practice act. Each of them is in conflict with the spirit and tends to defeat the aim of section 522. When the legislature makes mention of "a more favorable judgment," they do not mean one larger or less by a dollar or a mill, but one that shows the judgment below to have been substantially wrong. Properly construed, these words forbid the district court to render any judgment in favor of the appellant for costs of his appeal, unless he shall have recovered in that court a judgment substantially more favorable to him than the judgment was which the justice gave. Whether or not, in any particular case, the amount of enhancement or reduction is sufficient to make the judgment substantially more favorable, must of necessity depend upon the peculiar circumstances of that case, and be left to the sound

discretion of the district judge for his decision. As a rule, a few cents or a few dollars, more or less, added to a judgment or subtracted from it, would not suffice to make it "more favorable" within the meaning of the statute. Upon the whole, therefore, our opinion is that the judgment of the district court be affirmed.

WINGARD, J., and HOYT, J., concurred.

WHEELER v. PORT BLAKELEY MILL COMPANY.

July Term, 1881.

MECHANICS' LIENS—DESCRIPTION OF PROPERTY.—A notice of a mechanic's lien will be held on demurrer to sufficiently describe the property sought to be charged, when the same is described therein as "a lot of sawlogs marked 'F. & A.,' now lying in" a certain slough.

THE SAME—REQUISITES OF STATEMENT OF DEMAND.—The notice of such lien must contain a statement of the full amount of the lienor's demand before any deductions are made, and also the amount thereof after the deduction of all just credits and offsets. Unless each of such amounts is stated, the notice is insufficient.

ERROR to the third judicial district court. The opinion states the facts.

Struve, Haines & Leary, for the plaintiff in error.

McNaught, Ferry & McNaught, for the defendant in error.

HOYT, J. In this cause the court below sustained a demurrer to the complaint therein and an exception to such action was duly taken, and said ruling is assigned here as error. The said demurrer was general and, therefore, the only question raised is as to whether or not the said complaint stated facts sufficient to constitute a cause of action. The plaintiff in his complaint sought to enforce certain rights growing out of liens claimed on certain sawlogs, and the important question made below as well as here was as to the sufficiency of the notices of said liens as set out in said complaint. Two objections to said notices have been urged and fully argued: First, that they contained no sufficient description of the property sought to be charged; and, second, that the demands of the lienors were not sufficiently set out therein.

The description was as follows: "A lot of sawlogs marked 'F. & A.,' now lying in Ebey's slough." Is this a sufficient description? The statute requires the property to be so described as to render it thereby capable of identification with reasonable certainty. Does the above language so describe anything? What is a lot of logs? The definition of the word "lot" as applicable to its use in the above sentence is given by Webster as follows: "The separate portion belonging to one person, and hence a distinct parcel, a separate part, as a lot of goods." From which it appears that it means more than a mere quantity in this, that while it does not give any information as to the amount of a parcel or aggregation, yet it does clearly show that whatever the amount covered it is a parcel by itself distinct from all others. The description above quoted, therefore, is, in our opinion, equally as definite and certain as it would

have been had it read "A certain 'raft' of sawlogs marked 'F. & A.,' now lying in Ebey's slough." And this we think sufficient, for while it might be presumed that there were other rafts of logs in said slough, yet it would not be presumed, in the absence of proof thereof, that there are such other rafts with the logs therein marked "F. & A." It is doubtless true that upon proof that there were other rafts thus marked in said slough, an ambiguity latent in the description would be developed, but until such proof is made, such ambiguity does not appear, and therefore said description must be held good upon demurrer.

Now as to the second point above stated. Was the statement of the demand as set out in their notice sufficient? This must depend upon the language contained in the statute relating thereto; for however liberal a rule we may adopt in the construction of such laws, we cannot do violence to the language used unless such language is in some degree ambiguous so as to open the door for judicial construction. The statute says that such notices shall contain "a statement of the demand and the amount thereof after deducting as near as possible all just credits and offsets." From this language, it is clear to us that the legislature intended that such statement must contain at least two things, to wit: the full amount of the claim before any deductions were made, and also the amount thereof after the deduction of credit and offsets. Any other construction will no give weight to all the words of the statute, and in the absence of something in the context or in surrounding circumstances to indicate that some other method should be taken by which to arrive at the intention of the legislature, we know of no other rule than to construe the law as it reads, giving to each word therein used its form and ordinary meaning. Not only do we think that the statute thus requires the claim to be set out; but, in our opinion, such a provision was a reasonable and necessary one, as thus requiring the gross as well as the net demand to be set out tends greatly to prevent the filing of fraudulent or exorbitant claims, to the needless embarrassment of the owners of the property.

While we think it essential that the notice should contain the facts above mentioned, it is not, in our opinion, necessary that said essential facts should be stated separately, but only that they appear reasonably certain from the statement taken as a whole. Does the statement of demand in these notices embody the above described essential particulars? We have carefully examined them, and from such examination have been unable to determine the amount of the demand of the lienors, before the deduction of offsets, though the amount of such claims after such deduction fully appears, and we are, therefore, of the opinion that the statement of the demand in said notices is insufficient, for the reason that one of the above recited necessary averments was not sufficiently stated. The statement of the demand being thus defective, the notices were void and of no effect. Several other objections to the complaint have been argued by counsel, but as it is conceded that unless said

notices are valid, the action cannot be sustained, we do not deem it necessary to discuss the other questions raised.

We find no error in the record, and the judgment of the court below must therefore be affirmed.

GREENE, C. J., and WINGARD, J., concurred

WADDELL ET AL. v. THE STEAMER DAISY

July Term, 1881.

APPEAL IN ADMIRALTY, PETITION FOR.—A petition for an appeal in admiralty from a definitive sentence, or for apostles, is not required to be in writing.

LETTERS DISMISSORY OF ADMIRALTY CAUSE.—The allowance of an appeal, in admiralty, and the granting of time by the lower court in which to perfect the same, is a sufficient letters dismissory of the cause.

THE FILING OF AN APPELLATORY LIBEL IS UNNECESSARY in this country on an appeal in admiralty.

AN APPEAL IN ADMIRALTY IS SUFFICIENT IN POINT OF TIME when the same was taken and allowed at the time of sentence, and perfected within the time fixed by the court.

NO MONITION FROM THE APPELLATE COURT is necessary to the perfection of an appeal in admiralty, when the same is allowed by the lower court without the intervention of such monition.

MARITIME CONTRACT, COMPLETED VESSEL.—Whether a contract for putting machinery into a steamer is a maritime one, so as to be enforceable in admiralty by a proceeding *in rem*, depends upon the fact whether the putting in of said machinery was a necessary part of the construction of said steamer as a completed vessel, consideration being had to the purposes for which she was intended. If the machinery were used in such construction, the contract was not a maritime one.

THE SAME.—A contract to furnish machinery to a steamer, which exists merely as an inchoate hull upon the ways, is not a maritime one.

PROCEEDINGS IN REM AGAINST VESSEL, POWER OF LEGISLATURE TO AUTHORIZE.—Whether the territorial legislature has power to authorize a proceeding *in rem* against a vessel for materials used in its construction, *quere*. However this may be, it has never sufficiently exercised such power so as to warrant a court in upholding such a proceeding.

SUB-CONTRACTOR, LIEN OF ON VESSEL.—Under the lien law of this territory, a sub-contractor has no lien upon a vessel for materials furnished by him to the contractor, and used in the construction of the vessel.

FEES IN ADMIRALTY CASES.—Section 823 *et sequitur* of the revised statutes of the United States, providing what the *per foliam* fee shall be in admiralty cases in the circuit and district courts of the United States, apply to such cases in the territorial courts. The territorial legislature has no power to regulate such fees.

APPEAL from the second judicial district court. The opinions state the facts.

Hanford, Burk & Rasin, for the appellants.

Struve, Haines & Leary, for the appellee.

HOYT, J. The attorneys for the respondents having reserved the right so to do in their brief, now move the court to dismiss the appeal herein, for the reasons stated in their brief, as follows: First, no petition for appeal, no petition for apostles, and no letters dismissory, signed by the judge of the court below, have been filed, and none are called for by the notice of appeal; second, no appellatory libel has been filed; third, the appeal was not taken or perfected at the time or at the same term the decree was entered, or at any regular term of the court entering said decree. They also now urge the further point that no monition issued out of this court to the court below to transmit the proceedings to this court.

The transcript in the case shows that the appeal was from a definitive sentence, and that it was taken and allowed at the time of the entry of said sentence, and that the court then allowed time in which to perfect the appeal, and this was in our opinion such a compliance with the rules governing appeals in admiralty as to fully meet the objections thereto raised by the first point above quoted, for we are of the opinion that no written petition for an appeal from a definitive sentence or for apostles is required, and that in view of the fact (as will be hereinafter stated) that no action of the appellatory court is required to perfect the appeal, the action of the court below in allowing the appeal and in granting time in which to perfect the same, was sufficient letters dismissory of cause.

As to the second point, we are of the opinion that the rules of the civil law have been so far modified in this country and in this court, by a uniform current of practice, as to make the filing of an appellatory libel in this court unnecessary.

The appeal having been taken and allowed at the time of sentence, and having been perfected within the time then fixed by the court, it was sufficient, in our opinion, under the rules, as interpreted by this court in the case of Brown et al. v. The Steamer Zephyr, 2 West Coast Rep. 51, to meet the objections raised by the third point above stated. It only remains to discuss the point now raised for the first time (the same not having been reserved in the briefs on file) as to the necessity of a monition issuing out of this court to the court below, and specially reserving the point as to whether said objection was taken in time, we would say that we are of the opinion that no monition was necessary, as there has been a uniform practice in this court to take jurisdiction of cases in admiralty, sent up on appeal, without the intervention of such monition; and such has been the practice of the supreme court of the United States as to appeals from this court. The appeal having been perfected by the filing of a bond, properly approved, and the court having in lieu of further apostles directed the entire record to be sent up, was, in our opinion, sufficient to divest said court of the case, and upon the filing of said record here, this court acquired jurisdiction therein. The case is not presented of a refusal on the part of the court below to direct the record to be sent up, and we do not, therefore, now assume to decide as to what would be the correct practice in such a contingency. It follows from what we have said that the motion must be denied, and it is so ordered.

GREENE, C. J., and WINGARD, J., concurred.

Afterward the following opinion was delivered on the merits:

HOYT, J. This was an action in admiralty brought by the libelants against the respondents to enforce a lien for certain materials furnished by them and used in the putting in of the boilers and engines of the said steamer Daisy, in the process of her construction as a steamer. To the libel exhibited therein the respondents and

claimants filed their exception and answer, and testimony was taken to show the circumstances under which such materials were furnished, and the only question of fact which is made in the case is as to whether said materials were furnished at the request of the owners of said steamer, or their agents, or at the request of one J. C. Fox, who had a contract for the furnishing and putting in of the machinery, in the construction of which the materials furnished by libelants were used. The conclusion to which we have come as to the law of this case makes it unnecessary for us to decide this question, so far as the decision of this case is concerned; but in view of the fact that the discussion of an important point of law raised in the case was made dependent upon the above-stated question of fact, we have thought it best to decide it, and are of the opinion that, it appearing clearly that said Fox had a contract for the furnishing of the machinery in the construction of which the materials of libelants were used, and that said libelants had notice thereof, and it not appearing that they were ever authorized by the owners of said steamer or their agents to furnish said materials, it follows in contemplation of law that such materials were furnished at the request of said contractor Fox, and the fact that they were without authority, charged to the steamer instead of to Fox could not change the legal liabilities of the parties. Upon the facts above stated two questions of law have been urged by the counsel for claimants,—conclusions against the right of libelants to maintain their action:

First—That the court had no jurisdiction of the subject-matter of the writ.

Second—That the materials having been furnished to the contractor, and by him used in the performance of his contract with the owners of the steamer, the libelants, as to the said steamer and her owners, stand in the relation of sub-contractors, and, therefore, have no lien upon said steamer under the provisions of the laws of this territory relating thereto.

The first point was not argued in the court below, but as it goes to the jurisdiction of the court over the subject-matter of the action it must be fatal to libelants' claim whenever brought to the attention of the court; we therefore proceed to consider it. Was the contract for putting in said machinery a maritime one within the meaning of the law giving courts of admiralty the right to enforce such contracts by proceedings *in rem?* The answer to the question must, in our opinion, turn upon the fact as to whether the putting in of said machinery was a part of the construction of said steamer as a completed vessel, or was she a completed vessel without the machinery in question? for if the materials were used in the construction of the steamer, then under the well-settled rule as declared by the supreme court of the United States the contract for the furnishing thereof was not a maritime one, and an action in admiralty *in rem* would not lie to enforce a lien therefor: People's Ferry Company v. Beers et al., 20 How. 399; Roach et al. v. Chapman et al., 22 Id. 129. Was the steamer Daisy a completed vessel at the time the said

machinery was put into her? We think not, for at the time the contract with Fox was made, under which said machinery was furnished, she was, if in existence at all, in existence only as an incomplete hull on the ways, and therefore said contract was within the most restricted construction of the case of Roach et al. v. Chapman et al., above cited, a contract for the construction of the vessel, and therefore not maritime. We, however, place but little stress upon the fact that at the time of the making of the contract the vessel had not yet been launched, as we do not think that the learned judge who pronounced the opinion of the court in the case of the People's Ferry Company v. Beers et al., above referred to, could have intended, by stating as one of the reasons why the contract in that case was not maritime, that "it was a contract made on land to be performed on land," thereby to make that fact the leading one in deciding that the contract in said case was maritime; for if the location of the hull (whether on land or water) was to be decisive as to the character of the contract, it would follow that a contract made one day would be not maritime, which, if made the next day, in exactly the same terms and applying to the same vessel, would be maritime. A contract not maritime would, without any change in its terms or conditions, be changed to a maritime one by the moving of the hull upon which such contract was to take effect, the distance of a few hundred feet. Work which, if done one day, would entitle to a lien in admiralty, would, if done one day earlier, fail to create such lien. Such a construction does not seem to us reasonable, and we do not think that the opinion, taken as a whole, warrants the conclusion that the court so held. In our opinion the material question is this: Were the materials used in the construction of a part of the vessel necessary to her practicable use as a vessel for the purposes for which she was intended? Was she so far the finished creature of her designer as to be reasonably adapted to the use for which she was intended? If she was so far finished, then anything further done upon her would be maritime in its nature; but everything done before such a degree of completion had been reached would be not maritime in its nature. Applying these rules to the case at bar, it becomes evident that it is immaterial as to whether we consider the contract as having been made at the date of the contract with Fox, or at the time when the material actually went into the steamer, as the machinery in the construction of which said materials were used was clearly necessary for the practicable use of the vessel for the purpose for which she was intended and adapted. Besides, libelants have set out in their libel that said materials were used in the *building*, equipping and furnishing of said steamer, without stating what part of said materials was used for each of said purposes, and, therefore, for the purposes of this question, said libel must be construed as though the entire claim was for the *building* of said steamer. It follows that, in our opinion, the contract in question was not a maritime one, and that a court of admiralty had no jurisdiction *in rem* to enforce the same.

But counsel for libelants urge that even if the action cannot be sustained as a suit in admiralty, yet under the territorial statute a proceeding *in rem* was authorized and that the action ought to be sustained thereunder; but with this claim we cannot agree, as we doubt the power of the legislature to provide for the proceedings had in this action, and are of the opinion that if it has such power, it has never sufficiently exercised the same to justify us in upholding the proceedings had herein, as a proper exercise of the authority of the district court in its capacity as a territorial court. The court below, then, had no jurisdiction of the subject-matter of this action.

This is all we need say in determining the case at bar; but for the reason already stated, and for the further reason that the same has been fully argued by able counsel, we think it our duty to decide the other question of law as above stated upon the hearing herein. Under the lien law of this territory, has a sub-contractor a lien upon a vessel for materials furnished by him to the contractor and used in the construction of the vessel? It is a well-settled rule in the construction of lien laws that the legislature will not be presumed to have intended to provide for the claims of those having no privity with the owners of the property, against which an enforcement of the lien is sought, unless they have made use of language from which their intention to have so extended the law as to cover such claims is clearly manifest. See Phillips on Mechanics' Liens, sec. 45, and cases therein cited. Does the language used in the law of this territory relating thereto clearly show that the legislature intended thereby to provide for a lien in favor of a sub-contractor who, without any privity with the owners thereof, furnished materials for the construction of a vessel? Such an intention does not appear from a literal reading of the statute, as it in terms only gives a lien to the one who furnishes the materials, and the contractor is the one who, in contemplation of the law, furnishes the materials, and not the sub-contractor of whom he may have procured the same. Nor is it reasonable to so extend the letter of the statute as to cover such cases, for if the sub-contractor is said to have furnished to the vessel the material put in by the contractor, then the person of whom such sub-contractor procured them may likewise be said to have so furnished them, and as all liens created upon vessels remain in force for the period of three years without any notice thereof being required, it would follow that there might be double or triple liens upon the vessel for the same articles, and these several liens could be allowed to remain dormant, the existence thereof entirely unknown to the owners of the vessel until they were enforced one after another at any time within the said three years.

Not only would such a construction be unreasonable, but the law so construed would be susceptible of working great injustice, and would tend greatly to discourage the industry of ship-building in this territory, and, therefore, not only should the language of the

statute be not extended so as to cover the claim of a sub-contractor, but should, if necessary, be very much restricted before being interpreted as the expression of an intention on the part of the legislature to enact a law which would lead to such injustice and hardship as might follow the enforcement of this law thus construed. But we have seen that we can give each word of the statute its ordinary and full meaning without holding that the claims of sub-contractors are included therein, and in our opinion it must be so construed, and that, therefore, no lien exists in favor of a sub-contractor for material furnished by him to the contractor for use in the construction of a vessel. This construction has further sanction in the fact that the legislature has in the chapters of the lien law which provide for liens upon other species of property in express terms carefully protected the claims of sub-contractors as such, and has provided for the enforcement of such claims in such a way as to lead to the least possible inconvenience to the owners of such property. It follows from the above conclusions, that had the court below possessed jurisdiction of the subject-matter its decree would be affirmed here, but as it had no such jurisdiction there must be a decree entered here dismissing the libel, with costs of both courts against libelants.

GREENE, C. J., and WINGARD, J., concurred.

On motion to retax costs the following opinion was rendered:

GREENE, C. J. Resolved, That it is the intent of section 823 of the revised statutes of the United States, that recourse to the nation for judicial relief should be under a uniform tariff of fees throughout the entire territory of the United States, and that recourse to the territorial courts in their exercise of the same jurisdiction as circuit and district courts of the United States is recourse to the nation through organs constituted to act in its behalf, and that, therefore, that section and the sections following having specifically provided what the *per foliam* fee shall be in admiralty cases in the circuit and district courts of the United States, and in absence of other provisions by law what it shall be in the territories, and having in the organic act given to the territorial legislature a general power only to legislate and to legislate solely on rightful subjects not inconsistent with the laws of the United States, the *per foliam* fee granted by the United States fee bill in these sections is the only one that can be taxed.

Motion granted.

WINGARD, J., and HOYT, J., concurred.

MURNE v. SCHWABACHER BROS. & CO.

July Term, 1883.

NEW PARTY IN SUPPLEMENTARY PROCEEDINGS.—Whether in a proceeding supplemental to execution pending in the district court, the court can direct a new party to be brought in, *quære?*

PARTIES IN SUPPLEMENTARY PROCEEDINGS.—In proceedings supplementary to execution to reach certain property in the judgment debtor's possession, the debtor denied that the property was his own, and alleged that it belonged to certain named persons of whom he was an agent. These alleged principals had full knowledge of the proceeding, and on the trial of the issue raised by the judgment debtor they were examined as witnesses concerning the title and ownership of the property in question. *Held*, that an adjudication in such proceeding against the judgment debtor alone, determining that the property was his, and should be paid over to the judgment creditor, was proper; that he was the only necessary party defendant to the proceedings; that the alleged principals were not necessary parties, and need not be brought in as new parties.

ERROR to the district court in proceedings supplemental to execution. The opinion states the facts.

J. R. Lewis, for the plaintiff in error.

McNaught, Ferry, McNaught & Mitchell, for the defendants in error.

GREENE, C. J. This cause was heard at last term and an opinion filed. Appellee not being satisfied that a proper practice, or justice itself, will admit of bringing a new party into a proceeding such as this, applied for a rehearing. His application was granted. Now, after a full re-argument, we are disposed to modify our former opinion in one particular.

Waiving the question, whether the district judge can, in any proceeding supplemental to execution, cause a new party to be brought in—on which question we are not all of us altogether clear—we are of opinion, that if the facts obtaining in this particular proceeding are such that a determination of the issues in it, against the judgment debtor, would operate to estop the individual proposed as a new party from afterward setting up any claim to the disputed property, then there is no necessity for bringing him in, nor any reason why the proceeding should fall futile and be dismissed, or be in any wise affected, for want of jurisdiction acquired over his person.

Plaintiff in error complains that he is a mere agent, and that the property of his principals is being taken, and their rights are being adjudicated away, without any opportunity for these principals to be heard. He does not claim, nor does he desire, that his principals should be made a party to this proceeding, but he insists that without them nothing can be adjudged against himself. The issue on this point is just what is liable to be presented in any case of the nature of replevin or detinue, the only difference seeming to be that this proceeding, though attached to a law case, is of equitable character and cognizance. But passing by all question arising out of the forum, it is conceded and appears of record that the supposed principals had full notice of this proceeding and its aim before trial. A deposition of one of them and the oral testimony of the other were taken as to the ownership of the property. Either could have

intervened before trial, under section 23 of the code, if he had so desired; for that section allows intervention in a "proceeding" as well as in an "action." And even while the trial was in progress we have little doubt that an intervention would have been properly allowed in equity. If the principals were not disposed to intervene, they might have used some other means to protect their interests. No steps, however, were taken by either of them to assert any rights. Each left his supposed agent to defend as best he might alone. It seems to us that this maxim, *respondeat superior*, will here apply. Really these principals, if they be such, have suffered their property to be litigated away, before their face and eyes, under the name of their agent. What matters that to the agent? It is his principal's loss, not his own.

The findings of the district judge upon the facts are fairly deducible from the evidence, and ought not to be disturbed. According to those findings the property, at the date of the arrest of the defendant, was in the defendant's possession, and was his own. No third party was present in court making claim in any appropriate way. There was no dispute between the debtor and third persons before the district judge for settlement, but only a denial by the debtor that the property was his own, and an assertion by himself that it belonged to other persons that he named. It is said by plaintiff in error that the testimony shows the property to be now beyond the reach of defendant and of the court, and that therefore he cannot now comply with the order to turn it over. In fact, it appears that after he was arrested, and apprised by the proceedings in the district court that he would be required to pay over the disputed money, he purposely and willfully put it beyond his reach, in order that the court might be powerless to compel him to pay it. Well, he had an option to retain the money, to abide the judgment of the court, or to brave the consequences of not having it. We do not think he ought to complain of the bed he has made for himself.

We conclude that the judgment of the court below must be affirmed.

WINGARD, J., concurred.

McCOY *v.* AYERS, Administrator, etc.

July Term. 1883.

VERIFICATION OF PETITION IN PROBATE COURT—JURISDICTION.—Proceedings in the probate court of Umatilla county, Oregon, are not void for want of jurisdiction because the petition on which such proceedings were founded was unverified.

PRESUMPTION AS TO THE SITUS OF PERSONALTY.—The fact that a probate court has assumed jurisdiction over certain personal property is *prima facie* evidence that such property is within the jurisdiction of the court.

THE opinion states the facts.

Anders & Langford, for the plaintiff in error.

Allen & Thompson, for the defendant in error.

HOYT, J. Upon the trial of this cause, plaintiff in error offered in evidence a transcript from the records of the probate court of Umatilla county, Oregon, which was excluded by the court on the ground that the petition which was the foundation of the proceedings, recited in said transcript, had not been verified, and that, therefore, the proceedings had thereon were null and void for want of jurisdiction, and such refusal is the only error assigned, to correct which the case has been brought to this court. There had been an attempt to verify said petition, but the jurat was signed by a justice of the peace, and failed to recite any venue, but as to whether or not such omission was fatal we do not now decide, as we are all of the opinion that the verification of the petition was not a matter which determined the jurisdiction of the court, and that a petition in other respects sufficient would give the court jurisdiction, and a failure to have it verified would be a mere irregularity, correctible only on appeal. It follows that the proceedings recited in the transcript were not void, and it was error to exclude them for that said reason.

Defendants in error, however, strongly insist that such error could not have prejudiced the rights of the plaintiff in error, as said transcript did not tend to prove or disprove any of the issues in the case. But we think it did, as one of the issues was as to whether, at a certain date, certain notes and other specific articles of property were in Walla Walla county, and in our opinion the fact that said transcript showed that at said date the probate court of said Umatilla county had assumed jurisdiction over said articles and was proceeding against them as within its control would, *prima facie*, establish the fact that they were then within the said county of Umatilla and within the jurisdiction of said probate court. The transcript, then, should have been admitted in evidence and its exclusion was error, for which the judgment must be reversed and a new trial granted, and it is so ordered.

GREENE, C. J., and WINGARD, J., concurred.

HADLAN v. OTT ET AL.

July Term, 1883.

JUDGMENT ON THE PLEADINGS IN AN ACTION FOR BREACH OF CONTRACT.—In an action to recover damages for breach of a contract, where the answer admits the material allegations of the complaint, the plaintiff may move for judgment on the pleadings, or submit the question of damages to a jury. If he adopts the former course, without giving evidence of damages, the court can only award him nominal damages.

ERROR to the district court. The opinion states the facts.

P. P. Carroll, for the plaintiff in error.

Judson & Israel, for the defendants in error.

WINGARD, J. The following are the complaint and answer in this case:

Plaintiff complains of defendants and for cause of action alleges:

First—That on the first day of July, 1881, by a written agreement of lease between plaintiff and defendants, plaintiff rented defendants' property, situated at the southwest corner of Fourth and Washington streets, in the city of Olympia, for the term of one year from that date, at the monthly rent of twenty-two dollars, payable monthly.

Second—That defendants covenanted with plaintiff that said lease should be for one year with the privilege of five years from the date of the expiration of the first year, to wit: the first day of July, 1882.

Third—That said lease provided for a written notice by plaintiff to defendants on or before the first day of June, 1882, should plaintiff elect to renew and continue said lease for five years from the expiration of the said first year.

Fourth—That the buildings on said premises were included in said lease and were used and occupied by plaintiff for a residence and for the business of a beer-hall, and were leased for such uses and purposes. Such beer-hall was built for plaintiff in consideration of said lease and for the business of plaintiff.

Fifth—That defendants covenanted with plaintiff to keep said buildings, to wit: the residence, the beer-hall and outbuildings, and the said premises in proper and necessary condition and repair for all proper uses and enjoyment by plaintiff.

Sixth—That said defendants reserved the right to increase said rent to the rate of twenty-five dollars per month from and after the first day of July, 1882, which rent plaintiff agreed to pay upon continuation and renewal of said lease for five years.

Seventh—That defendants reserved the right to build on the corner of said premises formed by the alley and Washington street.

Eighth—That plaintiff entered into and took possession of said premises under said lease and occupied the same for the purpose of residence and business of beer-hall as aforesaid up to about the eighteenth day of May, 1882, at which time the buildings on said premises were destroyed by fire.

Ninth—That after said fire, and prior to notice hereinafter mentioned, defendants signified to plaintiff their intention to renew said premises for the use and enjoyment of plaintiff, and on the twenty-fifth day of May, 1882, plaintiff notified defendants in writing that it was his intention to renew and continue said lease and retain possession of said premises for the full term of five years, and requested defendants to put said premises in condition and repair for his occupancy and use as residence and business aforesaid.

Tenth—That after said fire and the receipt of said notice defendants met plaintiff and consulted with him in regard to the repairs and renewal of said buildings and premises, and defendants then and there informed him that they would have to charge him, in consideration of the renewal and continuance of said lease, the monthly rent of twenty-five dollars per month, which rent of twenty-five dollars per month plaintiff then and there agreed to pay from and after the first day of July, 1882.

Eleventh—That plaintiff has performed each and every of his obligations and covenants to and with defendants, and has regularly paid the rent of twenty-two dollars per month, and, according to his agreement with defendants, plaintiff has paid the said rent of twenty-five dollars per month up to and including the month of July, 1882, to the said defendants, who promised to renew the said premises at their meeting aforesaid.

Twelfth—That plaintiff is now and always has been since entering into said agreement with defendants, ready and willing to perform each and every part of his covenants to and with defendants.

Thirteenth—That defendants now refuse to recognize the renewal and continuance of said lease and have gone upon and taken possession of said premises and disseized plaintiff.

Fourteenth—That defendants have erected buildings upon said premises for their own use and profit, contrary to and in violation of their agreement with plaintiff.

Fifteenth—That defendants are *in mova* and persist in refusing to give plaintiff the use and enjoyment of said premises.

Sixteenth—That defendants are *in mova* and now refuse to repair, restore and put said premises in proper order and condition for the use of and occupation by plaintiff for residence and business as aforesaid, and that such refusal is a willful violation and breach of their said agreement with plaintiff.

Seventeenth—That the said acts and the said refusal of defendants has caused plaintiff injury, loss and damage in the sum of three thousand dollars.

Eighteenth—That the said breach of the said defendants caused plaintiff to be thrown out of business, by which plaintiff is further injured and damaged to the extent and sum of five hundred dollars.

Nineteenth—That said premises were worth to plaintiff, in preference to any other location for residence and business, six hundred dollars a year, and the said acts and breach of defendants have deprived plaintiff of such preference and caused him further and other injury, loss and damage in the sum of three thousand dollars.

Twentieth—That since the making and entering into said agreement rents have increased, and it has become more difficult and more expensive for plaintiff to secure a suitable place for residence and business, and because of such increase said acts and said breach of defendants have caused plaintiff further and other injury, loss and damage in the sum of one thousand dollars.

Twenty-first—That through inadvertence and mistake plaintiff and defendants failed to attach their seals to said agreement of lease.

Wherefore plaintiff prays judgment, that defendants properly attach their seals to said lease, and that plaintiff do have and recover of and from defendants the sum of seven thousand five hundred dollars actual, pecuniary, punitive and exemplary damages and for costs and disbursements.

[Signed] P. P. CARROLL,
Attorney for Plaintiff.

Comes now the above-named Jacob Ott and Elizabeth Ott, defendants in the above-entitled action, and for answer to plaintiff's complaint they allege as follows, to wit:

First—They admit that on the first day of July, 1881, they entered into a written agreement with plaintiff to lease to said plaintiff the premises described in the complaint, for the period of one year from that date, at the rent of twenty-two dollars per month, but they deny that the said agreement so made was under seal.

Second—They admit the second, third and fourth paragraphs of said complaint.

Third—They admit that the agreement set out in the first paragraph of this answer contains an agreement on the part of defendants to keep said premises in proper and necessary repair and condition for all proper use and enjoyment of the same by the plaintiff for the purpose of business and residence aforesaid.

Fourth—They admit the sixth paragraph of the complaint.

Fifth—They admit the seventh and eighth paragraphs of the complaint.

Sixth—They deny that after said fire, or at any other time they, or either of them, signified or in any way indicated to plaintiff their intention to renew said premises for the enjoyment or use of plaintiff, except upon the condition that a new lease be made, under and by virtue of which a new dwelling-house was to be erected on the southeast corner of the lot. They admit that they signified their intention to rebuild if plaintiff refused to do so, and that they specified the nature and size of building proposed to be built and the ground upon which it was to be erected, and that plaintiff refused to have or lease said building, and that in consequence of said refusal they have not erected any buildings on the ground leased to plaintiff. They admit that after the destruction of the buildings occupied by plaintiff, he notified them that it was his intention to renew said contract or agreement and to retain possession of said premises for the full term of five years, on and after July 1, 1882. They admit that plaintiff requested defendants to rebuild said buildings for his occupancy and use.

Seventh—They deny that plaintiff has performed the obligation or covenants to be by him kept or performed under said agreement. They admit that he has paid the rent during the time alleged in the complaint. They deny that they, or either of them, ever promised to renew or rebuild the said premises at any meeting, time or place whatever, under the lease of July 1, 1881.

Eighth—They deny each and every allegation contained in the twelfth, thirteenth, fourteenth and fifteenth paragraphs of said complaint.

Ninth—They admit that they refused to renew or rebuild said building after the fire, under said lease; but they allege that they did voluntarily offer plaintiff a new lease, at the same rent, of the premises, and that under a new lease they offered to erect new buildings for the use of said plaintiff, and that plaintiff rejected said offer.

Tenth—They deny each and every allegation contained in the seventeenth, eighteenth, nineteenth, twentieth and twenty-first paragraphs of the complaint.

FIRST.—And for further answer and defense by way of counterclaim, the defendants allege: That on the first day of July, 1881, these defendants leased to the plaintiff the premises described in the complaint, together with the buildings thereon situate, being a beer-hall and dwelling-house, for the term of one year from said date; that said plaintiff, for and in consideration of the use and enjoyment of said premises, covenanted and agreed with defendants that he would quit and surrender said premises in as good state and condition as reasonable and proper use of said premises will allow, damages by the elements excepted; that plaintiff entered into said premises, and that at the time of his entry thereof said buildings on said premises were in good condition and repair, and were of the value of twelve hundred dollars; that while plaintiff was so in possession of said premises the said buildings were totally destroyed by fire; that in the month of June, 1882, the said plaintiff quit and surrendered said premises to defendants, but that he did not surrender the same in as good state and condition as he received the same; that plaintiff neglects and refuses to rebuild said buildings, and that the defendants are injured and damaged by said refusal of the plaintiff to rebuild said buildings in the full sum of twelve hundred dollars.

SECOND.—And for further answer and defense by way of counterclaim, the defendants allege: That on the first day of July, 1881, defendants entered into an agreement with plaintiff, whereby they agreed to lease to him the premises described in the complaint, for the period of one year, with the privilege of six years; that in said agreement these defendants agreed to keep said buildings in repair, and the plaintiff agreed to pay the stipulated rent each and every month, and to surrender said premises in as good order and condition as he received the same, damage by the elements excepted; that in May, 1882, the buildings on said premises were destroyed by fire, and that thereafter plaintiff notified defendants of his intention to hold said premises for the full term of five years from and after July 1, 1882, and that thereupon defendant notified plaintiff that they would charge him rent for the use of said premises (to wit, the ground) at the rate of twenty-five dollars per month, and that plaintiff agreed to pay said rent, and did pay the same for the month of July, 1882; that said plaintiff, since said month of July, and now, refuses to pay the said rent, and that there is now due from the plaintiff to defendants rent for the months of August, September, October, November and December, at twenty-five dollars per month, being one hundred and twenty-five dollars.

Wherefore defendants pray for judgment against said plaintiff for the sum of one thousand three hundred and twenty-five dollars, and for costs of suit.

[Signed] JUDSON & ISRAEL,
Attorneys for defendants.

Upon this complaint and answer the plaintiff moved the court for judgment on the pleadings, which motion was granted and judgment was accordingly rendered by the court in favor of the plaintiff for the sum of six cents damages and costs and disbursements to be taxed.

This judgment the plaintiff moved the court to set aside and to grant a new trial, which was refused, and thereupon the plaintiff took a writ of error.

We see no error in the judgment.

The plaintiff sets up a contract, a breach of which is admitted by the answer. This would entitle the plaintiff to nominal damages, which were given.

The plaintiff might have had a trial of the questions involved, but he chose to move for judgment on the pleadings, thereby waiving a jury and virtually demanding a trial by the court.

In the absence of proof the court could only award nominal damages.

Let the judgment of the court below be affirmed.

GREENE, C. J., and HOYT, J., concurring. We do not think there was any question of right to a jury trial involved in the action of the district court in this case. The pleadings were such as to entitle the plaintiff to judgment without further delay or costs to him, though not for the full damages asked in the complaint. It was a question for him to debate with himself, and for him to determine, whether he would apply for and take such judgment as the defendant was ready to concede, or commit the issue of damages to the hazard of a trial. He chose the former course and got what he requested of the court. It would have been error in the court to have refused his request. Therefore, we concur in the conclusion of our brother Wingard.

FRANK ET AL. *v.* PICKLE.

July Term, 1881.

NOTE SECURED BY MORTGAGE—WAIVER OF REMEDY BY FORECLOSURE.—Where a note and mortgage are both contained in the same instrument, the mortgagee may waive his remedy by foreclosure, and sue on the note and recover a money judgment.

ERROR to the district court. The opinion states the facts.

WINGARD, J. The plaintiffs in error brought an action against the defendant in error, to recover the sum of three hundred and fifty dollars, which was claimed to be due on a promissory note.

A general demurrer was interposed, which was sustained by the court below.

This ruling of said court is the error complained of.

The instrument sued upon, and claimed to be a promissory note was set out in full in the complaint, as follows:

"$350.00 TOWNSHIP 14, July 23, 1878.

"No. 1221. For value received in a self-binding Harvester, number 2145, I, G. F. Pickle, of the Township 14, county of Whitman, Washington Ter., P. O. Almota, or before the first day of January, 1879, promise to pay to the order of Frank Brothers & Co., three hundred and fifty dollars, at Almota, in U. S. gold coin, with interest in like gold coin, at one per cent. per month from date, and in addition I will pay collection and attorney fees, if suit is commenced on this note. This note is to become due on demand in case I sell my farm or move my present residence, and I give jurisdiction of said sum to any justice of the peace. I hereby sell, assign and set over unto said Frank Brothers & Co., the above property being in my possession and so to remain, unless taken by said Frank Brothers & Co., as hereinafter provided. This grant is intended as security for the payment of the entire purchase price agreed to be paid by me for said property, being in addition to the sum and interest above named, the further sum of $——, $—— and $——, and interest at the same rate falling due ——, 18—, 18—, 18—, as per other note of even date herewith, which payment, if made, will render this grant null and void. On any default in any payment, or sooner if they deem themselves insecure, the said Frank Brothers or their agent may take possession of and sell said property at private sale, without notice, or at public sale on ten days posted notices of time and place, at their discretion, and out of the proceeds may retain the balance then unpaid of said entire purchase price, rendering the surplus, if any, to me. These provisions shall apply to the legal representatives of the respective parties. In order to obtain credit for the above machine, I, ——, certify that I own in my own name, —— acres of land in sec. ——, in territory of ——, township No. ——, range No. ——, county of —— and state of ——, with —— acres improved, on which I reside, worth, at a fair valuation, $500. It is not encumbered by mortgage or otherwise, except the amount of $——, and the title is perfect in me in all respects. I have stock and personal property to the amount of $500, over and above all debts, liabilities and exemptions.

"Witness: G. F. PICKLE."

On the back of the said instrument is the following in words and figures:

"In consideration of having been appointed agent by Frank Brothers & Co., for the sale of machines, upon condition that I would guarantee all notes taken by me for them, and having taken the within note for them, in that capacity, I, the undersigned, do hereby agree to pay the within note to Frank Brothers & Co., or their assigns, within six months after due, if it has not been sooner paid by the maker, and I hereby waive notice, demand and protest.

"AUSTIN & JONES."

"STATE OF ———— } ss.
County of ——— }

"On this —— day of ——, A. D., eighteen hundred and ——, before me, ——, in and for said county personally came ——, to me personally known to be the identical person whose name —— affixed to within instrument, as maker and mortgagor, and acknowledged the same to be, — voluntary act and deed for the uses and purposes therein expressed.

"STATE OF ———— } ss.
County of ——— }

"Filed for record the —— day of —— A. D. 18—, at — o'clock —. M., and recorded 95 in book — of —, on page —.

"————, Recorder.
"———— Deputy."

We are of opinion that the aforesaid instrument is a mortgage; but it is also a note and mortgage. Under our statute the mortgagee may elect to proceed separately on the note and recover his money demand: Laws W. T. (1877), p. 128, sec. 619. This is all the plaintiffs in error attempted to do in the court below, and having stated a cause of action on the promissory note in the complaint, the demurrer should have been overruled.

The decision of the court below is therefore reversed, and a trial *de novo* ordered.

GREENE, C. J., and HOYT, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9260.

KEATING *v.* EDGAR, Auditor, etc.

In Bank. Filed March 29, 1884.

JUDGMENT HELD SUPPORTED BY THE FINDINGS.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The facts of the case are stated in the prior opinion of the court reported in 1 West Coast Rep. 45, and in the dissenting opinion of Thornton, J.

William Craig, city and county attorney, for the appellant.

Scrivner & McKinne, Robert Crockett and *Talcott & Crockett*, for the respondent.

The COURT. The only question presented by the record on this appeal is whether the findings support the judgment. We think they do.

Judgment affirmed.

MCKINSTRY, ROSS, and THORNTON, J J., dissented.

THORNTON, J. I dissent. This is an application for a writ of mandate to be directed to Wm. M. Edgar, auditor of the

city and county of San Francisco, commanding him to audit a claim of the petitioner, Keating. The proceeding was instituted in the superior court for the city and county of San Francisco, where judgment was rendered for the applicant, from which the defendant appeals.

The case is substantially as follows: The applicant was awarded a contract, as the lowest bidder, for certain work to be done on the new city hall. The applicant entered into a contract, peformed the work acccording to such contract. The lines, levels and heights referred to in the contract were furnished him after considerable delay by one Clifford, then the architect of the new city hall, whose duty it was to furnish them. At or about the time that the applicant had finished the work aforesaid, "in accordance with the lines, levels and heights as aforesaid furnished by said architect Clifford, the said Clifford was discharged for incompetency from his position and place as such architect," and he thereupon ceased to act. Thereafter one Hatherton was duly appointed architect for the new city hall in the place of Clifford, and entered on the duties of his office. "That said Hatherton after assuming the duties of his position as such architect, and after he had so entered into the said office or place, discovered and ascertained that the lines, levels and heights so furnished to the petitioner as said contractor by said Clifford as aforesaid, were erroneous, and that the work done and performed by petitioner according to the lines, levels and heights so as aforesaid furnished by said architect Clifford, would not answer the purpose or purposes for which the same was intended or designed, and was not in accordance with the work called for under said contract and the specifications thereto attached, and thereupon the architect Hatherton furnished to said petitioner, as such contractor, new lines, levels and heights, and required your petitioner, as such contractor, to remodel and move the said foundations and replace them in accordance with the lines, levels and heights so furnished by said Hatherton. That by the terms of the said contract it is provided that any and all work so performed by said contractor shall be done and completed in a proper and workmanlike manner, and to the satisfaction of the architect and the superintendent. That said architect was dissatisfied with and refused to approve the work so done and completed by said petitioner, in accordance with the lines, levels and heights so furnished by the said Clifford, until he had completed the work specified in said contract by the lines, levels and heights so furnished by the said Hatherton. That said contractor did remodel said work and foundations in accordance with the instructions and command and to the satisfaction of said Hatherton, at a great additional expense to himself. That the work and labor performed by relator, under the instructions of said architect Clifford, was well and faithfully done, and any and all imperfections in said work was wholly due to and caused by the mistake or incompetency of said architect Clifford. That when the work and labor so to be done and performed by

petitioner, as such contractor, had been carefully, well and skillfully done, in accordance with the lines, levels and heights so as aforesaid furnished by said Hatherton, relator was paid only the original amount provided in said written contract to be paid."

Afterwards the applicant presented to the board of new city hall commissioners his demand for nine hundred and fifty dollars (which demand is the one herein sought to be audited), "for damages actually suffered by him by reason of the above-mentioned facts, which said demand was by a majority of the board allowed and ordered to be paid." The defendant refused to audit the demand. The facts above stated are so found by the court.

We are of opinion that the court below erred in rendering judgment for the petitioner. It was provided by the contract that the lines, levels and heights were to be furnished by the architect, and that the contractor must observe them. The contract binds the contractor "to set out the lines and levels for all the works, and must be responsible for the correctness of such setting out." These lines, levels and heights were furnished by the architect, the work was done by Keating in accordance with them, and with the terms of his contract. It was the duty of the architect, when the work was so done, to have approved it, and to have granted his certificate. Nevertheless, the succeeding architect refused to approve the work and grant his certificate until the work was done according to the lines, levels and heights furnished by him.

When the architect Hatherton refused to do what under the facts found it was his bounden duty to do—that is, approve the work and grant his certificate to the applicant, that such applicant might get his pay—the only course left open for the applicant was to take steps to compel him to do so. This he might have done under the facts of the case by an application to the proper judicial tribunal to compel the architect to do what the law made it his duty to do. Having failed to do this, and yielding to the demands of the architect that he should remodel the work, which he did at great expense, does not and cannot enlarge his rights. The architect had no right under the law to impose any such terms on a contractor who had done all that his contract required him to do. Such demands were unjust, illegal and arbitrary on the part of the architect, and the law did not require a submission to them by the applicant.

When the work was completed the board of commissioners could only allow to him what it did allow, viz., the original amount provided in the written contract to be paid. This, it is found, was paid him, and under the contract and the facts found this was all the law allowed him, and all the law justified the board in allowing him. The statute is explicit in its requisition: "Nor shall a contractor be allowed a claim for work done or material furnished not embraced in his contract": Stats. 1875–6, sec. 14 of act of March 24, 1876, p. 465. If the board had allowed a sum greater than that agreed by the contracting parties to be paid when the work was performed, such action would have been unauthorized, in conflict with the pro-

visions of the statute just above cited, and an inexcusable dereliction of duty on the part of its members.

If, after the completion of the contract, in accordance with the directions of the architect Clifford, it became necessary for any reason to remodel the work, or have it altered in any respect, it should have been let to the lowest bidder by the board under call for bids in accordance with the requirements of the statute, which invested the board with all the powers they had. See section 14 of statute above cited. The board could not have work done without a contract regularly awarded and entered into, and after it was done allow its value. This was substantially forbidden by the statute.

We see nothing in the statute under which the board of commissioners acted which authorized them to allow any claim for damages, whether for delay on the part of the architect or on any other ground. We have examined the statute, and can find no such power vested in the board by the act. See act of March 24, 1875, Stats. 1875–6, p. 461.

Further, the consequences of such delay is provided for in the contract. It is stipulated therein that if the work of the contractor is delayed by the action of the architect and other causes specified, the contractor should be entitled to an extension of time for the performance of his work proportionate to the delay so caused.

It is true that by section 10 the board is authorized *to allow claims*, but manifestly the claims here alluded to are those which the board is called to pass on for work done or materials furnished under contracts awarded and entered into under the provisions of the law from which such board derived its being and its powers. The board had no power to make this allowance to Keating, and such allowance was null. Therefore the defendant acted properly in refusing to audit such claim, and the application of the petitioner Keating should be denied.

No. 10,895.

PEOPLE v. BUSH.

In Bank. Filed March 29, 1884.

MURDER—IMPEACHMENT OF WITNESS.—On a trial for murder a witness for the defense was asked in substance whether the prisoner had ever informed her that he intended to kill the deceased. She answered no. Subsequently the prosecution called a witness, who was asked whether the former witness had ever said anything to her about the defendant going to kill the deceased. The defendant objected to the inquiry, first, because the matter upon which it was sought to impeach the former witness was immaterial to the issues, and, second, because a proper foundation had not been laid for the impeachment. The court overruled the objection. *Held*, that the evidence should have been excluded.

EVIDENCE OF THE GOOD CHARACTER OF A WITNESS CANNOT BE GIVEN UNTIL after such witness's character has been attacked by evidence that his reputation for truth, honesty and integrity is bad.

MURDER—INSTRUCTIONS—DUELING.—When there is nothing in the circumstances attending a killing to bring the case within the crime of dueling, an instruction that "when parties by mutual understanding engage in a conflict with deadly weapons, and death ensues to either, the slayer is guilty of murder," is correct.

weapons, and death ensues to either, the slayer is guilty of murder." The court proceeds: "If a sufficient time elapses between a quarrel and the agreement to fight, to allow the blood to cool, the killing will be murder. The law assigns no limit within which cooling time may take place. Every case must depend on its own circumstances, but the time in which an ordinary man in like circumstances would have cooled, may be said to be the reasonable time. If between the quarrel and the mortal stroke given, the prisoner takes up any other design or business not connected with the immediate object of his passion, or subservient thereto, it may be reasonably supposed that his attention was once called off from the subject of the provocation, and any subsequent killing of his adversary without other provocation, and with a deadly weapon, would be murder."

It is claimed, on behalf of the defense, that the foregoing instruction is erroneous, for two reasons; first, that an encounter and killing under such circumstances comes within the statute of dueling; that the act is, therefore, punishable under that statute, and, therefore, does not constitute murder; and, second, that the instruction charges the jury upon matters of fact.

Independent of the statute concerning dueling, it has been held that "when parties by mutual understanding engage in a conflict with deadly weapons, and death ensues to either, the slayer is guilty of murder," and we do not think there is anything in the circumstances attending the killing in this case, to take it out of the general rule: State v. Underwood, 37 Mo. 50; 1 Bishop's Cr. L., sec. 870; Chalmers's Case, 9 Leigh, 605. We are therefore of the opinion that the first objection to the charge cannot be sustained.

In the next place, it is claimed that the court invaded the province of the jury by charging them upon a matter of fact: "If between the quarrel and the killing there is a space or interval of time sufficient for an ordinary man to cool, that may be deemed a *reasonable time* within the meaning of the rule on the subject. And if between the quarrel and the infliction of the mortal wound, the mind of the defendant is directed to and is taken up by any other subject not in any manner connected with the cause of the quarrel, it may be reasonably supposed that his attention was called off from the subject of the provocation, and any subsequent killing of his adversary, without other provocation, and with a deadly weapon, would be murder."

The instruction seems to have been copied by the learned judge from the case of Commonwealth v. Greene, 1 Ashmead's R. 289, as the language is almost identical in the two cases. To the same effect is the rule laid down by Mr. Wharton in his work on American Criminal Law, pp. 181, 182. See also State v. McCants, 1 Spears (S. C.), 357; Regina v. Fisher, 8 Car. & P. 182; State v. Sizemore, 7 Jones, 206.

On the authority of the foregoing cases the instruction complained of seems to be correct, and is not obnoxious to the second objection made by the defense.

Another, and the last point made by the appellant, is upon the following portion of the charge:

"If the defendant himself brought on the fight and went into it armed, he cannot justify killing his adversary."

We think the foregoing is not a correct statement of the law concerning justifiable homicide. By section 197 of the penal code it is declared that homicide is justifiable in certain cases, the third subdivision of the section reading as follows:

"When committed in the lawful defense of such person, or a wife, husband, * * * ; but such person, or the person in whose behalf the defense was made, if he was the assailant, or engaged in mortal combat, must really and in good faith have endeavored to decline any further struggle before the homicide was committed."

The charge entirely overlooks the above provision of the penal code, and was therefore erroneous.

It is not true that a party cannot justify killing another simply because he is the assailant. If he, in good faith, endeavors to decline any further struggle before the act of homicide is committed, he may, although he was the assailant, justify the killing. In the case of the People v. Simons, 60 Cal. 72, this court held that "even if the defendant had been the assailant, if he had really and in good faith endeavored to decline any further struggle, before the homicide was committed, the killing might be justified in self-defense." Other cases might be cited to the same effect; and it is no answer to the objection that an erroneous instruction was given, for the prosecution to show that in another part of the charge another instruction was given in which the law was correctly stated by the court. In such a case it would be impossible to determine under which of two contradictory instructions the jury acted. As was said by this court in the case of People v. Wong Ah Ngow, 54 Cal. 151, "an erroneous instruction is not cured by a correct statement of the law in another part of the charge." See also People v. Campbell, 30 Cal. 312.

We think there was evidence tending to bring the defendant's case within the section of the code last referred to; and whether he was the aggressor, and, if so, he did in good faith try to avoid any further difficulty with the deceased before the homicide was committed, should have been left to the jury, by a proper instruction on the law applicable to the case. For this erroneous instruction and the admission of improper evidence, the judgment must be reversed and the cause remanded for a new trial. It is so ordered.

McKEE, J., and THORNTON, J., concurred.

McKINSTRY, J. I concur in the judgment.

ROSS, J. I concur in the judgment upon the ground last considered in the opinion.

SHARPSTEIN, J. I concur in the judgment. Evidence of the good character of a witness is not admissible until his character has been impeached: C. C. P. 2053. This doubtless refers to impeach-

ment, "by evidence that his general reputation for truth, honesty and integrity is bad": C. C. P. 2051.

When witnesses contradict each other, the character of the one is as much impeached as that of the other; and the there would be as good ground for admitting evidence of the good character of the one as of the other. And where a witness is impeached by evidence of his having previously made statements inconsistent with his testimony, it amounts to nothing beyond contradictory evidence. He must be asked if he made such statements, and if he answers that he *did not*, evidence that he did is admissible; if he answers that he *did*, that is the end of the matter. I think the instructions referred to in the principal opinion were erroneous. On other points I express no opinion.

No. 7653.

COLLINS *v.* FROST.

Department Two. Filed April 1, 1884.

FINDINGS HELD SUPPORTED BY THE EVIDENCE.

APPEAL from a judgment of the superior court for Santa Clara county. The opinion states the facts.

Stephens and Moyes, for the appellant.

W. H. Collins, for the respondent.

The COURT. The findings are supported by the evidence; no error appears in the record. It appearing to us that the appeal was taken for delay, the judgment and order are affirmed, with seventy-five dollars damages.

No. 10,929.

PEOPLE *v.* MAJORS.

In Bank. Filed April 1, 1884.

PLEA OF ONCE IN JEOPARDY—MURDER OF TWO PERSONS AT SAME TIME AND BY SAME ACT.—The murder of two persons by the same act, according to the weight of authority, constitutes two offenses, for each of which a separate prosecution will lie, and a conviction or acquittal in one case does not bar a prosecution in the other. But where two persons are directly concerned in the murder of two others, although the killing takes place at the same point of time, it does not follow necessarily that the murder of the two was accomplished by the same act.

MOTION FOR CHANGE OF VENUE—COUNTER AFFIDAVITS.—On an application by a defendant in a criminal prosecution for a change of the place of trial, the prosecution may file counter affidavits contesting the grounds for which the removal is asked.

JURISDICTION WHEN DEFENDANT IS UNDER LIFE IMPRISONMENT.—The court has jurisdiction to try a defendant for murder, although he is at the time under sentence of life imprisonment for another crime.

MOTION FOR NEW TRIAL—PLEA OF FORMER CONVICTION—APPEAL.—The superior court has jurisdiction to try a defendant for the crime of murder, although an appeal has been taken, and is still pending in the supreme court, from an order denying him a new trial on a plea of former conviction. No appeal lies from such order.

SCRUPLES AGAINST DEATH PENALTY—IMPANELING JURY.—In a prosecution for murder, although such crime is not necessarily punishable by death, still it may be, and, therefore, under subdivision 8 of section 1074 of the penal code, persons who entertain conscientious scruples against inflicting the death penalty can neither be permitted nor compelled to serve as jurors.

PEREMPTORY CHALLENGES BY PROSECUTION AFTER PASSING THE JURY.—After the prosecution has passed the jury, declining to exercise the right of peremptory challenge, and the defendant thereupon peremptorily challenges one juror, it is not error warranting a reversal for the court to allow the prosecution to then peremptorily challenge a juror. At most the action of the court would be a mere irregularity, not affecting any substantial right of the defendant.

EVIDENCE OF SURROUNDING CIRCUMSTANCES—RES GESTÆ.—In a prosecution for murder, the surrounding circumstances, such as the condition in which the body and clothing of the person killed were found, are admissible as part of the *res gestæ*.

EVIDENCE OF CONVERSATIONS BETWEEN CONSPIRATORS—STRIKING OUT EVIDENCE, EFFECT OF.—All matters talked about between conspirators at the time the main subject of the conspiracy was discussed, are admissible in evidence in a criminal prosecution against one conspirator, for a crime growing out of the conspiracy, although such matters, if talked about at a different time, would have been inadmissible. Even if the admission of such evidence was erroneous, the error would be cured if the court struck it out, and instructed the jury not to consider it.

APPEAL from a judgment of the superior court of Santa Clara county, entered upon a plea of former conviction, and from a judgment of the superior court of Alameda county, entered upon a verdict convicting the defendant of murder. The opinion states the facts. The opinions in department in this case are reported in 1 West Coast Rep. 859, and 2 Id. 287.

J. B. Lamar, for the appellant.

Attorney-General and *J. H. Campbell*, district attorney, for the respondent.

MORRISON, C. J. The defendant was prosecuted by information filed in the superior court of Santa Clara county, for the murder of one Archibald McIntyre, and a change of venue having been granted him to the county of Alameda, he was tried and convicted there of the crime of murder in the first degree. The appeal is from the judgment against him in the first-named court on the plea of former conviction, as well as from the judgment on the final trial in the county of Alameda, and brings before us for review all the orders and proceedings in the case in both courts.

The importance of the case, as well as the zealous and able manner in which it has been presented, demands from us a careful consideration of all the questions involved.

The first and most important point to be considered is the plea of a former conviction, and for a full and distinct understanding of the trial on that plea, we will consider the facts upon which it was submitted to the jury, as the same are found in the following stipulation:

STATEMENT OF FACTS.

"I. That the defendant, Lloyd L. Majors, is the identical Lloyd L. Majors who was a defendant in the information filed in this court on the 30th day of March, 1883, charging Joseph Jewell, John Showers and Lloyd L. Majors with the crime of murder in the killing of one William P. Renowden at the said county of Santa Clara, on the 11th day of March, 1883.

"II. That under said information of March 30, 1883, the said Lloyd L. Majors was duly arraigned, and on the second day of April, 1883, pleaded not guilty and was put upon his trial. That on the 27th day of May, 1883, the jury returned into said court a verdict in the following words, etc.:

" 'The superior court, county of Santa Clara:

" 'The People of the State of California v. Lloyd L. Majors, defendant.

" 'We, the jury in the above entitled cause, find the defendant Lloyd L. Majors guilty of murder in the first degree, with imprisonment for life in the state prison.

" 'JOHN CARRICK, Foreman.'

"III. That in pursuance of the above verdict the court, on the second day of June, 1883, pronounced upon said Lloyd L. Majors judgment of imprisonment for life in the state prison at San Quentin, and said judgment is final and in full force.

"IV. The facts shown by the evidence upon the said trial under said information of March 30, 1883, and upon which said Majors was convicted as aforesaid, are as follows: That said Lloyd L. Majors counseled and advised one Joseph Jewell to rob one William P. Renowden, living near Lexington, in the said county of Santa Clara, on the eleventh day of March, 1883. That on said day said Jewell repaired to said Renowden's house, taking with him one John Showers. That said Jewell and Showers unexpectedly found at the house of said Renowden one Archibald McIntyre, who was then residing with said Renowden. That in the attempt to carry out the design of robbery, both said Renowden and said McIntyre were there and then—at the same point of time, to wit, about 6:30 o'clock P. M. of the eleventh day of March, 1883, killed by said Jewell and Showers.

"V. Said Majors was not present, neither did he personally participate in the said act of killing said Renowden and McIntyre, or either of them, except counseling and advising said Jewell to commit said robbery as aforesaid.

"VI. The foregoing evidence and facts are substantially the evidence and facts adduced upon the trial of said Lloyd L. Majors upon the trial heretofore had in this court, upon said information, for the murder of William P. Renowden, and which are to be adduced and proven in support of the information now pending, to which the said Lloyd L. Majors has pleaded a former conviction, should the same be put in issue by a plea of not guilty.

"VII. It is stipulated and agreed by the plaintiffs and the defendant as follows: The foregoing statement of evidence and facts are hereby admitted to be true, solely for the purpose of determining the issue now pending in this court on the plea of former conviction, and shall be read in evidence on the trial of said issue as the evidence of the case, together with the record of the case of the People against Lloyd L. Majors for the murder of William P. Renow-

den, heretofore tried in this court, consisting of the judgment-roll and the minutes of the court in said cause."

The defendant was first prosecuted for and convicted of the murder of said Renowden, and as it is stipulated in the agreed statement of facts on which he was tried in the present case on his plea of former conviction, that Renowden and McIntyre were "at the same point of time, to wit, about 6:30 o'clock P. M. of the eleventh of March, 1883, killed by said Jewell and Showers," it is therefore claimed that defendant has been *once in jeopardy*, and cannot now be prosecuted for the murder of McIntyre. In support of this ground of defense, defendant relies upon numerous adjudged cases, and it must be conceded that the general principle is too well established to admit of controversy, that the law will not allow the people to maintain a second prosecution after a former trial and conviction or acquittal of a party *for the same offense*. The cases most strongly relied upon on the part of the defense we will now proceed to examine.

The first is the case of Damon v. The State, 2 Tyler (Vt.), 387, in which it appeared that the defendant had, in the same affray and by the same stroke, cut two persons, and having been convicted of wounding one of the parties, it was held that the plea of *autrefois acquit* was well pleaded to an indictment for wounding the other. In delivering the opinion of the court the learned judge says: "The indictment charges the defendant with having disturbed the public peace by assaulting and wounding one of its citizens. For this crime he shows that he has been legally convicted by a court of competent jurisdiction. He cannot, therefore, be again held to answer in this court for the same offense." On the theory that both indictments were for "the same breach of the peace," and not for wounding two persons by the same wrongful act, the case may be harmonized with authorities which will be hereafter referred to in this opinion. Another case relied on is that of The State v. Cooper, 13 N. J. L. R. 361. The defendant was indicted for the crime of murder, committed in feloniously setting fire to and burning the dwelling-house of one Ralph Smith, in which was one Joseph Hooper, who was burned to death. To the indictment the defendant interposed the plea of former conviction on an indictment for the crime of arson, committed in setting fire to and burning the same dwelling-house. The plea was sustained, and the court in its opinion says: "It is a maxim of the common law that no man is to be brought in jeopardy of his life more than once for the same offense. * * * Upon this principle are founded the pleas of *autrefois acquit* and *autrefois convict*. The writers on the subject concur in stating that these pleas must be upon the prosecution for the same *identical* act and crime: 4. Bl. Com. 336; 1 Ch. Cr. L. 452–462. But says Chitty, p. 455: 'It is not in all cases necessary that the two charges should be precisely the same in point of degree, for it is sufficient *if an acquittal of the one would show that the defendant could not have been guilty of the other*.' Thus a general

acquittal of murder is a discharge upon an indictment for manslaughter on the same person, *because the latter charge was included in the former.* * * * At first view it appears as if there were two crimes distinctly indictable and punishable. But our sense of justice is shocked by the idea that a man shall be convicted and punished for the arson, with that measure of punishment which the laws mete out to those guilty of that crime, and that afterwards for a perfectly accidental and involuntary killing he shall be liable to the same punishment of death, which is inflicted on the willful and malicious murderer. In the case before us the killing *was a simple consequence of the burning*, and there is no pretense that it was, in point of fact, intentional." We have quoted from the opinion at some length to show how far it bears upon the case we are now considering.

A third case is that of Clem v. The State, 52 Ind. 420, in which Downey, J., delivering the opinion of the court, says: "It does not follow because one of the indictments was for the murder of Nancy Jane Young and the other for the murder of Jacob Young, that the crime is not the same. If the same act of the defendant resulted in the death of both of them, there was but one crime. When by the discharge of a firearm, or a stroke of the same instrument, an injury is inflicted upon two or more persons, or their death is produced, there is but one crime committed." This case is an authority in favor of the defendant, if, as his learned counsel contends, the stipulation means that the death of Renowden and McIntyre resulted from one and the same act—a question which we will consider hereafter.

The cases of Copenhaven v. The State, 14 Ga. 8, and Holt v. The State, 38 Id. 187, are also cited on behalf of the defendant; and it is there said that "the plea of *autrefois acquit* or *convict*, is sufficient whenever the proof shows the second case to be the same *transaction* with the first." The question how far the authority of these cases agrees with other kindred cases depends on what is meant by the word "transaction."

The foregoing review of the cases relied on in support of defendant's plea of former conviction will suffice for the purposes of this opinion, and we will now proceed to the examination of some of the cases cited by the prosecution.

It is claimed that the case in 52 Indiana has been overruled by the same court in the two later cases of State v. Elder, 65 Ind. 282, and State v. Hattebaugh, 66 Id. 223. In the first case (reported in 65 Ind.), the rule on the subject we are now treating is stated as follows: "When the same facts constitute two or more offenses, wherein the lesser offense is not necessarily included in the greater, and when the facts necessary to convict in the second prosecution would not necessarily have convicted in the first, then the first prosecution will not be a bar to the second, *although the offenses were both committed at the same time and by the same act.*" And in the other case (66 Ind.) it said: "The usual test by which to determine

whether the former conviction or acquittal was for the same offense as that charged in the second prosecution, and, therefore, whether the former is a bar to the latter, is to inquire whether the evidence necessary to sustain the latter would have justified a conviction in the former case."

Testing the case of Clem v. The State, *supra*, by the rule laid down in the later cases referred to (65 and 66 Ind.), it would be difficult to sustain the authority of the former. Clem being indicted and prosecuted for the murder of Nancy Young, could not, on such indictment and prosecution, have been convicted of the murder of another person, to wit, Jacob Young, nor *vice versa*. Indeed, on an indictment for the murder of one of the Youngs, evidence on the part of the prosecution tending to prove the murder of the other would have been wholly inadmissible on general rules of evidence.

We now come to cases on the other side, more directly in point. The first case to which we will refer is that of the State v. Standifer (5 Porter, Ala. 523), in which it appears that two persons, John W. F. Long and Lei A. Long were injured, one killed and the other wounded, by the defendant at the same time and in the same transaction. For the murder the defendant was tried and acquitted, and on the trial for the wounding he pleaded the acquittal in the murder case. The court held the plea bad, and stated the law as follows: "Cases exist in which a minor offense may be discharged by the acquittal of the individual charged, on an indictment for a major offense, but these are cases in which the jury trying the case could have lawfully returned a verdict for the lesser crime. Thus an acquittal for murder would be a bar to an indictment for manslaughter. So of a burglary, when the same indictment included a charge of larceny, an acquittal would be a complete bar. But the reason in such cases is that the jury could, if the evidence was satisfactory, have convicted the offender of the lesser criminal charge. In the present case, no question can possibly arise as to the law. The offenses have no appearance of identity; they could not be included in the same indictment, and the evidence which would produce an acquittal of the one might produce a conviction of the other."

The next case is that of Teat v. The State, 53 Miss. 439, where it was held that "T. and S. lying in ambush together, each armed with a double-barreled shot-gun, two distinct, but almost simultaneous shots were fired from the ambush, by which G. and W. were mortally wounded, and S. fired a third shot in the prostrate body of G., held, that the murder of G. was a distinct crime from that of W., and that for each of the offenses T. might be separately tried; nor could he, on an indictment for the murder of W., successfully plead former jeopardy in having been already tried for the murder of G. A putting in jeopardy for one act is no bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for one of them first had." The

learned judge further says: "It is believed that no well-considered case can be found, where a putting in jeopardy for one act was held to bar a prosecution for another separate and distinct one, merely because they were so closely connected in point of time that it was impossible to separate the evidence relating to them."

In Vaughan v. The Commonwealth, 2 Va. Cases, 273, it was held that "if a person be indicted for shooting S. W., and acquitted thereof, and then indicted for shooting J. W., her plea of *autrefois acquit* will not be supported, although the same act of shooting is charged in each indictment."

Bishop, in his work on criminal law (vol. 1, sec. 1051), speaking of the identity of offenses, says: "They are not the same—first, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, secondly, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or, thirdly, when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction," etc.

In the case of Freeland v. The People, 16 Ill. 380, it was held "that it is no bar to a prosecution for a riot that one of the accused had been tried and convicted and fined for an assault and battery arising out of the same transaction or offense, or occurring at the same time. A riot may embrace an assault and battery, yet a conviction of the latter cannot be pleaded in bar of a prosecution for the former." See, also, Severin v. The People, 37 Ill. 414.

In the case of Commonwealth v. Roby, 12 Pick. 496, the court says that "a conviction upon an indictment for an assault with intent to commit murder cannot be pleaded in bar to an indictment for murder." And further: "Unless the first of the two indictments was such as the prisoner might have been convicted upon, by proof of the facts contained in the second, an acquittal or conviction on the first can be no bar to the second."

In the case of Burns and Cary v. The People, 1 Parker's Cr. L. N. Y. 182, the supreme court of New York holds that "to constitute a bar, the offense charged in both indictments must be identically the same, in law as well as in fact." To the same effect is the case of The People v. Saunders, 4 Id. 196, as is also the case of Regina v. Morris, 10 Cox C. C. 480.

We might cite many other cases laying down the same principle, but we will content ourselves with the foregoing, and one other case from our own reports. We refer to the case of The People v. Alibez, 49 Cal. 452, where it was held that "an indictment which charges the defendant with the murder of three persons charges three offenses." The charge was that the defendant administered a poisonous drug, to wit, strychnine, to three persons at one and the same time, and the trial court was asked to arrest the judgment on the ground that the indictment charged more than one offense, in violation of section 954 of the penal code. The court refused to ar-

rest the judgment, and the supreme court reversed the case. This is a direct authority on the point we have been considering, and we do not doubt its correctness.

On the trial of the defendant Majors for the murder of Renowden he could not have been convicted of the murder of McIntyre. The two crimes, although committed at one time and by the same act, are entirely different in their elements, and the evidence required to convict in the one case very different from that essential to a conviction in the other.

Tested, then, by the rule laid down in the foregoing cases, the plea of former conviction was not sustained on the trial in the superior court of Santa Clara county.

But we do not think the stipulation means that both Renowden and McIntyre were murdered by one and the same act. It might well be that they were both killed at the same point of time, and it does not follow therefrom that the murder of the two was accomplished by one act. There were two parties directly concerned in the murder, and each of them might have discharged his weapon at his victim at the same moment or point of time, and yet the killing under such circumstances would have been done by two acts, entirely separate and distinct from each other. Under such a state of facts, the authorities all agree that there may be several prosecutions, and the burden of proof was on the defendant to show that there was but one act, which caused the death of the two. But even on this theory, we have attempted to show that the better rule, and that established by the great weight of respectable authority, is that the murder of two persons, even by the same act, constitutes two offenses, for each of which a separate prosecution will lie, and that a conviction or acquittal in one case does not bar a prosecution in the other.

2. Defendant's second point is that the court erred in permitting the introduction of counter affidavits on defendant's motion for a change of the place of trial.

Sections 1033 and 1034 of the penal code provide for the removal of a criminal action on the application of defendant, and section 1035 of the same code declares that "if the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from a like objection." It is claimed, on behalf of the defense, that when a sufficient showing for such removal is made by the defendant's affidavit, the court is obliged to accept as true the facts sworn to by him, and the people cannot controvert his statements by opposing affidavits. The language of the code is that "if the court is *satisfied* that the representation of the defendant is true," it shall make the order of removal. Is it not a fair implication from the language of the provision that counter affidavits may be filed on behalf of the people, and is such not the good sense of the law in such cases? When the proper showing is made by the defendant, the court would be *obliged* to make the order of removal, if counter affidavits were not allowed; but the court must be *satisfied* that the

defendant's affidavit *speaks the truth*, and it may be that this can be shown only after the prosecution has been allowed to file counter affidavits.

Such seems to have been the view taken by this court in People v. Yoakum, 53 Cal. 570, and we have no doubt of its correctness.

3. On the motion of the prosecution for the court to fix a day for a trial of the case the defendant objected to the jurisdiction of the court on two grounds: First, that the defendant was under sentence of life imprisonment in the state prison; and, second, that an appeal had been taken and was still pending in the supreme court from the order of the superior court denying a new trial on the plea of former conviction.

The first objection is answered by the decision of this court in the case of The People v. Hong Ah Duck, 10 P. C. L. J. 149, and the second by the case of People v. Majors, 2 West Coast Rep. 287.

It is unnecessary for us to do more than refer to these cases. The defendant had been once tried on his plea of former conviction, and it was not the duty of the court to grant him another trial on that plea. We see no irregularity in the proceedings of the court connected with this assignment of error.

4. The fourth ground of error relied upon relates to the impaneling of the jury. The prosecution was allowed to challenge jurors peremptorily under subdivision 8 of section 1074 of the penal code, which provides as follows:

"If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he must neither be *permitted* nor compelled to serve as a juror."

It is claimed that inasmuch as the crime of murder is not *necessarily* punishable by death, therefore the above subdivision of section 1074 does not apply. We cannot yield our assent to this view of the law. Murder may be punished under the code by death, but if jurors in the case entertain conscientious scruples against the infliction of the death penalty, the law inflicting that penalty would be a dead letter on the statute book. It has always been held, so far as our experience or knowledge goes, that the provision of the code referred to applies in all prosecutions for murder, and we have no doubt that it does.

5. The next objection involves another question concerning the right of peremptory challenges. It is said that the prosecution "passed the jurors, declining to exercise any challenge, the defendant being then called upon to exercise his peremptory challenges, if any he had. The defendant then challenged one juror, and the prosecution then immediately demanded to challenge one of said jurors, and was allowed to do so, against the defendant's objection."

This, it is claimed, was a violation of section 1088 of the penal code, which provides "if all challenges (for cause) on both sides

are disallowed either party, first the people and then the defendant may take a peremptory challenge, unless the parties' peremptory challenges are exhausted."

In the case of The People v. McCarthy, 48 Cal. 557, it was held "that if the prosecution in a criminal case pass the jury to the defendant, who declines to make any challenge, the prosecution may then interpose a peremptory challenge to a juror before he is sworn." It is true the foregoing case differs slightly from this, inasmuch as in that case the defendant did not interpose any challenge, whereas, as in this case, he did; but we do not think that the difference between the facts of the two cases in any manner affects the principle applicable to both. It is there said that the prosecution had not accepted the jury by only passing them to the other side.

At most, the action of the court was an irregularity, not affecting, so far as we can see, any substantial right of the defendant, and one which does not call for a reversal of the judgment: Penal Code, sec. 1258; People v. Sprague, 53 Cal. 491.

6. The admission of certain evidence showing, or tending to show, that Renowden's person and clothing had been burned, is the next matter complained of. We do not clearly perceive what objection could have been made to the admission of this evidence. The production of the bloody clothing worn at the time by the victim of a homicide is a matter of common practice, and certainly it would be permitted for the jury to view the remains of the deceased, as they are allowed under the express provision of the code to view the premises where the homicide was committed. Sometimes bodies are exhumed for the purpose of procuring evidence against the accused. The condition in which the body and clothing were found was properly admitted in evidence. The surrounding circumstances may always be shown as a part of the *res gestæ:* 1 Greenl. Ev., sec. 108.

7. The conversations admitted in evidence between defendant and Jewell all occurred at one time and were properly admitted. At the time the main transaction was discussed, those other matters were spoken of. If they had not been talked about at the same time, and in the course of the same conversation, they would have been inadmissible. But independent of this, they were stricken out on motion of defendant's counsel, and the jury were instructed not to consider them. This was of itself sufficient to cure any error there might have been in their admission.

8. Defendant complains of the action of the court in giving and refusing certain instructions. We have examined the instructions given, and think they contain a correct exposition of the law applicable to the case. We have also examined the instructions refused, and think the action of the court in refusing them was correct.

We have now considered all the points in the case made by the learned counsel for the defense, and have endeavored to answer them.

No error is found in the case which calls for a reversal of the judgment below, and the same is, therefore, affirm ed, together with the order denying a new trial.

Judgment and order affirmed.

MYRICK, J., ROSS, J., MCKEE, J., THORNTON, J., MCKINSTRY, J., and SHARPSTEIN, J., concurred.

No. 10,940.

PEOPLE *v.* EHRING.

[Departmnt Two. Filed April 1, 1884.

ROBBERY—STATEMENT OF PERSON ROBBED—RES GESTÆ.—On a trial for robbery, after the prosecuting witness has testified "that he thought that he had been knocked down and his watch [the property claimed to have been taken] was taken from him without his consent, but of this he was not certain," the prosecution cannot give evidence of a statement of such witness, made some time after the alleged robbery occurred, and not in the presence of the defendant, to the effect that he had "been knocked down and robbed." Such statement forms no part of the *res gestæ*.

APPEAL from a judgment of the superior court of Stanislaus county, entered upon a verdict convicting the defendant of robbery, and from an order refusing him a new trial.

Maddox, Minor and *Whitby*, for the appellant.

Attorney-General, for the respondent.

SHARPSTEIN, J. The court erred in admitting evidence of a statement made by Pinkston, the person alleged to have been robbed by the defendant, to the witness Dallas. The statement was not made in the presence of the defendant, and there is nothing in the record that shows it was anything more than a narrative of a past occurrence. It was an isolated conversation held between Pinkston and the witness, some time after the events narrated had transpired; but how long after does not appear. Pinkston, when on the witness stand, did not attempt to state when, where or by whom the alleged robbery was committed.

He testified that he had a watch at 11 A. M., and between 1 and 2 P. M. he missed it. He thought he had been knocked down, and that the watch had been taken from him without his consent. But of that he was not positive. This was what he stated *when under oath*. The prosecution was permitted to prove that, *when not under oath*, he had *positively* stated he had been "knocked down and robbed." It does not appear that he then stated what he had been robbed of, or who had knocked him down and robbed him.

This illustrates very clearly the objection to the admission of such evidence. Judges and law-writers have differed as to when statements must be made in order to be admissible in evidence as part of the *res gestæ*. But, so far as we are advised, there is no reported case in which such evidence has ever been admitted under circumstances at all similar to those under which it was admitted in this case.

Judgment and order reversed.

THORNTON, J., and MYRICK, J., concurred.

No. 10,913.

PEOPLE v. ROBINSON.

Department Two. Filed April 1, 1884.

HANDING FORM OF VERDICT TO JURY.—It is neither an error nor an irregularity for the clerk to hand to the jury, when they are leaving the court-room to consider the verdict, various forms of verdict corresponding to those which they were instructed might be brought in.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered upon a verdict convicting the defendant of robbery, and from an order denying him a new trial. The opinion states the facts.

John D. Whaley, for the appellant.

Attorney-General, for the respondent.

SHARPSTEIN, J. The court did not, as appellant's counsel claims, "charge the jury that under the information their verdict *must* be either guilty of robbery, guilty of grand larceny or not guilty;" but did charge them that they *might* find a verdict of guilty of either of the offenses above specified or might find a verdict of acquittal, as they deemed proper. The jury were not told that they could not find any other verdict, and the court was not requested to charge them that they could.

It appears that when the jury were leaving the court-room on their way to the jury-room, the clerk handed them three forms of verdict corresponding to those mentioned, and that they returned one of them as their verdict. That is, they found the defendant guilty of robbery, the highest crime of which they could find him guilty under the information. This does not, in our opinion, constitute an error or even an irregularity.

Judgment and order affirmed.

THORNTON, J., and MYRICK, J., concurred.

No. 10,902.

PEOPLE v. CARTY.

Department Two. Filed April 3, 1884.

NEW TRIAL GRANTED on the ground of newly discovered evidence.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered upon a verdict convicting the defendant of manslaughter, and from an order denying him a new trial. The opinion states the facts.

H. E. Highton, for the appellant.

Attorney-General, for the respondent.

The COURT. In this cause the defendant moved for a new trial on the ground, *inter alia*, of newly discovered evidence. We have examined the affidavits as to such newly discovered evidence, and think that they bring the application within the rules of law, and that defendant should have a new trial.

The judgment and order are reversed, and cause remanded that it may be tried anew.

WEST COAST REPORTER.

WHOLE No. 16. APRIL 17, 1884. VOL. II. No. 8.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

RIPARIAN PROPRIETORS AND RIPARIAN RIGHTS ON PRIVATE STREAMS.

Utah. The general statutes and session laws of this territory contain an elaborate and detailed system of regulations devoting the water of all streams to the purpose of irrigation. The common-law doctrines concerning property in the waters of streams, and "riparian rights," are completely abrogated. The leading statute concerning irrigation[18] provides for the formation of irrigation districts; the citizens of such districts may be organized into irrigation companies, and may elect trustees for the management of these companies; a tax may be levied upon the lands in each district benefited in order to defray expenses; land may be condemned for ditches, etc.; all ditches and other works become the property of the company, etc. No irrigation company shall be entitled to divert the waters of any stream to the injury of any irrigation company or person holding a prior right to the use of said water.[19]

A more recent statute regulates the use of water by private persons, and protects their rights to such use, supplementary to the former system.[20] The selectmen of each county are made "water commissioners," and have general power to manage irrigation, and to regulate the use and distribution of water among the land-owners of their respective counties. This statute contains provisions, not found in any other legislation, which divide the vested rights of private persons to use water for domestic, agricultural, manufacturing and all other beneficial purposes, into two grades, "primary" and "secondary," of which the "secondary" is the subordinate grade.[21] The "primary" vested rights exist, (1) when any person or persons shall have taken, diverted, and used any of the unappropriated water of any natural stream, lake, or lake or spring or other natural source of supply; (2) when any person or

[18] Comp. Laws of Utah (1876), pp. 219–225, "An act to incorporate irrigation companies," passed January 20, 1865; amended in Ses. Laws of 1878, pp. 49–53.

[19] Ses. Laws of 1878, p. 53, § 7.

[20] Ses. Laws of 1880, pp. 36–41. "An act for the recording vested rights to the use of water, and regulating their exercise."

[21] Ibid., §§ 6 and 7.

persons shall have had open, peaceable, uninterrupted, and continuous use of water for a period of seven years. "The secondary" rights exist, subject to the "primary," (1) when the whole water of any stream, lake, or spring, or other natural source of supply, has been taken, diverted and used by prior appropriators for a part or parts of each year, and other persons have subsequently appropriated said water during other parts of said year; and (2) when the unusual increase of the water of a stream, over and above its average amount for seven years, has been appropriated and used by any person or persons, and the ordinary or average flow of the same stream has been appropriated and used by other persons.

In Oregon and Washington Territory there is not, so far as I have been able to discover, any legislation whatever concerning the use of water, or property in natural streams and lakes, or the rights of riparian proprietors. The necessity for any such special legislation, it may be assumed, does not exist in these commonwealths.

II. *The effect of this legislation.*

It is plain from the foregoing summary that in the state of Colorado, and in the territories of Montana, Idaho, Dakota, Wyoming, New Nexico, Arizona, and Utah, the legislation has wholly abandoned and abrogated all the common-law doctrines concerning private property in streams and lakes, and concerning the "riparian rights" of "riparian proprietors." The statutes in express terms apply to all streams, as well those running through public lands as those bordered by the lands of private owners. No exception from their operation is made in favor of persons owning land on the banks of a stream. Under these statutes no proprietor derives any legal benefit or advantage from the fact that his land is immediately adjacent to a stream. Unless he has made an actual appropriation and diversion of its water for the use of his own land he is liable to have perhaps the entire stream appropriated and diverted away for the benefit of a proprietor whose land is situated at any distance from the stream. In fact, a proprietor immediately adjoining a stream is, by reason of his position, subject to a liability which must often be a grievous burden upon the land, and a serious interference with his rights of private property, namely, the liability to which his land is exposed of having ditches or canals constructed across it without his consent, for the purpose of conducting water from the stream to more distant lands. Even though this right of aqueduct across the land of a private owner must be acquired by condemnation, under the exercise of the power of eminent domain, and upon payment of compensation, still it must be a most material incumbrance upon all riparian owners, and hindrance to their enjoyment and free use of their own property. The statutes of one territory seem to go to the extreme of permitting canals and ditches to be constructed across the lands of private owners, against their con-

sent, without any condemnation or any compensation. Such a statutory provision seems to be a most palpable and express invasion of private property rights, and it is difficult to understand upon what principle its validity can be upheld. And yet the early decisions in Colorado *seem* to hold that all lands of private owners are subject to the rights of others to locate and construct irrigating canals and ditches over them, and that the statute on this subject is simply declaratory of the common law in that commonwealth.[22]

It will be seen that the legislation, as a whole, in these last-mentioned commonwealths, provides in fact for two distinct systems. One of these is wholly private; permits private owners to appropriate the water of any stream, and to conduct it by a ditch or canal to his own lands. All disputes between two or more appropriators or claimants, under this system, must generally be settled by judicial proceedings, or appropriate actions, in which the priority of the appropriation must determine all questions of priority in right. The other system is public, or at least quasi public. It provides for territorial water or irrigation districts including a community, or space of territory which can be conveniently irrigated by the same supply, drawn from the same source. These districts are under the general control of county governments; have local or district officials, whose powers relate to the location, construction, and maintenance of a system of canals for each district, to the raising of money to defray the expense of their construction and maintenance, to the distribution of water among the landed proprietors in the districts, and other like matters. I shall not, at present, discuss the policy of this legislation. Nor shall I make any attempt to suggest and examine the questions which must arise from the particular provisions of these statutes. Hitherto very few cases have come before the courts involving a judicial interpretation of these legislative systems, and it would be useless to speculate concerning any possible interpretation in the future. It is enough to say that in each of these commonwealths, the statutes have covered the whole ground, entirely displacing the common-law doctrines; and the labors of their courts will be confined to the proper construction and application of the statutory rules. Without attempting any further examination of these statutes, which so completely displace the common-law doctrine, I shall confine myself to the law concerning riparian rights, riparian proprietors, and the use of streams flowing through private lands, in the commonwealths which have not adopted these complete statutory systems, and settled all questions of right by legislation. These commonwealths are the states of California and Nevada.

[22] See Yunker v. Nichols, 1 Col. 551; Heiderer, 5 Id. 589. Schilling v. Rominger, 4 Id. 100; Chrisman v.

III. *Water rights in private streams in California and Nevada.*

What is the present condition of the law of California concerning the rights of private owners on the banks of natural streams to use the water of such streams? We have already seen that the civil code furnishes what purports to be a system of rules determining and regulating the rights of water in all streams, public and private; but that the effect and operation of these rules are rendered at least doubtful, and perhaps nugatory, in their application to streams running through or by private lands, by the final provision, § 1422: "The rights of riparian proprietors are not affected by the provisions of this title." What are the practical consequences, with respect to the whole legislation of the code, of this restrictive clause? It has been said, by way of answer, that this clause is *not* restrictive, and that it can produce no practical consequence upon the legislation as a whole, because (1) under the law of California independently of the code, private "riparian proprietors" have no rights as such to the waters of the adjoining streams; or, (2) the "rights of riparian proprietors" intended to be saved and protected are simply those which are not inconsistent with the preceding provisions of the title, and which are not, therefore, taken away by it; those rights, in short, which still remain after and notwithstanding the previous and operative sections of the statutes. Before entering upon any discussion of this most important question, it will be expedient to collect the various judicial authorities bearing upon it, which will aid in its examination.

There seems to be a prevalent opinion that the common-law doctrines concerning "riparian rights" of "riparian proprietors" upon natural streams have no existence whatever in the law of California; that the rights of all private owners of lands bordering upon any stream are wholly subordinate and subject to the right of one who has made a prior appropriation and diversion of its water to any extent for some beneficial purpose; that priority of appropriation and diversion determines the existence, nature and extent of the rights to the waters of all natural streams among all persons. This opinion is wholly unsupported by judicial authority. It is directly opposed to a long line of decisions and of *dicta* which have, in the clearest manner, both prior to and since the codes, recognized the common-law doctrines concerning "riparian rights," and protected "riparian proprietors" in the enjoyment of those rights, to some extent at least, although they have not fully defined those rights, in all their scope and detail. The correctness of this statement will clearly appear from the following citations:

In the very latest case, which related wholly to the appropriation of the waters of a public stream, the court says: "No question as to the use of the waters of a stream by *riparian proprietors* is presented by this record. There is nothing in the pleadings or findings to indicate that

when all the waters of Lytle creek were appropriated, any of the lands by or through which the creek flows had passed into private ownership."[23] The court here expressly recognizes the distinction between the right of appropriating a stream flowing through the public lands, and the right to the use of its waters after any of the lands by or through which it flows have been acquired by private owners. In the recent case of Ellis v. Tone,[24] the private proprietor of lands bordering on a stream maintained an action and recovered damages for a diversion of the water from the stream made by the defendant in 1877. The decision recognizes and is based upon the existence of some riparian rights held by the plaintiff as a riparian proprietor on the stream. The opinion, it is true, does not discuss the general doctrine; but is confined to an examination of certain instructions given to the jury at the trial, and the entire charge of the trial judge is not reported. The case, however, is a direct authority for the existence of "riparian rights" under the common-law doctrines, at least to some extent. The decision in Pope v. Kingman[25] is unambiguous and express. A stream called Lytle creek rises on public lands, and then flows through private lands, including those of the plaintiff and of the defendants. The plaintiff received the patent to his tract in 1872. The title, or at least the possession of the defendants, was earlier. The defendants had diverted and used all the water of the creek, and claimed the exclusive right to do so. The plaintiff brought this action in 1877 to quiet his title to the use of the water as a riparian owner, and to restrain the defendants' diversion. The court, after holding that the plaintiff's action was not barred by the statute of limitations, says: "The principal question is, whether it is competent for the defendants, by the mere diversion of the waters of Lytle creek, which is an unnavigable stream flowing across the lands of the plaintiff, to deprive the plaintiff of all interest or right of any nature in the waters of that creek. *As being owner of the land, the plaintiff has an interest in the living stream of water flowing over the land; his interest is that called the 'riparian right.'* It is not necessary in this case to define in detail the precise extent of the riparian rights as existing in this country; it is enough to say that under settled principles, both of the civil and the common law, the *riparian proprietor has a usufruct in the stream* as it passes over his land. The judgment of the court below deprived the plaintiff of that usufruct, and declares in terms 'that plaintiff has no right, title, nor interest in said waters or any portion of them.' The judgment of the court below is therefore modified so as to read as follows: (1) That defendants have nothing as against the plaintiff, except only such rights as any of them may have of like character with that of the plaintiff, as being riparian

[23] Lytle Creek W. Co. v. Perdrew, 1 West Coast Rep. 866.

[24] 58 Cal. 289.

[25] 54 Cal. 3.

proprietors of land bordering on said stream, and (2) that none of defendants have any right, title nor interest in or to the waters of said creek except as riparian proprietors as aforesaid."

The rights of a "riparian proprietor" were also admitted and protected in the case of Creighton v. Evans.[26] The court said: "It is admitted that the waters of Elk bayou flowed in its natural channel through plaintiff's land, and that defendant diverted a portion of the water to his own land for purpose of irrigation, and other purposes. It is not averred that he is a riparian owner, and as such entitled to use any portion of said water. The court properly instructed the jury that plaintiff was entitled to recover at least nominal damages, even though he had suffered no actual damages. But the court further instructed the jury that if defendant diverted a portion of the water for a useful purpose, and that enough water was left in the stream for the use of the plaintiff for watering his stock and for domestic purposes, and if the plaintiff was not damaged by the diversion, the verdict should be for the defendant. This was not only contradictory to the first instruction, but was erroneous as matter of law. So far as appears on the record, defendant was not entitled to divert the water for any purpose, and plaintiff was entitled to at least nominal damages." This case was decided in 1878, but the report does not show when the cause of action arose. Several cases concerning the interference with or use of subterranean water, whether percolating through the soil or flowing in defined streams, also recognize and are decided in accordance with the settled common-law rules on that subject.[27] *J. N. P.*

[TO BE CONTINUED.]

[26] 53 Cal. 55.

[27] See Hale v. McLea, 53 Cal. 578; Huston v. Leach, 53 Id. 262; Hanson v. McCue, 42 Id. 303; Mosier v. Caldwell, 7 Nev. 363; Strait v. Brown, 16 Id. 317.

INTERSTATE EXTRADITION.

IN RE ROBB.

MR. SAMUEL T. SPEAR, a writer of reputation upon the law of extradition and other branches of the law, in an elaborate article published in the Albany Law Journal, reviews the recent decision of the United States circuit court for the ninth circuit, in the extradition case, In re Robb, 1 West Coast Rep. 439, and arrives at a different conclusion from that reached by the court. Having been counsel in the case of Robb, and believing the action of the court to be in strict conformity with the constitution and laws of the United States, I desire to make some observations upon the criticisms of the learned reviewer, and to point out wherein I think his views are untenable.

Mr. Spear says: "There can be no doubt that the governor of a state in issuing his warrant for the arrest and delivery of a fugitive criminal, upon the demand of the governor of another state, is acting under the authority or color of the authority of the United States, and consequently, that the arrest and detention are under color of the same authority. The arrest and detention purport to be under the authority of the United States; and the supreme court of the United States, in Prigg v. Commonwealth of Pennsylvania, 16 Pet. 539, declared the law of congress giving to state governors this authority to be constitutional. It is on this ground that the federal courts have claimed and exercised jurisdiction in extradition cases: Ex parte Smith, 3 McLean, 121; Matter of Titus, 8 Ben. 411; Matter of John Leary, 10 Id. 197; In re Doo Woon, 18 Fed. Rep. 898. An arrest for extradition is, in this respect, essentially parallel to the cases cited by Judge Sawyer:" 29 Alb. Law Jour. 207.

It seems to me that in this passage the whole case is surrendered. It is conceded that the parties having Bayley in custody were acting in the execution of the constitution and laws of the United States, through instrumentalities or agencies appointed by virtue of the authority conferred by the laws of the United States, and were exercising powers derived from the United States, without which they could not lawfully have acted at all in the manner they did. The writer makes an acute, technical criticism upon the term "officer," as the term is supposed to be used in the constitution of the United States; and it is insisted that the governor, and others acting in a case of extradition in pursuance of the authority conferred by the constitution and laws of the United States, can not be officers of the United States in the sense suggested; that if they are, their appointment by an act of congress would be unconstitutional, and consequently void. Conceding these views to be correct, then, these officers had no other authority whatever to act, and the question as to the authority must still be determined by the constitution and laws of the United States. But his argument would apply with equal force to a large number of other statutes of the United States, many of them nearly as old as the government itself, which have been recognized and acted upon without objection, remonstrance, or successful attack. Whether the persons acting are officers of the United States or not, in the limited sense indicated by

the writer, is a matter that can not affect the question at issue. They are instrumentalities or agencies, appointed and employed by the United States within their constitutional powers, in carrying into effect the constitution and laws of the United States. This was so held in the Prigg case, as is admitted, and whether the state officers can be compelled to execute the powers conferred is also wholly outside the question at issue. If they do accept the trust, and act, they act solely by virtue of the laws of the United States. The supreme court does not limit its language to officers in the restricted sense of that term in which Mr. Spear insists it must be used. The language in the Booth case is: "Or other authorized officer or *agent* of the United States:" 21 How. 523. The Prigg case and the Booth cases grew out of the provision of the act of 1793 respecting fugitive slaves, the same act providing for the extradition of fugitives from justice, and being the one under which Bayley was arrested and afterward held in custody by Robb.

In the Prigg case it was held, that under this act and the constitution of the United States, the owner of a slave, or his attorney or agent, was an agent under the law clothed with entire authority in every state in the Union, without warrant or other authority than the statute itself, to seize and recapture his slave. For this purpose he was the agent of the law. The owner, or his agent or attorney, having seized his slave, was authorized by the third section of the act "to take him or her before any judge of the circuit or district court of the United States, residing or *being* within the state, *or before any magistrate of a county, city, or town corporate*, wherein such seizure or arrest shall be made, and upon proof to the satisfaction of such judge or magistrate," receive a certificate authorizing him to remove the slave from the state. The state magistrates by this act were put upon precisely the same footing as the judges of the United States courts. Now, by what authority did the owner or his agent and these state judges and magistrates act? In executing the laws of the United States, of what sovereignty were they the officers, instrumentalities, or agents? Certainly not of the state, even in the cases where the state magistrate acted. Not a scintilla of the authority exercised was derived from the states, whose magistrates in other respects and for other purposes under the state laws they were. But their authority to act in the matter of the return of fugitive slaves was derived from another section of the same act of congress as that under which Robb was acting—the latter having been carried into the revised statutes. If these magistrates, for the purposes of this act, were state officers, so must the United States judges, acting under the same statute, have been state officers. Both classes derived all their authority from the same sovereignty. Numerous other acts of congress in like manner confer extensive powers, judicial and executive, upon state officers, in respect to matters in which the respective states have no concern whatever. As examples, section 1014, revised statutes, authorizes "any justice or judge of the United States," or "any commissioner of the circuit court of the United States," or "*any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate of any state where he may be found,*" to arrest, imprison, and hold to bail for trial before the court having cognizance of the case any party committing "any crime or offense against the United States."

Section 4606 of the revised statutes makes it an offense to go aboard a vessel under certain circumstances, "punishable by a fine of *not more than two hundred dollars and by imprisonment for not more than six months*, and the *master* of any such vessel may take any such person so going on board into custody, and deliver him forthwith to any constable or police officer, to be by him taken *before any justice of the peace to be dealt with according to the provisions of this act;*" that is to say, to be convicted and punished. Section 4522 authorizes certain penalties of defaulting seamen to be recovered "before any *justice of any state, city, town, or county of the United States*, which by the laws thereof have cognizance of debts of equal value." Section 3833 authorizes all causes of action arising under the postal laws to be prosecuted "before the *justices of the peace, magistrates, or other judicial* courts of the several states" having jurisdiction under the state laws of equal amounts or over similar punishments; "and such justices, magistrates, or judiciary shall take cognizance thereof, *proceed to judgment and execution as in other cases.*" Section 4546 gives jurisdiction in certain cases of seamen's wages to "*any judge or justice of the peace*, or any commissioner of a circuit court." Section 3066 authorizes "any *justice of the peace*" to issue search-warrants on the application of certain designated officers of the United States. Section 5280 authorizes "any court, judge, commissioner of any circuit court, *justice, or other magistrate*" to issue warrants of arrest, examine and remand to the ship seamen deserting from foreign ships. See also sections 4556–4559, 2181, 1758, 1778, 1750. No oath administered by any notary public or other state officer has any validity in a United States court or executive departments of the general government, unless such officer be expressly authorized to administer oaths by the statutes of the United States. His authority under the state laws is wholly insufficient. Here, then, are judicial and other functions and powers of the highest nature, in which the state has no interest whatever, conferred by the laws of the United States upon certain *state* officers—powers and functions which no one of them could exercise under the state laws or as state officers, or in their character of state officers.

Under section 1014 of the revised statutes, the judges, justices of the peace, and other state officers, as committing magistrates in case of crimes against the United States, exercise the same powers, and by virtue of the same authority, and no other, as does the chief justice and justices of the supreme court of the United States, and other United States judges and commissioners. Under this statute, with reference to the jurisdiction conferred, they stand upon an equality with the highest judicial officers of the United States: United States v. Schuman, 7 Saw. 440; Giant Powder Co. v. Cal. V. P. Co., 6 Id. 532; Robinson v. Satterlee, 3 Id. 140. So in some of the other sections cited, jurisdiction is conferred upon the designated state officers, not merely to hold preliminary examinations, but to try cases, civil and criminal in their nature, and render and enforce final judgments without appeal. Thus, under the laws of the United States, they are authorized to exercise judicial functions and powers of the highest character, in relation to matters in which the state has no concern whatever, and over which the state could give them no possible authority. They take part in the administration of the laws of the United States. They act by virtue of the authority of the United States, and no other. The fact that, with

reference to matters of the state government, they also perform other duties under the state laws, can not affect the character of the acts performed solely by virtue of the laws of the United States. They act in a double capacity: in the one case, they act as officers or instrumentalities or agents for the administration of the laws of the United States; and in the other, of the state. And the fact that the state is interested in the act to be performed, can not affect the character in which the officer or instrumentality performing it acts. There is no necessary connection, and, indeed, no connection in fact or in law, between the duties performed in the two distinct capacities in which they act. Congress might just as well confer the powers referred to upon any other persons as upon those named. The office is simply used instead of the name of the incumbent as a description of the persons upon whom jurisdiction and power are conferred. The jurisdiction and power to be exercised is derived solely from the act of congress, and not from their character as state officers. It was doubtless supposed that men occupying analogous positions under the state government would be competent to perform the services indicated, and that it would be more convenient and economical, in view of the small amount of services of the kind likely to be required to confer the jurisdiction on them, than to maintain a separate set of officers. Whatever the reason, congress has seen fit, for certain purposes, to constitute certain state magistrates and certain state executive officers a part of the judiciary and executive force of the United States government; but while executing the laws of the United States by virtue of their powers thus conferred, their official acts are as separate and distinct from their official acts as state magistrates and state executive officers as if they held no state office whatever. If the acts under the laws of congress are not official acts with respect to the United States, they certainly are not official acts with respect to the state.

True, congress has not attempted to provide for compelling the governor to act under the extradition laws, either by *mandamus* or punishment criminally; and he may decline to act with impunity. Neither has it made any provision whereby the assumption and exercise of the judicial functions mentioned in the numerous sections cited can be compelled, and the several state officers designated might, doubtless, decline with impunity to assume the jurisdiction. But where they do assume to exercise the powers and functions designated, whether governor, judges, justices of the peace, or otherwise, they act solely by virtue and in execution of the laws of the United States; and no matter by what name we designate them, are instrumentalities or agencies employed in the administration of the laws of the United States, and are, within the language of the supreme court quoted, "any authorized *officer* or *agent* of the United States." Whether congress has power to compel by coercive means the assumption by the governor or other officers of the state mentioned, and the exercise of the power conferred on them, is a question not pertinent to the present discussion, as no such legislation as to any of them has been attempted. But having assumed the functions and exercised the powers, there can be no doubt that their acts within the jurisdiction conferred by the laws of the United States, if valid, are acts of the sovereignty of the United States, and not of the state sovereignty, of which they are also officers. If not valid, they of course can not be acts of the state or any other sovereignty. The naturalization laws,

administered by the numerous state courts solely under and in pursuance of the acts of congress, and other laws that might be cited, furnish other illustrations.

Mr. Spear says: "Interstate extradition, then, though *regulated* by federal law, is a transaction between two independent and sovereign states, considered in their political character; and each state acts through its governor, and he acts for the state in 'his official character' as governor, and in so acting, he 'represents the sovereignty' of that state. The process of the extradition, so far as the work of actual execution is concerned, is exclusively a matter of state agency, and is made such by the law of congress. The demand is by a state governor. The delivery is by a state governor. The warrant of arrest is issued by such a governor. The actual arrest is made by a state officer. The party receiving the fugitive is a state officer, deriving his appointment from the demanding governor. To make this agency a federal agency is to give it a character which the law does not assign to it, and which, as a matter of fact, it does not possess at all. * * * Assuming, then, without pursuing the argument to greater length, that the process of interstate extradition, though regulated by a law of the United States, and conducted under the authority of that law, is nevertheless a process executed by state officers, we see at once that the cases cited by Judge Sawyer are not in this respect parallel to a case of extradition. It may be true, and according to the ruling of the supreme court of the United States it is true, that a party in custody under color of the authority of the United States by an officer thereof can not be reached by a writ of *habeas corpus* issued by a state judge or a state court. But it does not by any means follow that a party in custody by a state *sheriff*, as a fugitive criminal, under a warrant issued by a state governor, can not be reached by such a writ of *habeas corpus*."

It appears to me that the *dual capacity* in which the officers named in the foregoing extract act has been wholly overlooked. The two capacities in which the respective officers act seem to be confounded with the personality of the individual who acts in both, and herein lies the fallacy of the reasoning. The governor of California, *as governor*, derives all his powers from the constitution and laws of the state. Congress can neither enlarge nor restrict his legitimate powers *as governor*. Congress can confer other powers on the individual holding the office of governor, and the power may be conferred by his official designation, and executed in his official name. His being governor may be a good reason for conferring upon him by congress powers not inconsistent with his other duties; but where such powers are conferred, they are derived from another sovereignty; and in executing such powers, he acts as an instrumentality or agency of that sovereignty which confers the powers, and no other, even though the act may be for the benefit of some other sovereignty or some other party. The reviewer, in the passage cited, seems to suppose that Robb was a state *sheriff*, and acting in that capacity; but there was nothing in the record to indicate that he was in fact sheriff of any county in Oregon or elsewhere, or that he held any office under the state government of Oregon, other than his authority to act as its agent to remove Bayley by virtue of his appointment under the authority of the act of congress in question. He was not acting, and he could not act, in the capacity of an Oregon sheriff in Cali-

fornia. Neither the governor under the laws of Oregon, nor the laws of Oregon themselves, could authorize a sheriff or any other officer of Oregon to exercise any official authority whatever in the state of California. The moment the sheriff or any other officer of Oregon passes the boundary line of the state, he is without his jurisdiction, and has no more authority than any other private citizen. Nor could the governor of California, *as such*, unless expressly so authorized by the constitution and laws of California, add anything to the powers of such officer of Oregon while in the state of California.

The whole power exercised beyond the jurisdiction of Oregon is derived from the constitution and statute of the United States. The authority to designate the agent, under the statutes of the United States, and for carrying them, in this particular, into execution, is conferred, very properly, upon the governor of the demanding state; but the power to designate the agent for the purpose indicated, and the power to be exercised by him after having been so designated, arise solely from the act of congress. And so the governor of the state upon which the demand is made, and the party making the arrest under the warrant issued, and his authority to deliver him to the agent appointed to return the fugitive, are also derived from the act of congress. The authority has no necessary connection with the office of governor. The authority to issue the warrant of arrest, the authority to make the arrest, and, upon arrest, to deliver the fugitive to the agent duly authorized, under the act of congress, to be transported out of the state, might just as well have been conferred upon the judges of the *state* or national courts, or upon a commissioner of the circuit courts, as was done in the section relating to fugitive slaves, and as is done in relation to extradition to foreign countries, under the provisions of section 5270, revised statutes, or as in the case of numerous other powers conferred on similar officers in the other sections of the statutes already cited. So the agent to receive the prisoner for transportation to the demanding state need not be a sheriff or any other state officer. The authority under the act of congress may be vested in any private citizen. The fact that the agent is a sheriff, if he be such, adds nothing to his powers; and the fact that the person authorized to issue the warrant of arrest is a governor, and that it is conferred on him by his official designation, adds nothing to his powers. The individual who is to execute the power is indicated by his official designation: it is merely *descriptio personæ*. But the power of all concerned to act is derived solely from the acts of congress, and it is not exercised by virtue of any official authority derived from the constitution or laws of the respective states. The governor making the demand, doubtless may do so under state laws, but he can make no effective, lawful demand by virtue of the state laws, that will impose any obligation upon the state to which he has fled, to return the fugitive, except by virtue of the provision of the constitution and laws of the United States imposing such duty, and all legal subsequent proceedings to perform the duty imposed by an effective demand, so far as any possible action outside of his state is concerned, must depend upon the laws of the United States alone.

This is not a mere "regulation" of the modes of proceeding "by federal laws." The power to act at all comes from congress and the United States constitution, and every person who lawfully performs any

act under and by virtue of the powers conferred by the constitution and laws of the United States, whatever other official relation he may personally bear to the state, is necessarily, for that purpose, either an officer, agent, or other lawful instrumentality of the sovereignty of the United States, and necessarily *under the protecting power of that sovereignty*. The supreme court, in the Booth and Tarble cases, does not discuss the character of the agent or instrumentality used, the only question being, "*Is the party in custody under the authority of the United States?*" and it defines for itself the phrase thus used as "*an authority, the validity of which is to be determined by the constitution and laws of the United States.*" Is not the validity of the authority under which Bayley was held by Robb "*to be determined by the laws and constitution of the United States,*" *and by such constitution and laws alone?* "If so," proceeds the court, "the state court or judge "can proceed no further. *No state judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them.* And if the authority of a state, in the form of judicial process or otherwise, should attempt to control the marshal, or *other authorized officer or agent* of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it," etc. Section 5279 of the revised statutes of the United States provides that "any *agent so appointed* [that is to say, in pursuance of the provisions of the preceding sections], who receives the fugitive into his custody, *shall be empowered to transport him to the state or territory from which he has fled.*" This is the authority, and the only authority, under which Bayley was held in custody, and the validity of this authority is to be determined by this provision and the constitutional provision under which it was assumed to be passed by congress.

But it is admitted that Bayley was in Robb's custody, "under the authority of the United States," and that brings him within the category distinctly stated by the supreme court, as taking him wholly out of the jurisdiction of the state courts. No exception is made to the rule stated. Not only is all the power exercised by the governor in issuing his warrant for the arrest of a fugitive, the officer who makes the arrest, and the agent appointed to transport him out of the state derived ultimately and primarily from the statutes of the United States, but the officers or agents having the prisoner in charge are alone protected in the execution of their powers so derived by the provisions of section 5279 of the revised statutes, making it a punishable offense by force to liberate or rescue such prisoner. In view of all these circumstances, if a prisoner in transit, as Bayley was, is not held "in custody under the authority of the United States," within the meaning of the language as used by the supreme court, it would be difficult to say what would constitute that condition.

But, says the learned reviewer, he was also in custody of state officers, and therefore the state courts had *concurrent* jurisdiction to inquire into the imprisonment on *habeas corpus*. But he was in their custody while in the state of California and *in transitu*, not *as* state officers, or by virtue of their authority *as* state officers, but only by virtue of the authority conferred upon them by the constitution and laws of the United States. When once delivered to the proper authorities in Oregon, the functions of the agents acting under the laws of the United States would

have been performed, and thenceforth he would be in the custody of the state, under and by virtue of its own constitution and laws. But till delivered, he would be in the custody of the agent acting under the laws of the United States—in short, in the custody of the laws of the United States. While under arrest and in transit, in pursuance of the laws of the United States in question, the prisoner is as clearly in the *custody of the United States government itself*, acting under and through its constitution and laws, by instrumentalities and agencies duly appointed under the constitution and laws, as is a prisoner arrested by virtue of a warrant issued by any of the officers, *state or national*, mentioned in section 1014 of the revised statutes, and held to bail to answer for any offense against the United States, such as in the Booth cases.

In both cases alike, the United States act by their duly appointed agencies, through and under their constitution and laws. The only difference is in the object of that action. In one case, the ultimate object is to execute the powers and perform the duties imposed upon the government by the constitution, by punishing offenses against the United States. In the other, the object of the United States is to exercise their constitutional powers, and perform their constitutional duty to the demanding states, in a particular equally important, by compelling the return of fugitives from justice, in order that they may be ultimately punished by the state sovereignty whose laws have been violated. Neither the object to be attained nor the personality of the agent employed can affect the legal *status* or quality of the acts to be performed. The only question is, Are the acts alike performed by or on behalf of the national government in pursuance of the constitution and laws of the United States, through and by its legally appointed instrumentalities? If so, *they must be acts of the general government in the same sense in one case as in the other*. If the state courts can take jurisdiction by *habeas corpus* in such cases, it would be impossible for the United States government to exercise its powers or discharge its functions under the constitution and laws of the nation relating to the return of fugitives from justice, except with the permission of the courts of the state upon which the demand is made. The courts of the state where the fugitive is found, and upon which the demand is made, might wholly defeat the extradition. The national sovereignty or government can not be in that impotent and humiliating condition. It can not be sovereign, and yet find it necessary to say "by your leave" to the state courts. It must be in a position to command—in a condition where the appointed agencies accept the trust and assume to act, to execute its own laws, whether passed for the benefit of individuals, the state, or the nation, in all their length and breadth, without hinderance or interference from any subordinate power or authority. It must be in a condition to perform by its own agencies all duties imposed upon it by the constitution of the United States. When the general government shall surrender the power to a subordinate sovereignty, to interfere by its courts, or otherwise, with the execution of its laws in relation to the return to the proper state or to foreign nations of fugitives from justice, it will have abdicated one important constitutional attribute of its sovereignty.

It is not enough to say that the state courts will be presumed to faithfully discharge their duties, and permit the proper execution of the laws of the United States. That is not the question. The question is not

what they *will* do, but what they can do—what they have the power to do. If it were otherwise, the Booth cases furnish notable examples of what even the highest judicial tribunals of a state *will* do in certain conditions of local public sentiment. The extradition of fugitives from justice, as well as formerly fugitives from labor, was one among a number of matters that our fathers, in framing and adopting the constitution of the United States, deemed prudent to withdraw from the operation of state jealousies and local prejudices, and commit to the care and control of the general government; and that control can only be made effectual through its own instrumentalities, without interference or legal power of obstruction from the subordinate state or local governments. Concurrent jurisdiction in the United States and state courts, the latter acting solely under the authority of the laws of the state, to examine on *habeas corpus* the legality of the imprisonment, and to discharge a party held under the laws of the United States in question, is impossible, without subordinating the sovereignty of the United States to the sovereignty of the state.

It is true that the United States, by its legislation providing for interstate extradition, are not seeking to punish any offenses against their own laws, but by such legislation are only aiding a state in bringing to justice offenders against the state laws, who might otherwise escape. But that fact can not affect the legal *status* of the question at issue. The state upon which the demand of the fugitive is made is no more interested in the punishment of offenses committed in other states than are the United States. It is only in obedience to the provisions of the constitution of the United States that fugitives from justice are required to be returned at all. Both the duty to return, the authority to act, the agencies to be employed, and the forms and modes of proceeding, are all found in the constitution and laws of the United States. The United States, therefore, stand in the superior position in this respect, and are more immediately interested in extraditing fugitives from justice than the state within which the fugitive is found, and the demand is made. The authority of every act on the part of the state within which the demand is made, and of every authoritative act on the part of the demanding state, imposing a legal duty upon the officers of the state upon whom the demand is made, is found in the constitution and laws of the general government; and, as we have seen, the validity of such authority must be determined by the constitution and laws of the United States. How then can it be properly said, that "to make this agency a federal agency, is to give it a character which the law does not assign to it, and which, as a matter of fact, it does not possess at all"? It is, on the contrary, confidently submitted, that this is precisely the character which the law *does* assign to it, and which it *does*, in fact and in law, possess.

The United States are interested in the due and proper execution of their own laws, no matter upon what subject. The constitution conferred the power, and thereby imposed the corresponding duty, upon the government to provide for the return, from other states to the states where crimes have been committed, of fugitives from justice. Congress has legislated upon the subject, and provided instrumentalities for carrying out this power; and it is just as important, both to the general government and to the demanding state, that the agencies adopted shall be exempt from interference or obstruction by the states upon which the

demand is made, through their courts, as that the exercise of any other of the sovereign powers of the nation shall be so exempt. Times of great local excitement may occur, as they have heretofore occurred, in relation to the extradition of slaves, provided for in the same act of congress, and exigencies may arise where the protection of the agencies employed under the extradition act in question, and their exemption from interference by the state tribunals by *habeas corpus*, may be of the utmost importance to the peace of the country.

Under the treaty with Mexico of December 11, 1861, persons committing certain offenses "within the limits of the *frontier* states or territories" of one nation and escaping across the line into a *frontier* state or territory of the other nation may, upon the demand of the authorities of the state where the offense is committed, be delivered up for extradition by the chief civil authority, which is of course the governor, of the *frontier* state wherein the criminal is found: 12 R. S., p. 1200, arts. 2, 3, 4.

Thus a party committing one of the designated crimes in Lower California, and fleeing into the state of California, on the demand of the governor of Lower California, may be arrested on a warrant of the governor of the frontier state of California, and delivered to the duly appointed agent of Lower California, to be transported to that state of the republic of Mexico for trial. Can it be properly said that the governor of California and the agent appointed by a Mexican state, to take charge of and transport the prisoner to Mexico, under the authority and in pursuance of the terms of the treaty between the two nations, are *not* agencies of the government of the United States for carrying into execution the constitution, treaties, and laws of the United States? and that in acting in strict pursuance of the provisions of the treaty, such governor and agent are not exempt from interference and obstruction from the state courts of California by writ of *habeas corpus?* Is this simply a matter between the two frontier states? The state of California has no interest at all in the matter. As a state, it is under no obligation to surrender such fugitive—no duty in the premises to perform. Yet the provisions of the treaty are precisely similar in effect to those of the act of congress in question, and impose similar duties upon the same officer—the governor—to be performed in a similar manner and character. Will the learned reviewer of Robb's case say in this case, "that to make this agency a federal agency is to give it a character which the law does not assign to it, and which as a question of fact it does not possess"? I think it will hardly be so claimed.

If the law, then, adopts a state officer as an agency for effecting its purposes, whether administrative, executive, or judicial, is the state officer so adopted a state agency, as seems to be intimated by the learned reviewer, unless the law itself in terms christens him an agency of the United States? Does the name given, or does the thing to be done, and authority to do it, and the source of the authority, characterize an act? And yet the only difference in the two cases mentioned is, that the demanding state in one case is a state of a foreign government, and in the other a state of the United States. In both cases, the proceeding, so far as it takes place in the state of California, is one wholly in execution of the supreme laws of the United States. In neither does any party concerned derive any authority from the state of California, or even from the demanding state, except so far as the acts of the demanding state are also

authorized by the constitution, treaties, and laws of the United States. The authority derived from the state is only secondary and subordinate, and itself depends upon the laws of the United States. The authority derived from the United States is the primary and paramount authority. The United States have no more interest in one case than in the other. They stand in the same relation to both. The powers conferred upon the general government by the constitution in both cases carry with them correlative and corresponding duties. Yet an interference on the part of the state courts by *habeas corpus*, in the execution of the provisions of the treaty in the one case, is liable to embroil the country in foreign complications, and embarrassments, if not in war. The case of Clodomiro Cota, which created some excitement in California three years ago, points to difficulties liable to arise. Upon the demand of the governor of the Mexican state of Lower California, Cota was arrested on a warrant issued by the governor of California, and delivered over to the Mexican consul, who placed him on board a Mexican vessel of war, in charge of the commander, to be transported to Lower California.

One of the superior courts of San Francisco issued a writ of *habeas corpus*, and further proceedings were had, whereby it was contemplated to take the prisoner forcibly from the vessel. The moderation and good sense of the Mexican consul, however, led him to avoid any conflict between the officers of Mexico and of the state of California. He again took personal possession of the prisoner, removed him from the vessel to the shore, where he was placed in the charge of the police force. The writ was subsequently dismissed, it is understood, on jurisdictional grounds. The case indicates the embarrassments liable to arise from any attempted exercise of jurisdiction by the state courts in matters pertaining to the execution of the functions and laws of the United States government relating to the extradition of fugitives from justice from foreign countries.

The state of California, in its penal code, has made provision for the extradition of fugitives from justice from other states, under which, possibly, Bayley might have been returned to Oregon, had the state of Oregon or the governor of California seen fit to proceed under the state code: Penal Code of California, secs. 1548 to 1556, inclusive. These provisions, however, required the interposition of judicial action in the state of California, as the basis of surrender by the governor.

Had proceedings been taken under the state laws, without reference to the laws of the United States, the state courts would, undoubtedly, have had jurisdiction to inquire into the regularity of the imprisonment, and their jurisdiction would have been *exclusive*, unless the party should claim, in good faith, to be imprisoned in violation of the constitution or laws of the United States. But the state of Oregon and the governor of California did not, in fact, nor did they profess to, proceed under the state laws. The governor proceeded, and so expressly stated in the recitals of the warrant, under and by virtue of the powers conferred by the laws of the United States. He acted, professedly, as an agency of the sovereignty of the general government. State laws, like those of California, passed in pursuance of the comity that ought to exist between states, may possibly, ordinarily, be sufficient for the purpose of extradition between *adjoining* states. But states might not pass such laws, and if they did, they would be utterly impracticable for states lying remote

from each other without legislation by congress. For example, take the states of California and Maine. No law could be passed by either or both states, acting in concert, that would be effectual to return a fugitive escaping from one state to the other.

The laws of California might authorize a demand, and the appointment of an agent to receive the fugitive; and the laws of Maine might authorize the arrest and surrender of such fugitive to the agent to be transported to California; but the moment the agent should cross the line of Maine into New Hampshire with the fugitive, all authority over his prisoner would cease; and he could escape, and go his way unmolested, until arrested and returned to him by virtue of proceedings *de novo*, under such laws as might be in force in the state of New Hampshire. And this proceeding would require to be repeated at the boundary of every state through which he should attempt to pass. Thus the states are utterly incapable of providing adequate means for securing the return of fugitives from justice escaping into remote states, and there is an absolute necessity for vesting the power over this subject in the national government; and it having been so vested, it is equally important that these powers be executed by the agencies provided by the laws of the superior sovereignty, without any interference or obstruction from the subordinate governments or their tribunals. If the state courts have jurisdiction to examine and discharge such fugitives on *habeas corpus*, then an agent of the state of Oregon attempting to transport a fugitive from the state of Maine to Oregon would be liable to be called upon to respond to a writ of *habeas corpus* within the local jurisdiction of every court through which he would be compelled to pass between the states of Maine and Oregon.

With the greatest deference to the opinions of so able a law-writer as the author of the work on the Law of Extradition and the Constitutionality of the Legal Tender Acts, in view of the considerations hereinbefore set out, it is submitted that the case of Robb can not be distinguished from the Booth and Ableman cases, or taken out of the rule therein established. If those cases were well decided, then the case of Robb must be governed by them, and it was also well decided.

ALFRED CLARKE.

San Francisco, Cal.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

UNITED STATES v. EVANS.

Filed April 3, 1884.

SUBORNATION OF PERJURY, INDICTMENT FOR.—To sustain an indictment for procuring a person to commit perjury, it is necessary that perjury has in fact been committed. It cannot be committed unless the witness swears to what was false, willfully and knowingly. Consequently the indictment must aver, not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus that the crime of perjury would be committed by him.

DEMURRER to an indictment charging the defendant with subornation of perjury. The opinion states the facts.

A. P. Van Duzer and *J. J. De Haven*, for the defendant.

S. G. Hilborn, United States Attorney, and *Carroll Cook*, Assistant United States Attorney, for the United States.

HOFFMAN, D. J. The indictment, after the usual formal allegations, which seem to be quite sufficient, charges in substance that the defendant procured one Burnett to commit the crime of perjury by swearing to certain allegations contained in an affidavit made and subscribed by him on an application for an entry of certain timber lands. It avers that Burnett knew that these allegations were false, and it negatives them by averring what the facts were. It also avers that the defendant, when he procured Burnett to swear to these allegations, also knew that they were false. It does not aver that he knew that Burnett was aware of their falsehood.

To sustain an indictment for procuring a person to commit perjury it is obviously necessary that perjury has in fact been committed. It cannot be committed unless the person taking the oath not only swears to what was false, but does so willfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person who is to swear to them knew them to be false; for unless the witness has that knowledge, the intent to swear falsely is wanting, and he commits no perjury.

It is, therefore, essential that the indictment should aver not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus the crime of perjury would be committed by him.

The allegations of the indictment in this case are consistent with a belief on the part of the defendant that the party alleged to have been suborned supposed the statements he was expected to make to be true. In that case he would not be guilty of perjury, nor could the defendant be adjudged guilty of procuring him to commit perjury.

Demurrer sustained.

See cases U. S. v. Denne, 3 Woods, 39; Commonwealth v. Douglass, 5 Met. 244; 2 Arch. Cr. Pr. & Pl., Pomeroy's notes, 1750; 2 Wharton Cr. L., 8th ed. 1329.

SUPREME COURT OF COLORADO.

SALISBURY *v.* ELLISON.

Filed April 1, 1884.

AN ASSIGNMENT BY THE SURVIVING PARTNER OF AN INSOLVENT FIRM, for the benefit of preferred creditors, is invalid in equity, and will be so held when the question is properly drawn in issue.

EQUITABLE DEFENSES MAY BE INTERPOSED to an action at law.

DEFENSE NOT PLEADED, WHEN MAY BE TAKEN ADVANTAGE OF.—If a defense, legal or equitable, to which the defendant is entitled to the benefit, be not averred in the answer, but is fully established by the plaintiff in attempting to make out his case in the first instance, the plaintiff will be deemed to have waived the absence of averment, and cannot recover if objection be taken by the defendant.

REHEARING granted in Salisbury v. Ellison, 2 West Coast Rep. 102.

ERROR to the district court of Boulder county. Petition for a rehearing. The facts are stated in the former opinion, reported in 2 West Coast Rep. 102.

Harmon & Ellis, for the plaintiff in error.

Platt, Rogers & R. H. Whiteley, for the defendant in error.

HELM, J. We discover no reason for changing our views upon the the leading questions considered in the opinion deciding the case. The following propositions were announced and are still adhered to, viz.: First, that an assignment by the surviving partner of an insolvent firm for the benefit of preferred creditors is invalid in equity, when the question is properly drawn in issue, and that this was true before the adoption of our recent statute on this subject; second, that in actions at law appropriate equitable defenses may be interposed; third, that if the defense be not averred in the answer, yet be fully established by the plaintiff in attempting to make out his case in the first instance, he will be deemed to have waived the absence of averment, and cannot recovered if objection be taken by defendant; and, fourth, that this waiver takes place, under our practice, whether the specific defense proven by the plaintiff be legal or equitable.

But these propositions must of course be understood with the qualification that the legal action is between the proper parties; and that the defense, legal or equitable is one of which the *defendant* is entitled to the benefit.

In their argument supporting this petition for a rehearing, counsel urge with considerable force that the defendant in this case has no interest in the equitable defense above stated, and was not entitled to plead the same; also that the question of fraud in the assignment could only become important and be adjudicated in an action to which the surviving partner and the unpreferred creditors as well as the assignee were parties.

We have decided to grant the prayer of the petition, for the purpose of more fully considering these questions; the arguments upon the rehearing will be confined thereto.

Rehearing allowed.

BECK, C. J. I concur that a rehearing should be granted.

TUCKER, Sheriff, etc., v. PARKS, Assignee, etc.

Filed April 1, 1884.

JUDGMENT DIRECTED TO BE ENTERED in accordance with the former opinion, reported in 1 West Coast Rep. 264.

APPEAL from the district court of Lake county, on rehearing. The facts are stated in the former opinion reported in 1 West Coast Rep. 264.

R. D. Thompson, for the appellant.

Markham, Patterson & Thomas, for the appellee.

The COURT. Upon a full consideration of this case and examination of the numerous authorities cited in the briefs filed on the rehearing herein, we agree in concluding that upon authority this court has ample power to reverse and direct a judgment in the present case, and that the ends of justice will be subserved thereby.

It is therefore ordered that the court below be directed to enter a judgment in accordance with the opinion heretofore rendered in this court therein for the sum of seven thousand seven hundred and forty-six dollars and twenty cents, the same being the amount of the value of the goods in controversy, as admitted by the pleadings, together with interest on said amount for the time indicated in the aforesaid opinion of this court, if the plaintiff shall elect to accept such directed judgment within ten days from the filing of the remittitur in the court below, otherwise the cause will stand for new trial as heretofore remanded.

It is further ordered that the appellee Parks be adjudged to pay the costs of the proceedings in this court.

Judgment directed.

RIO GRANDE EXTENSION COMPANY v. COBY.

Filed April 1, 1884.

TIME CHECKS, ACTION ON BY ASSIGNEE.—A written acknowledgment of indebtedness in the form of a time check, as follows:

COLORADO SPRINGS, COL., July 17, 1880.

[Time check. Not negotiable. Payable on regular pay day.]

Paymaster Rio Grande Extension Company:

Due Thos. Flinn, for labor in month of July, 188—, as laboror, twelve days at $1.25 per day $15 00

Deduct for board 3 05

Balance due $11 95

Approved, F. T. GRISWOLD. T. S. BLACKBURN, Foreman.

Is an assignable chose in action, on which an action may be maintained by the assignee, against the company, without an acceptance thereof by it, after proof of the agency of the maker.

ACTION IN JUSTICE'S COURT.—Whether an action in the justice's court be with or without written pleadings, the facts essential to constitute a cause of action must be given in evidence, unless such evidence be waived by the conduct of the defendant, or by the averments or admissions of the answer.

APPEAL from a judgment of the county court of El Paso county, entered in favor of the plaintiff. The opinion states the facts.

William Harrison, *L. M. Cuthbert* and *L. K. Bass*, for the appellant.

J. B. Cochran, for the appellee.

HELM, J. This action was brought against the Extension Company by appellee as assignee and owner of five several instruments of writing known as time checks. The checks and also certain separate orders relating thereto, were received in evidence over the objections of appellant.

There is no claim or proof that these orders were ever presented to or accepted by the company; the judgment, therefore, cannot rest upon them, as no liability on its part thereunder was shown. It must be sustained, if at all, exclusively by the time checks. They are alike in form, and the following sample is all that need be given here:

COLORADO SPRINGS, COL., July 17, 1880.

[Time check. Not negotiable. Payable on regular pay day.]

Paymaster Rio Grande Extension Company:

Due Thos. Flinn for labor in month of July, 188—, as laborer, twelve days at $1.25 per day	$15 00
Deduct for board	3 05
Balance due	$11 95

Approved, T. S. BLACKBURN,
F. T. GRISWOLD. Foreman.

[Indorsements:] His
THOS. (X) FLINN.
Mark.

Witness: E. W. ROSENBERG.

These checks purport to be written acknowledgments of indebtedness executed upon a settlement with the laborers to whom they were given. They are apparently made for the information and guidance of the paymaster of the company; and therefore we might perhaps infer that they were intended to represent obligations of the company.

Each acknowledges a definite sum of money to be due from some one to a payee named therein, and is payable at a time certain; were there no restricting words, they would therefore be clearly negotiable under our laws: Gen. Stats., chap. 9. The indorsement of the payee's name upon the same is the proper mode of transferring the ownership of such instruments. But the words "not negotiable" appear written or printed across the end of these checks. It is unnecessary for us to consider whether the maker has power to take away by such declaration the attributes of negotiability bestowed upon the instruments by statute; for in the first place they still remain assignable thereunder; and, second, they

are choses in action and as such the ownership might be transferred by assignment independent of statute.

Under our practice (see section 3 of the code of civil procedure) the equitable rule relating thereto prevails, and the action should be in the name of the purchaser and assignee, because he is the owner and real party in interest. The principal effect of destroying the negotiability of these instruments is simply to render them subject in suit by the assignee to all defenses existing prior to notice of the assignment that might have been interposed to an action by the original payee: Pomeroy's Remedies and Remedial Rights, sec. 157; Combs v. Chandler, 33 Ohio St. 178; Moore v. Metropolitan Bk., 55 N. Y. 41; 1 Parsons on Contracts, 227.

Objection is made that no acceptance of the time checks by the company was proven; but if a recovery can be sustained upon them at all, it is because they are acknowledgments of indebtedness made by the company itself; they are more in the nature of due bills than orders or bills of exchange, and no acceptance is necessary; this would be equally true could they be regarded as the drafts of one agent of the company upon another agent; such drafts are analogous to the case where an individual draws upon himself, and may be treated either as accepted bills or as promissory notes: 1 Daniel's Neg. Insts., sec. 424.

The word "approved" over the signature of one Griswold appears written thereon; it may be that Griswold was an agent of the company and that his approval was evidence to its paymaster of the justice of the debt, and genuineness of the time check; upon this subject we are not enlightened by the record; but this supposition, if true, only recognizes a private arrangement or regulation of the company, for its own convenience and protection, and in no way changes the character of the instrument so far as third parties are concerned.

There is, however, a fatal objection to the recovery had in the court below. The action was originally brought before a justice of the peace, and was tried in the county court on appeal. There are, therefore, no written pleadings. No evidence was offered by the defendant, and hence we are not advised of its defenses except as they may be learned from the objections interposed at the trial and argued upon this appeal. From these sources it appears that the agency of the drawer of the time checks was not admitted. It devolved upon plaintiff in making his *prima facie* case to offer some proof upon this point. He introduced none whatever. He did not even show that the checks were ever presented to the defendant for payment. He simply offered them in evidence, together with the orders above mentioned, and rested. He might, perhaps, be excused under section 1949, general statutes, from establishing the genuineness of the signature of the maker, but some slight evidence that Blackburn was an agent of the company, authorized to execute such instruments, was indispensable: Angell and Ames on Corps., sec. 283; First Nat'l Bank v. Hogan, 47 Mo. 473; Northern Cent. R'y

Co. v. Bastian, 15 Md. 501; Partridge v. Badger, 25 Barb. 171; Chapman et al. v. Chicago & N. W. R'y Co., 26 Wis. 303; Abbott's Trial Evidence, p. 40 and notes.

Had the action been commenced in a court of record, the complaint would have averred the liability of defendant in appropriate terms. It might, perhaps, have been sufficient even though there was no special allegation of agency; but the absence of such averment would be overlooked simply because corporations can only act by agents, and in law the act of the agent is that of the principal. The liability of the principal could hardly be established without some proof of the agency.

Whether the proceedings be with or without written pleadings, the facts essential to constitute a cause of action must be given in evidence; provided, of course, that such evidence be not waived by the conduct of the defendant, or by averment or admission in his answer.

As already intimated, very slight proof, in cases like this, on the part of plaintiff, would be sufficient to raise a presumption of agency, and cast upon the defendant the burden of showing that no such relation existed between it and the party professing to act in its behalf. This rule is based upon the fact that knowledge on the subject is fully possessed by the defendant, and perhaps difficult of attainment by plaintiff.

The motion for a nonsuit should have been allowed.

The judgment will be reversed and the cause remanded for a new trial.

Reversed.

SNYDER *v.* VOORHIES, Executrix, etc.

Filed April 1, 1884.

ACTION FOR CANCELLATION—NECESSARY PARTIES.—In an action for the cancellation of a deed, alleged to have been fraudulently obtained by the grantee during his lifetime, the heirs and devisees of the deceased grantee are necessary parties.

APPEAL from a judgment of the district court for Pueblo county, entered in favor of the defendant. The opinion states the facts.

E. J. Bennett and *G. Q. Richmond*, for the appellant.

J. W. Horner and *Patton & Urmy*, for the appellee.

STONE, J. The complaint of the appellant, as plaintiff in the court below, alleged that her husband, being indebted to James L. Voorhies, the husband of appellee, the defendant below, gave his promissory note therefor, payable to Flora L. Voorhies, the said defendant; that afterward, for the purpose of discharging said indebtedness, the plaintiff executed a deed conveying certain land lying in the county of Pueblo, to the said James L. Voorhies, and deposited the said deed as an escrow with one M. G. Bradford, to be delivered to the said grantee upon condition that the note aforesaid should be surrendered and delivered to said depositary; that

subsequently the said Bradford offered to deliver the deed to the said grantee and his wife, the defendant, upon the condition aforesaid, but that both said grantee and defendant refused to comply with said condition, and deliver up the note; that afterward, in the absence of said Bradford from his house, the said grantee went to said house, and, upon pretense of examining said deed, obtained the same from the wife of Bradford, and without the knowledge or consent of said Bradford, or of the plaintiff, carried the deed away and had the same recorded fraudulently and in violation of the condition of its delivery, etc. That the said note has never been delivered up nor canceled, the said land has never been paid for, nor has there ever been any consideration for said deed. That neither the said James L. Voorhies nor his said wife, the defendant, has ever owned or been in possession of said land, but that the plaintiff is now and has been in continuous possession of said land and the ownership in fee thereof. That subsequent to the recording of the deed as aforesaid, the said James L. Voorhies died, leaving a will by which the said Flora, the defendant, was appointed the sole executrix thereof; that said will was probated in the county of Onondaga, in the state of New York, and said defendant thereupon qualified as such executrix, and entered upon the duties thereof. That the said deed so fraudulently obtained and recorded as aforesaid is a cloud upon the title of the said lands of the plaintiff, and the complaint therefore prays that the same be adjudged fraudulent and void; that it be set aside, canceled and expunged from the records, and for general relief.

This complaint was demurred to by defendant, the demurrer sustained, and the plaintiff appeals to this court, assigning for error the ruling of the court below in sustaining the demurrer and rendering judgment thereon.

The principal question raised by the demurrer, and the only one we will pass upon under the assignments of error, is whether the proper and necessary parties are made defendants in the action.

On the part of the appellant, it is insisted that since there was no valid delivery of the deed, no interest in the premises passed by the conveyance to the decedent in his lifetime, and hence neither his heirs nor devisees have any interest to be affected by the decree prayed for in this action.

While it is true that a deed delivered wrongfully and fraudulently, or without authority, and contrary to the conditions of its delivery, as averred in this complaint, like an undelivered deed, passes no estate or interest thereby, yet the averments of the complaint in this case are facts to be established upon trial, and while these averments are by the demurrer admitted to be true, as against the sole defendant sued as executrix, yet they are not admitted as against any one not a party to the action.

Taking the complaint as true, the deed in question, having been properly executed, by a competent grantor, and upon a sufficient consideration, to a competent grantee, would, upon a good delivery,

operate to pass the estate therein described, and the heirs or devisees of the decedent grantee dying seized of the premises, would be the real parties in interest to be affected by a judgment or decree in this action. Their possible interest cannot be admitted away by the executrix. Such heirs or devisees in whom the estate would be vested, in case the conveyance were valid, are entitled to their day in court, and to have an opportunity to contest the averments of the complaint in the action. In real actions or one like this, in which the title to realty is affected, it is as important to the parties plaintiff as to parties defendant to have the proper and necessary parties before the court in order that they may be bound by the judgment.

We think there was no error in the ruling and judgment of the court in sustaining the demurrer upon the ground of a defect of proper parties defendant, and the judgment will be accordingly affirmed.

Judgment affirmed.

BROWN *v.* CITY OF DENVER ET AL.

Filed April 1, 1884.

THE ACT OF APRIL 6, 1877, entitled "An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereof, into one act, and to revise and amend the same," is not unconstitutional as being in contravention of the provisions of the constitution respecting special legislation.

SPECIAL LEGISLATION—LEGISLATIVE DISCRETION.—Where the constitution, after enumerating certain subjects on which special legislation is prohibited, provides that "in all other cases where a general law can be made applicable no special law shall be enacted," the question whether a subject not enumerated can be provided for by a general law is one of legislative discretion, and not for the courts.

DUE PROCESS OF LAW—NOTICE.—Whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise, at some stage of it and before the property is taken, or the charge becomes absolute against either the owner or his property, an opportunity to be heard must be given; otherwise such proceeding is without due process of law.

THE SAME—SIDEWALK ORDINANCE OF DENVER.—Tested by the above rules, the sidewalk ordinance passed by the city council of Denver, on March 17, 1881, is void, as furnishing the owner no notice of the assessment and no opportunity to be heard thereon.

ERROR to the district court of Arapahoe county. The opinion states the facts.

J. H. Brown, for the plaintiff in error.

Stallcup, Dawson, Luthe and Shaffroth, for the defendant in error.

BECK, C. J. This was a proceeding instituted in the district court of Arapahoe county to enjoin the city of Denver and its clerk from certifying to the county clerk and recorder of said county certificates issued by the city engineer to the Denver Sidewalk and Paving Company, certifying that said company had constructed in accordance with its contract with said city and with the sidewalk ordinance thereof, a plank sidewalk on Broadway street in said city, immediately in front of and abutting upon the lots of the plaintiff, the said lots being duly described in the complaint.

The complaint prayed that a writ of injunction be issued, forever enjoining the city and its clerk from certifying the certificates to the county clerk and recorder, and that the same be delivered up to be canceled as a cloud upon the title of plaintiff's lots, and for such other and further relief as to the court should seem proper.

A demurrer was interposed to the complaint, assigning as ground thereof that it did not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and the plaintiff, electing to stand by her complaint, gave judgment that the defendant go hence without day.

The ordinance referred to in the complaint is known as the "sidewalk ordinance," and was passed by the city council of the city of Denver on or about the 17th of March, 1881, to make provision for and require the construction and repair of sidewalks within the corporate limits of the city. It requires the owners of lots abutting upon streets laid out, improved and in common use by foot travelers, to construct, at their own expense, sidewalks of the kind described by the ordinance. By its provisions the publication of the ordinance was to give notice to the lot-owners to construct the required sidewalks within sixty days thereafter, the kind of materials, manner of construction, dimensions and other matters of description and detail, for the sidewalks required to be constructed in different portions of the city being specified in the ordinance.

Provision was made for awarding a contract for one year by the city to the lowest responsible bidder for the construction and repair of sidewalks, under the ordinance and under the direction of the city council. The grading was to be done by the city, and if the owners of property failed to construct the walks within the prescribed time, the contractor was to proceed and build the same, and upon completion thereof the city engineer was required to inspect the work, and if found to be done in conformity with the ordinance, he was authorized to issue certificates to the contractor, which would state the number of linear feet constructed, the number and description of the lots and blocks before which the same was constructed, and the amount due the contractor under the contract for the portion fronting upon each lot.

To this sum was to be added fifty cents for each lot of twenty-five feet frontage, as payment for furnishing grades, inspections and other services by the city engineer.

These certificates were to be presented to the city clerk, who was required to draw a warrant in favor of the contractor upon the "sidewalk fund" for the amount called for.

The ordinance required the city clerk to retain the certificates for a period of thirty days, to afford the owners of such property an opportunity to repay the amounts due upon the lots so improved; if repayment was not made within that time, he was directed to certify the certificates to the county clerk and recorder of Arapahoe county, who was required to place the respective amounts named in the certificates, together with ten per centum penalty thereon to defray the

cost of collection, upon the tax-list of the current year, as a special assessment against each of the lots, to be collected as general city taxes are collected.

The foregoing provisions of the ordinance are warranted by an act of the legislature, approved April 6, 1877, entitled "An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereto, into one act, and to revise and amend the same."

Two principal objections are raised as to the validity of the ordinance, one being that the statute under which it was enacted is in contravention of the state constitution, it being a special law, therefore void; the other, that the provisions of the ordinance are in contravention of both the state constitution and the constitution of the United States, in not affording the owners of the property to be charged with the expense of the improvements provided for an opportunity to be heard in respect to the same, before such assessments became fixed charges against their property.

In Palmer v. Way et al., 6 Col. 106, we considered the question whether, under our constitution, the legislature could authorize the city council, by ordinance, to impose upon the owners of lots fronting upon a public street the burden of constructing sidewalks in front thereof, and making the cost of construction a charge upon the property. The conclusion arrived at was that assessments of this character could not be sustained, by virtue of the power of taxation conferred by the constitution, but might be upheld as a police regulation.

The two objections to the ordinance above mentioned were not considered in that case, and we will now proceed to consider and pass upon them.

First—Is the act of April 6, 1877, amending the city charter, in contravention of the provisions of the state constitution respecting special legislation? It was, no doubt, the intention of the framers of the constitution that cities and towns organized after its adoption should be organized under general and not special laws. This is evident from the language of section 13, article XIV: "The general assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers, and be subject to the same restrictions."

It is well known, however, that at the time of the adoption of the constitution the city of Denver and other cities and towns were acting under special charters previously granted by the territorial legislature. That it was not intended to interfere with these special charters is made apparent by section 14 of said article XIV, which is as follows: "The general assembly shall also make provision, by general law, whereby any city, town or village incorporated by any special or local laws may elect to become subject to and be governed by the general law relating to such corporations."

This section clearly indicates that if a special charter is surrendered in any case for the purpose of organizing under the general law, to be passed, it must be by the voluntary act of the corporation. The matter is left to their election. It is true that the pervading spirit of the constitution is opposed to special legislation. It is not, however, prohibitory of all special legislation, but only to such as relates to certain specified subjects, and to such other cases as general laws are applicable. Section 25, article V, enumerates the prohibited cases, and concludes as follows: "In all other cases where a general law can be made applicable, no special law shall be enacted."

This section is similar to section 53, article IV, of the Missouri constitution of 1875, which follows the enumeration of cases wherein special laws are prohibited, with the declaration: "In all other cases where a general law can be made applicable, no local or special law shall be enacted." But the latter section goes further, and declares that whether a general law can be made applicable in any case shall be a judicial question.

Prior to this constitutional provision, the courts of Missouri had held the question to be one for the exercise of legislative discretion, the exercise of which would not be interfered with by the courts. Since our constitution does not make the question a judicial one, the Missouri precedents are in point.

In the case of The State, ex rel. Henderson, v. The County Court of Boone County, 50 Mo. 317, the court says: "But who is to decide when a general or a special law will answer the best purpose? It strikes me that the rule in reference to general or special laws is laid down as a guide for the legislature, and the legislature is to judge of the necessity of the particular case. The legislature is quite as able to do this as the courts. The legislature must, in the first instance, exercise their discretion as to the necessity of a special instead of a general act. How can the courts control that discretion? If a discretion be conceded at all, in my judgment the courts have no right to control it. It is agreed that there is no discretion in regard to the passage of certain enumerated laws. They are inhibited by the letter of the constitution. When the legislature undertakes to pass these inhibited laws, it is the plain duty of the courts to declare them unconstitutional."

The above views appear to us to be both sound and applicable to the phraseology of our constitution. They are affirmed by the subsequent cases of The State, ex rel. Robbins, v. The County Court of New Madrid, 51 Mo. 83, and Hall v. Bray, Id. 288.

Similar views upon like constitutional provisions are announced in The State of Kansas, ex rel. Johnson, v. Hitchcock, 1 Kansas, 178, and Gentile v. The State of Indiana, 409.

Whether a special city charter can be amended by a general law, applicable to the whole state, so as to meet the necessities of a particular case, may be a close question, or such an amendment may perhaps be impossible.

Certainly the first body to pass upon that questic
ture. If a general law could not for any reason be
to the case, then a special law is authorized by
itself, and, with the authorities cited, we are dispo
the decision of the question is for the legislature
courts. Had the intention been to make it a jud
should have been so expressed in the constitution.
attempt by the legislature to evade the constitu
against special legislation should be promptly
courts.

Second—Is that portion of the ordinance, the v
questioned by this proceeding, in contravention of
the United States and of the state of Colorado?
provisions alleged to be violated are sectio
of the amendments to the constitution of t
and section 25, article II, of the constitution
former provides: "Nor shall any state dep
life, liberty or property without due process
that "no person shall be deprived of life, liber
out due process of law." Similar provisions a
state constitutions. They have been elaborate
sidered by the ablest courts of the country, i
court of the United States. The conclusions
upon questions of the nature involved in this c
sary, therefore, to state the result of the adjuc

The doctrine of the authorities is that whe
deprive a person of his property, or to creat
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owner must have notice of the proceeding, a
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charge. It matters not what the character of
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the property is taken or the charge becomes
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wrongs and errors which may have been co
Otherwise the constitutional guarantees abo

Learned dissertations upon the meani
process of law," have been written by jud
as applicable to summary proceedings of
sideration, the meaning is comprehende
graph. If the law authorizing the procee
to the owner of the property to be affec
portunity to appear at a specified time or
tribunal competent to administer prope
may be heard concerning the correctness
made conclusive, the constitutional requi

But when the validity of a law or ord
the ground that it authorizes the taking

notice or hearing, the objection is not obviated by proof that a hearing has been had as a matter of favor in the case.

Nor does it satisfy the constitutional requirements that the assessment is fair and just.

A valid assessment cannot be made under an invalid law or ordinance, and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions. This is the doctrine of the following cases, and many others might be cited to the same effect, but reference to them will be found in the cases cited: Stewart v. Palmer, 74 N. Y. 183; Thomas v. Gain, 35 Mich. 155; Davidson v. New Orleans, 96 U. S. 97; County of San Mateo v. Southern Pacific Railroad Company, 8 Saw. 238.

Testing the "sidewalk ordinance" by the foregoing principles, it is found to be defective, both as to matters of notice and hearing.

The only notice given the owner of property is a notice to construct a sidewalk of a certain kind and dimensions in front of his property, within a specified time, or that the city will cause it to be constructed at his expense; and that if the cost of construction is not repaid within another specified time, the amount, with a certain penalty added, will be placed on the tax-roll as a special assessment against his property, and collected in the same manner as general city taxes are collected.

The notice given to build the sidewalk, or that the city will cause it to be built at the owner's expense, is not equivalent to the notice referred to in the authorities and contemplated by the constitution. It furnishes no information of the amount of the assessment that will be made, nor does it designate a time, place or tribunal at or before which a hearing may be had.

No such opportunity is afforded at any stage of the proceedings, but the expense of constructing the sidewalk is made an absolute charge against his property, upon which it may be sold to satisfy the same.

Until the walk is built and a certificate therefor issued to the contractor, the owner cannot know what grounds of complaint he may have. The cost of grading may be included; the lumber or materials may not be of the quality and kind required or the walk may not be made in conformity with the requirements of the ordinance.

In this respect the ordinance is clearly defective. In so far, therefore, as the ordinance provides for making the cost of construction a special assessment against the property improved, and for the manner of collecting the same without notice or hearing, we are of opinion that it is in conflict with the state and federal constitutions, and for this reason invalid.

The demurrer to the complaint should have been overruled.

The judgment must be reversed and the cause remanded.

HELM, J. I concur with the majority of the court in the reasoning and conclusion upon the latter branch of this case, and, there-

fore, in the reversal thereof. Upon the subject of local and special legislation, I am not at present prepared to accept all the views expressed in the opinion.

EXCHANGE BANK OF DENVER *v.* FORD.

Filed April 1, 1884.

OBLIGATION, MEANING OF.—The word "obligation," as used in section 1834 of the general statutes, providing that "all joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants"; and in section 14 of the codeof civil procedure, providing that "all persons jointly or severally liable upon the same obligation or instrument, * * * may all or any of them be included in the same action," is confined to contracts in writing, and does not include oral contracts.

COPARTNERSHIP DEBT, MERGER OF IN JUDGMENT AGAINST ONE PARTNER.—The plaintiff sued the defendant in error and several others on a partnership note. The defendant in error's co-defendants defaulted, and judgment was rendered against them. Afterward, and before the trial against the defendant in error, the plaintiff voluntarily amended his complaint, so as to abandon the note and rest the action entirely upon the original indebtedness represented thereby. The trial was had more than two years after the default judgment was entered, and after several terms of the court had intervened. *Held*, that such default judgment was a bar to the continuance of the action against the defendant in error, and should not be set aside at the request of the plaintiff, and that the court had authority to render the same under section 146 of the code of civil procedure.

JUDGMENTS REGULARLY ENTERED ARE BEYOND THE COURT'S CONTROL after the expiration of the term during which they were rendered.

ERROR to the district court of Arapahoe county. The opinion states the facts.

Willard, Teller, Morrison & Fillins, for the plaintiff in error.

M. B. Carpenter, for the defendant in error.

HELM, J. This action was brought to collect a partnership debt. At common law, partners are held to be jointly liable for the firm debts. While each is bound for the whole indebtedness, and while a judgment might be recovered under some circumstances, in an action at law against one of the partners, yet the liability is regarded as joint only, and not as joint and several.

At common law, therefore, the doctrine of merger contended for by defendant in error, who was defendant below, would undoubtedly govern this case, and he could plead the judgment rendered against his co-defendants in bar of the proceedings against him for the same demand.

A desire to avoid the hardship resulting from the application of this common-law rule to the case at bar, coupled with the general importance of the subject, has led us to give the questions presented more than the usual degree of care and consideration.

The suit was first brought against Ford and others upon a promissory note; Ford's co-defendants defaulted, and judgment was rendered against them; afterward, and before the trial against Ford, plaintiff voluntarily amended its complaint so as to abandon the note, and rest the action entirely upon the original indebtedness represented thereby. The action was therefore tried against Ford upon an unwritten contract. At the trial, the former judgment

against his co-defendants was regarded by the court as a merger of the entire cause of action, and upon this ground plaintiff's right to recover against Ford was denied. A number of objections to the position taken by the court below are presented by plaintiff in error, and are thoroughly argued by counsel for both parties.

As at present advised, we are inclined to believe that under our practice the doctrine of merger might be held inapplicable to the case, provided the contract is one of those which are by statute declared to be several as well as joint.

Bearing directly upon this subject, we have two provisions, viz.: Section 1834 of the general statutes which reads as follows: "All joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants," and section 14 of our code of procedure, to wit: "All persons jointly or severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes and sureties on the same or separate instruments, may all or any of them be included in the same action, at the option of the plaintiff."

The principal question for consideration, as we view the case, is, do these statutes or does either of them refer to and include joint *oral* contracts; or was it the intention to confine their operation in this respect to joint specialties and joint simple contracts which are evidenced by writing?

Of course no argument is necessary to show that the words "covenants" and "instruments" do not cover unwritten contracts; our inquiry is, therefore, narrowed to a discovery of the true import of the word "obligation," as used in these statutes. This word has two well-defined legal meanings; one is where it is a name given to the contract itself; the other includes those cases where it refers to the *duty* imposed upon a person in connection with his contract to perform it, or to a liability arising from his contract or from his actionable tortious conduct.

The first class formerly covered only sealed instruments wherein the obligor was bound, under a penalty, to do a certain thing; but more recently it has been frequently extended to all written contracts.

Under the second class Chief Justice Marshall, in Sturges v. Crowninshield, 11 Wheat. 193, thus defines one meaning of the word: "A contract is an agreement wherein a party undertakes to do or not to do a particular thing; the law binds him to perform his engagement, and this is the obligation of the contract."

In illustration of another meaning of the word under this class, we quote the language of Mr. Justice Smith, in Crandall v. Bryan, 15 How. Pr. 56. Speaking of a certain statute, and referring to the word obligation used therein, he says that it includes all cases "where the action would not rest upon the contract, but would rest upon the legal duty; where the law casts a liability upon a man guilty of fraud, for which an action will lie; whenever fraud and damage give a right of action, the law casts a liability and creates an obligation."

The word is used in statutes as well as in text-books and decisions with these different meanings; and the significance to be given it in each statute must be gathered from the purpose and the context of the enactment. The third, and perhaps most uncommon legal use of the word is found in a New York law. It reads: "Where the defendant has been guilty of fraud in contracting the debt or incurring the obligation for which the action is brought," etc.: 15 How. 56, *supra*.

We are hardly prepared to quarrel with the court's interpretation, above given, of this statute; it seems reasonably certain that the legislature mean, when they speak of the obligation being "incurred," a liability affixed by law to the fraudulent conduct mentioned. Contracts are either expressly made by the parties or created by implication of law; it can hardly be said that they are ever incurred; the liability is incurred when the contract is violated, or the fraud committed; and when the word "obligation" is used with reference to this liability, the obligation may also be said to be incurred.

In Hargrave et al., Admrs., v. Cooke, 15 Ga., Lampkin, J, says: "In Comyns's Digest, obligation is defined to be a deed, whereby a man binds himself under a penalty to do a certain thing. But in its more popular sense, the term obligation signifies the instrument of writing by which the contract is witnessed."

So also in Illinois, the expression "obligations and covenants," in a statute exactly similar to our said section 1834, was construed to include a promissory note, and the guarantors thereon: Gage v. National Bank, 79 Ill. 62.

It has recently been held doubtful if this Illinois statute has any application to partnership contracts: Coats v. Preston et al., 105 Ill. 473. But no case has been cited, and we have not succeeded in finding one, which holds, that this word when used in a statute with reference to the contract itself, and not the duty or liability arising thereon, includes oral agreements. Brainard v. Jones et al., 11 How. Pr. 569, seems to hold this way and has been mentioned by counsel as doing so; but the action there was upon a replevin bond, and it was unnecessary to determine this question; besides in Strong v. Wheaton, 38 Barb. 616, this case is discussed, and no such interpretation of the word deduced therefrom.

As the result of our investigation we feel justified in stating the conclusion that whenever the word obligation is used in a statute as the name of a contract, as it is in the sections now under consideration, an agreement in writing, sealed or unsealed, is referred to; where in a legislative provision, it is used with reference to legal duty or liability, such duty or liability may arise from an oral or written contract, or in some instances from actionable tortious conduct.

Counsel for defendant in error, in discussing section 14 of the code, calls our attention to the fact that throughout that instrument wherever a general indebtedness or liability is mentioned, other expressions are used, as "contract or transaction," "alleged liability,"

"jointly indebted," "transaction," "contract sealed or parol," "contract express or implied," "debts or liabilities," etc. See sections 19, 21, 43, 58, 71, 91, 94, etc. This would seem to indicate that the legislature had in mind the meaning of the word obligation we contend for, and confined it thereto in section 14.

We are not, however, entirely without direct authority in support of our conclusion that the word does not cover oral contracts.

The New York statute is similar to our said section 14 in this respect; the supreme court of that state, in construing the same, uses the following language: "The word obligation must be confined to its legal meaning, and it does not embrace a cause of action not evidenced by writing": Strong v. Wheaton, *supra*. See also Barker v. Casserly, 16 Barb. 184.

Mr. Pomeroy considers at length the statutory provisions existing in many of the states that "persons severally liable upon the same obligation or instrument, including parties to bills of exchange and promissory notes," may all or any of them be included in the same action at the option of the plaintiff."

He says with reference thereto: "In the third place, there is no limit to the kind of contract from which this several liability may arise, *provided it is in writing*. The broad language of the clause includes any and every species of written contract": Pomeroy's Remedies and Remedial Rights, sec. 404.

This is of course not binding authority; it is the view, however, of one of our ablest legal text writers. It is argued that giving this restrictive meaning to the word "obligation" in said section 14 of the code renders the word "instrument" entirely superfluous; that "instrument" includes all written contracts, sealed as well as simple; and that unless we assent to the proposition that "obligation" includes oral contracts, we violate the rule requiring effect to be given, if possible, to all the language used. But the use of the word obligation under the common law was originally confined to sealed instruments of a certain kind; and courts have not always given it the significance we have adopted.

The supreme court of South Carolina held that the statutory phrase, "bonds or other obligations," did not include promissory notes; and that it might be construed as though it read "bonds or other contracts under seal": Executors of Rippon v. Executors of Townsend, 1 Bay, 445. In Gale v. Myers, 4 Houston, 546, the supreme court of Delaware declines to consider promissory notes as "covered by the statutory expression an obligation or written contract."

There are doubtless other cases like these, and in them we discover a reason for the legislature's using both of these words, and also expressly declaring that "bills of exchange and promissory notes" are included thereby. Owing to the doubts surrounding the subject, inspired by an abundance of caution the legislature saw fit to use both words, and also to add the explanatory phrase; in so doing, we think, as was said by the supreme court of Georgia concerning a

similar expression, "they were guilty of no vain repetition": Hargrave v. Cooke, *supra*.

But the doctrine that in equity, without statutory provision, partnership debts are both joint and several, is claimed by defendant in error to cover this case. This is purely a legal action; it is in the nature of assumpsit; no cause of action in equity is stated, and no equitable relief is demanded by either party. The code abolishes forms of action merely including the difference in this respect between actions at law and suits in equity, and provides a single method of pleading; it does not undertake to do away with the distinction between legal and equitable causes of action; it does not rescind the rule that the allegation and the proof must correspond; nor the correlative principle, that the judgment must follow the pleadings. To procure standing in a court of equity, and obtain equitable relief, the pleader must still state an equitable cause of action or defense.

He cannot now, any more than he could before the code was adopted, obtain the benefit in a court of law of principles like the one here involved, which theretofore applied exclusively to chancery proceedings.

These remarks do not cover instances where some equitable principle has been by express statutory language or by clear implication incorporated into procedure at law. Nor do we assert that no case may ever arise wherein a party may have the benefit of a defense not presented by the pleadings, or waive objection to a variance between the pleadings and the proof and judgment. We are of the opinion that the foregoing equity doctrine does not apply to this case.

The last position taken by counsel for plaintiff in error which we shall consider is that the court erred at the trial in refusing to set aside the judgment previously taken against Ford's codefendants. The judgment which plaintiff moved to vacate was rendered over two years prior to this trial; a number of terms of the court had passed since the one at which it was entered; it was in plaintiff's favor and was given upon its application. The motion to vacate came from plaintiff and was not based upon any want or defect of jurisdiction save as hereinafter mentioned; no fraud or collusion and no irregular or improper conduct on the part of the defendants in procuring the judgment to be entered were charged.

Defendant Ford pleaded this judgment in bar in his answer to the amended complaint. To this answer no reply, demurrer or motion was filed. The application to vacate was not interposed until the trial was in progress, and until plaintiff had rested, and defendant had offered the judgment in evidence in his defense. The motion to vacate seems to rest mainly upon the ground that the judgment was rendered after jurisdiction had been divested by the filing of the petition and bond for removal to the federal court, and was, therefore, void. The record itself does not bear out plaintiff's assertion in this respect. It appears that the judgment was given and the petition and bond were filed on the same day; but the record

entry of the former precedes that of the latter, and we infer, therefore, that this was the order in which the acts took place.

It cannot be said that the judgment in question is void, even if we admit the correctness of counsel's position, that under the view we adopt as to the word obligation, judgment on unwritten joint contracts against one joint defendant, without a determination of the cause as to the others, is irregular and void. At the time this judgment was pronounced the action was upon the promissory note. The liability upon this instrument was clearly rendered several by section 1834, *ante*. Under section 146 of the code we are of opinion that as the case then stood judgment might properly be taken against one defendant and the cause continue as to another.

The abandonment of the promissory note and subsequent procedure upon the original indebtedness was, as already remarked, plaintiff's own voluntary act. Plaintiff should have interposed its application for relief from the former judgment prior to the trial against Ford. But it is doubtful if this application would have availed anything had it then been made upon any ground that could truthfully have been stated. Courts have very limited discretionary power, except for a few well-known causes, to vacate or amend their judgments at a term subsequent to the rendition thereof.

No authorities need be cited to the proposition that in the absence of statute, judgments regularly entered are beyond the court's control after the term has expired.

A judgment procured by fraud, or by irregular or improper conduct of the successful party, or one entered without jurisdiction of the person against whom it is given, can hardly be said to be regularly entered.

These, therefore, constitute grounds on which, upon proper showing, courts sometimes presume to act at a subsequent time.

Section 75 of the code provides for relief from a judgment taken against a party through "mistake, inadvertence, surprise or excusable neglect." But this relief is only granted upon terms, and the showing therefore must be made in the manner pointed out by statute: if in vacation, it must be within five months after adjournment, and satisfactory reasons must be given for not applying during the term.

Plaintiff in error, as clearly appears from what we have said, was not in a position to secure the advantage of any one of the foregoing reasons or grounds in support of its motion.

We do not think the court erred in overruling the same.

The judgment must be affirmed.

SUPREME COURT OF NEVADA.

STATE, ex rel. BARNETT, *v.* FIFTH DISTRICT COURT.

Filed, March 24, 1884.

ADJUDICATION OF INSOLVENCY, EFFECT ON PENDING ACTIONS.—An order of the district court adjudging the defendant in a pending action an insolvent debtor and staying all proceedings against him, does not deprive the court in which such action is pending of jurisdiction, so as to make its subsequent action void.

APPEAL FROM JUSTICE'S COURT—EFFECT OF DISMISSAL—DAMAGES FOR FRIVOLOUS APPEALS. The dismissal of an appeal from the justice's court divests the district court of authority to proceed further, except to include costs on the dismissal. It cannot impose damages for frivolous appeals, nor directly, and without trial, reverse or affirm judgments brought by appeal from the justice's court.

REVIEW UPON CERTIORARI IS CONFINED to questions of jurisdiction.

APPLICATION for a writ of certiorari. The opinion states the facts.

S. D. King, for the relator.

D. S. Truman, for the respondent.

BELKNAP, J. Brennan recovered judgment against Raphael in the justice's court for the sum of two hundred and twenty-eight dollars and fifty cents and costs, upon a moneyed demand.

Raphael appealed to the district court. The case was called for trial upon the twenty-seventh day of July, whereupon counsel for appellant moved a stay of proceedings, upon the ground that since the appeal had been taken his client had been adjudged an insolvent, under the insolvency laws of the state, by the seventh judicial district court.

The motion was denied because of the incompetency of the evidence by which the fact was sought to have been established, the only evidence being a printed slip, presumably taken from the newspaper in which the order for the meeting of creditors was published, as provided in section 8 of the act for the relief of insolvent debtors: Stats. 1881, p. 125.

A motion to dismiss the appeal was then made and sustained, and the case dismissed.

Subsequently the court took under advisement a motion for judgment for damages and costs, and two days thereafter sustained this motion, awarding plaintiff ten per cent. of the amount of the judgment rendered by the justice as damages.

Judgment was accordingly entered dismissing the appeal, affirming the judgment of the justice, with the damages sustained by reason of the appeal and costs.

Certiorari is brought for the purpose of reviewing these proceedings.

First—The relator relies upon the order staying proceeding as divesting the district court of jurisdiction.

The cases of Tufts v. Manlove, 14 Cal. 47, and Cerf v. Oakes, 59 Id. 132, are referred to as sustaining this position.

In these cases the estates of the insolvents were seized under process issued at the suits of creditors whose claims were provable on

the insolvency proceedings. The courts having jurisdiction of the proceeding acquired control of the property of the insolvents, and it was their duty to protect the assets, so that distribution could be made as required by law. In the former case it was held that notice of the order staying proceedings either to the officer or creditor was unnecessary; that the effect of the order was from the making of it, and that the proceeding was in this respect more in the nature of a proceeding *in rem* than *in personam*. "If this were not so," said the court, "these proceedings might be made the means of the greatest frauds, and the statute would wholly fail in its purpose of distributing the insolvent's property, and the construction would defeat the power to allot anything to the petitioner, for if the personal service were necessary to give effect to the order, a creditor, or a few creditors, might keep out of the way of service and have the others restrained by service, and then those not served might come in and sweep all of the property": 14 Cal. 52. The general principle here acted upon affords no foundation for the idea that the proceedings in insolvency deprived the district court of jurisdiction. The subject-matter and the parties were within its jurisdiction, and the order staying proceedings did not divest it of authority to proceed so as to make subsequent action void.

The object of the provision requiring that all proceedings against the debtor shall be stayed is to preserve the estate of the insolvent for the proportionate distribution among his creditors and to protect him against needless lawsuits. The court in which the insolvency proceedings are instituted has control of the estate, and will protect it against creditors seeking to enforce the collection of their claims in any manner calculated to interfere with the operation of the insolvency law. Litigation is, therefore, in general unnecessary except to establish disputed demands.

If controversies arises which require an appeal to the courts, the law provides, at section fifteen, that not only the assignees may sue and be sued "in everything which respects the rights and actions which may belong to the insolvent or which may concern the mass of the creditors," but that "all suits brought against the insolvent prior to his surrender of the property, before the courts of other counties, shall be transferred to the court having jurisdiction in the county in which said insolvent shall have presented his schedule, and may be continued on motion and notice against his assignee."

If the assignee or debtor allows an action brought before the institution of the proceedings to proceed to judgment without this transfer or substitution, and without informing the court in some proper way of the adjudication of insolvency or of the order staying proceedings, we see no reason why the judgment should be treated as void in the absolute sense.

The district court was not bound to take judicial notice of the proceedings of the seventh district court. If the order and adjudication had been disregarded after having been proven, the action of the court would have amounted to no more than error: Bandy v.

Ransom, 54 Cal. 88; People v. Whitney, 47 Cal. 584; Pierson v. McCahill, 23 Cal. 249.

Second—After dismissing the appeal the court affirmed the judgment rendered by the justice, with damages and costs. The appeal alone had given the court jurisdiction of the case. By dismissing it the court divested itself of authority to proceed further except to include costs on dismissal, and left the judgment of the justice in full force, save as affected by the order staying proceedings.

The review upon certiorari is confined to the question of jurisdiction, and no other matter appearing in the record has been considered. It is proper to state, however, that district courts are not authorized to impose damages for frivolous appeals, nor to directly, and without trial, reverse or affirm judgment brought by appeal from justice's courts. Such cases must be tried anew: Comp. L., sec. 1643.

The judgment, beyond that of dismissal with costs, is annulled. Costs of this proceeding to be taxed against the respondent.

HAYDON v. NICOLETTI ET AL.

Filed March 25, 1884.

PLEDGEE—BONA FIDE HOLDER—NEGOTIABLE NOTE.—A pledgee of negotiable paper as collateral security is entitled to be protected as a *bona fide* holder to the same extent as one who becomes the absolute owner, and may maintain suit thereon in his own name, as the real party in interest. The only difference between the rights of such parties, as against the maker, is that the absolute owner may recover in full, while the pledgee, if there be equities, is restricted to the extent of his advances.

PARTNERSHIP IN NOTE, EVIDENCE OF.—A negotiable note, payable to two or more persons jointly, is not evidence that it is owned in partnership; nor is the fact that such note is in the actual manual possession of one of the payees such evidence. The evidence reviewed and held not to establish a partnership in the notes in question.

ASSIGNEE OF JOINT PROMISSORY NOTE—INDORSEMENT BY ONE PAYEE.—The assignee before maturity of a negotiable promissory note, payable to the joint order of two persons not partners, indorsed by one only of the two joint payees, takes the same subject to all the equities existing in favor of the maker, the same as though it had not been indorsed by either. Such note cannot be transferred except by the joint indorsement of all the payees.

APPEAL from a judgment of the district court of the seventh judicial district, for Washoe county, entered in favor of the plaintiff, and from an order denying defendants' motion for a new trial. The opinion states the facts.

R. M. Clarke, for the appellants.

Thos. E. Haydon, for the respondent.

LEONARD, J. Defendants appeal from the judgment and order denying their motion for a new trial.

It is alleged in the complaint that on the twentieth of December, 1878, defendant Nicoletti executed to defendants T. L. Lagomarsine and A. S. Lagomarsine his promissory notes, each for nine hundred and twenty-five dollars, payable in nine and twelve months from date, and to secure payment of the same gave a mortgage on land described. These averments are not denied. It is alleged, further,

that T. L. Lagomarsine and A. S. Lagomarsine pledged and delivered the first of said notes to the Reno Savings Bank July 11, 1870, to secure a loan of two hundred and forty dollars made on said date to T. L. Lagomarsine; that on July 14, 1879, at the request of T. L. and A. S. Lagomarsine, the bank loaned to the former the further sum of seventy dollars upon an agreement that the said Nicoeltti note, before pledged, should be security therefor; that at the time of said loans T. L. Lagomarsine gave to the bank his individual notes for the same.

In their answer defendants admitted that T. L. L. borrowed the sums mentioned and gave his notes therefor; but denied that T. L. L. and A. S. L. pledged or delivered the Nicoletti note as security to the bank.

Plaintiff alleged also that T. L. L. indorsed and delivered the Nicoletti note to the bank as agent and partner of A. S. L., by indorsing his name thereon.

Defendants admitted that T. L. L. indorsed and delivered the note, but denied that he was agent or partner of A. S. L., or that he had any authority to act for, or bind the latter in the premises; denied that A. S. L. agreed to indorse, assign or deliver, as a pledge or otherwise, said note, or that he did so.

As new matter, defendants allege that Nicoletti paid the note pledged to the bank before the commencement of this action, and that T. L. and A. S. Lagomarsine, for value received, sold, assigned, indorsed and delivered the second note, due in twelve months from date, to J. C. Hampton, and that said note is due and unpaid.

These facts are undisputed, viz.: The note in question was payable to A. S. Lagomarsine and T. L. Lagomarsine, or order. In July, 1879, before maturity, T. L. Lagomarsine pledged the note as security for a loan by the bank to himself individually of two hundred and forty dollars, and a few days thereafter he obtained seventy dollars more on the same terms. A. S. Lagomarsine received no benefit from the money borrowed, and did not know of the assignment until April, 1881, when the note was sold by the sheriff under an execution issued upon a judgment in favor of the executor of Larcomb's estate.

At the time of the loan by the bank, T. L. Lagomarsine indorsed his name, and was about to indorse his brother's also, when the cashier refused to allow him to do so, saying he preferred to have the other payee indorse for himself.

T. L. L. promised to have his brother make his indorsement.

The bank received the note in this condition, as collateral, and A. S. L. never indorsed it.

Nicoletti was not notified by the bank of the assignment, and he had no knowledge thereof until April, 1881.

At the time of the execution of the notes and mortgage, by Nicoletti, it was agreed between him and T. L. L. that he might pay any of the debts of the latter in Virginia City, and receive credit thereof upon the notes. In the fall of 1879, a settlement was had between

them, and it was found that Nicoletti had paid seven hundred and eighty dollars.

This amount T. L. Lagomarsine agreed to credit on the first note, the one in question, but failed to do, for the reason that it was in possession of the bank. Another settlement was had in the fall of 1880, and it was found and agreed that Nicoletti had paid of T. L. Lagomarsine's debts four hundred and thirty dollars during that year. It was agreed that this amount should be credited on the notes, and that the first should be given up as paid. T. Lagomarsine gave Nicoletti receipts for the amount stated on the dates of settlement, but the credits were not placed upon the notes. The court finds that between the date of the note and July 11, 1879, when it was assigned to the bank, Nicoletti paid of the debts of T. L. Lagomarsine three hundred and twenty dollars, but that the bank had no notice thereof at that time or subsequently, and that after the assignment Nicoletti paid the further sum of eight hundred and ninety dollars, making in all one thousand two hundred and ten dollars, none of which was indorsed on the note or mortgage.

Special issues were submitted to the jury, and from the facts found by them and the court, the court declared as conclusions of law that the Nicoletti notes to T. L. Lagomarsine and A. S. Lagomarsine were negotiable; that they were transferred in good faith and for a valuable consideration, before maturity, as pledges to secure the payment of loans made by the bank and Hampton; that T. L. Lagomarsine was authorized, as a partner and agent of A. S. Lagomarsine, to pledge them; that the delay of A. S. Lagomarsine to assert any rights in said notes and mortgage, after he knew of their disposition by T. L. Lagomarsine, operated as a legal ratification of the transfers; that the transfer to the bank protected the bank from all equities in favor of Nicoletti, and from all payments made by him, of which the bank had no notice, to the extent of the principal and interest of the loans made by the bank to T. L. Lagomarsine; that the bank was not obliged to notify Nicoletti of the assignment in order to protect itself from any payment or other equities existing or subsequently arising in his favor against T. L. and A. S. Lagomarsine, but that said payments, beyond the bank's loans to T. L. Lagomarsine, with interest, were operative to prevent any judgment against Nicoletti, beyond the amount of such loans and interest.

A decree was entered accordingly.

The principal question to be decided is whether, under the circumstances, Nicoletti is entitled, as against plaintiff, to receive credit upon the note in suit for all or any portion of the debts of T. L. Lagomarsine, paid by him before knowledge of the assignment to the bank. For the purposes of this case, without discussing or deciding the questions, we shall concede that plaintiff acquired, by purchase of this note at sheriff's sale, all the rights that the bank acquired by the assignment and loan; that if the bank would have been protected against Nicoletti's equities, then plaintiff is. It is

admitted also that a party receiving negotiable paper as collateral security is entitled to be protected as a *bona fide* holder to the same extent as one who becomes the absolute owner, and that he may bring suit in his own name as the real party in interest: 2 Pars. on Notes and Bills, 54; Bank v. Vanderhorst, 32 N. Y. 556; Brookman v. Metcalf, 32 Id. 595; Lindsay v. Chase, 105 Mo. 253; Bonand v. Genesi, 42 Ga. 639.

The only difference between the rights of an absolute, *bona fide* owner for value and a *bona fide* holder as collateral security, as against the maker, is that the former may recover in full, and the latter, if there be equities, is restricted to the extent of his advances: 7 La. Ann. 225. The jury found, and the court adopted the finding, that T. L. Lagomarsine and A. S. Lagomarsine were "partners in the Nicoletti notes."

We do not think there was the slightest evidence sustaining such conclusion, and if we are correct, the element of partnership should not be considered in our discussion. Let us test our conclusion by the record. In the first place, in the note itself, there was nothing to indicate a partnership. It was payable to two payees named, jointly, or their order. In form and substance it was like any other negotiable note owned jointly by two or more individuals. The bank knew there was but one way to obtain the legal title to the note; but one mode of transfer according to the law merchant, and that was by the indorsement of the papers. Acting upon that knowledge, the cashier refused to permit one of the payees to indorse for the other, preferring to have the latter indorse for himself, since, as he expressed it, "the note was made jointly to T. L. Lagomarsine and his brother."

The bank evidently regarded the transfer as incomplete at that time, and trusted in the personal promise of T. L. Lagomarsine to get the indorsement of his brother to complete it.

T. L. Lagomarsine did not claim that the note was owned by the payees, in partnership, but, on the contrary, said it belonged to him, and that he had the right to indorse his brother's name. In the face of such a note, the bank knew that as to all persons but T. L. Lagomarsine, it would, at its peril, trust in such claim of ownership and representations of power; and the result was as before stated; that is to say, the note was received as the joint property of the payees, with the indorsement of one, but with the intention and expectation of getting the other.

The jury found that the two brothers were partners in farming from 1876 until some time in 1878; that they were not partners in anything except the two Nicoletti notes, or engaged in any other business together, after September 8, 1878.

The notes and mortgage were given under the following circumstances:

T. L. and A. S. Lagomarsine owned the Steamboat ranch together. In 1878, before September, T. L. L. bought his brother's interest, agreeing to pay him one thousand dollars therefor. He

paid seventy-five dollars, but was unable to pay, at that time, the balance of nine hundred and twenty-five dollars. About the same time T. L. L. sold his interest in the Truckee ranch to Louis Lagomarsine, for one thousand eight hundred and fifty dollars.

Soon after Louis sold a part of his interest to Nicoletti.

After these transactions, Nicoletti was owing Louis one thousand eight hundred and fifty dollars; Louis was owing T. L. L. one thousand eight hundred and fifty dollars, and T. L. L. was owing his brother, A. S. L., nine hundred and twenty-five dollars.

For the sake of convenience, and to save expense, it was agreed among them that Nicoletti should give his notes and mortgage to T. L. L. and A. S. L., and so settle the entire indebtedness.

We quote from the testimony of T. L. L., which shows the nature of the arrangement:

"We agreed that instead of Louis mortgaging to me and Nicoletti mortgaging to Louis, Nicoletti should make a mortgage direct to me for one thousand eight hundred and fifty dollars, which Louis owed me, and in this way settle the indebtedness to all of us. I told my brother I could not pay him the nine hundred and twenty-five dollars which I owed him at that time, but if he wanted to do so, he could have a half interest in the mortgage which Nicoletti was to make to me. He agreed to this; and so the mortgage and notes were made to my brother and myself, jointly, and our indebtedness all around settled. We were to each own one-half of the notes and mortgage."

The other parties to these transactions testified to the same effect, and there was nothing to contradict their statements.

If Nicoletti had given a note and mortgage for nine hundred and twenty-five dollars to A. S. L., and a note and mortgage for the same amount to T. L. L. in satisfaction of the entire indebtedness of all the parties, it would hardly be claimed that T. L. L. and A. S. L. would have been partners in the two notes. In that case each would have owned his own paper, and both now have a joint ownership. But a negotiable note, payable to two or more persons jointly, like the one in question, is no evidence that it is owned in partnership; nor is the fact that such note is in the actual manual possession of one of the payees such evidence. It cannot be held by all at the same time, and whoever has it in possession holds it for himself and the other payees.

Without pursuing the question further, we repeat the conclusion before expressed—that there was no evidence showing a partnership in the two notes.

Such being the case, it will not be necessary to consider the question whether one partner, by the indorsement of his own name only upon negotiable paper payable to a partnership, before maturity, so transfers it as to relieve a purchaser for value of equities existing between maker and payees.

But, in addition to the findings that the note was owned in partnership, the court concluded that, as an agent of A. S. L., T. L. L.

was authorized to pledge the note in question to the bank, and that the delay of the former to assert any rights in the same or the mortgage, after he knew of their disposition by T. L. L. to the bank, operated as a legal ratification of the transfer.

We think the evidence justifies the finding that T. L. L. was authorized to do just what he did do. He could pledge the note as collateral security, indorse his own name, but not his brother's. And that was all he did—all that the bank desired him to do.

His promise to get the indorsement of his brother was a personal obligation that was not performed, and the upshot of the whole matter is that the note was pledged without the indorsement of one of the payees, and such was its condition at the trial.

Surely A. S. L. could not, and did not, ratify anything that was not done by T. L. L.

Upon these facts, then, what were the rights of Nicoletti? The statute provides as follows: "All notes in writing, made and signed by any person, whereby he shall promise to pay to any other person, or to his order, or to the order of any other person, or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants: C. L., sec. 9.

According to the *lex mercatoria*, the title to negotiable paper payable to order passes only by indorsement and delivery: Trust Co. v. National Bank, 101 U. S. 71; Whistler v. Forster, 108 Com. R. R. 255; Daniel on Neg. Inst., sec. 780.

The statute further provides that "in the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of, or before notice of, the assignment; but this section shall not apply to a negotiable promissory note, or bill of exchange, transferred in good faith, and upon good consideration, before due": C. L., sec. 1068.

"Every action shall be prosecuted in the name of the real party in interest:" Sec. 1067.

If the bank would have been protected against the equities of Nicoletti, it is because this negotiable note, payable to order, was transferred to it in good faith, and upon good consideration, before due.

The legislature did not intend to protect non-negotiable notes against the equities existing in favor of the makers before notice of assignment, although assigned for value before maturity.

Did it intend to protect notes negotiable, payable to order, but not indorsed by the payee? If it did, it intended to overturn a well-established rule of the law merchant, recognized and enforced the world over. Such was not the intention. At the time the code was passed there was a well-established mode of transferring a negotiable promissory note payable to order, and no other was recognized, which was by indorsement. If it was assigned for value

before maturity, but not indorsed, it was subject to the equities in the hands of the assignee that it would have been in the hands of the payee. This principle has not been changed by the statute. A note like the one under consideration, not indorsed, is not "transferred in good faith": Richards v. Warring, 39 Barb. 51–54; Bush v. Lothrop, 22 N. Y. 547; Patterson v. Crawford, 12 Ind. 245; Whistler v. Forster, *supra*, 257; Trust Co. v. National Bank, *supra;* Terry v. Ellis, 16 Wis. 479; Calder v. Billington, 15 Me. 344; Savage v. King, 17 Me. 302; Hedges v. Sealy, 9 Barb. 217; Pease et al. vs. Rush et al., 2 Minn. 111.

"A promissory note made payable to order may be transferred without indorsement, so as to vest the property in it in the purchaser. Transferred in that manner, it was formerly necessary to bring the action upon it in the name of the payee; under the code it may be brought in the name of the real owner, but such a transfer does not clothe the assignee with all the rights of an indorser of negotiable paper transferred to him in the usual course of business. It gives him the title to the note, but subject to rules applicable in case of an assignment of any other chose in action. In short, a note negotiable by indorsement, but not indorsed, transferred by delivery, and a note not negotiable transferred by delivery, are equally open to every equitable defense which the maker had against it at the time of transfer, and if the payee could not have recovered at that time the assignee cannot:" Edwards on Bills and Prom. Notes, 2d ed. 270.

"The rule is settled, by an unbroken series of authorities, that the assignee of a thing in action, not negotiable, takes the interest assigned subject to all the defenses, legal and equitable, of the debtor who issued the obligation * * *. That is, when the original debtor or trustee, in whatever form his promise or obligation is made, if it is not negotiable, is sued by the assignee, the defense, legal and equitable, which he had at the time of the assignment, or at the time when notice of it was given, against the original creditor, avail to him against the substituted creditor:" 2 Pomeroy's Eq. Jur., sec. 704.

Hedges v. Sealy was decided in 1850: 9th How. Pr. R. 217. The New York code was adopted in 1848. The case was on all forms with the one hand, with this exception: The note was payable to one person, who pledged it as collateral security for money loaned, without indorsement; while in this case the note was payable to two and indorsed by one. The court said:

"Although the plaintiff took the note upon sufficient consideration, and the transfer was consummated by the actual delivery, yet the plaintiff is not a *bona fide* holder, or indorsee, and entitled as such to recover against the maker, if the proof shows that he had a good defense against it in the hands of Roberts. To entitle the plaintiff to protection from such a defense, in addition to the valuable consideration paid by him for the note, it must also appear that he is the indorsee. The pleadings disclose that it

was payable to order, and was not indorsed by the payee. In respect to the note the plaintiff is a mere assignee, and his rights are to be settled by the same rules that govern the case of an assignee of any other chose in action. The rule that the indorsee may recover where the payee may not is founded on the commercial policy of sustaining the credit of negotiable paper. The paper in question was negotiable, but it was not negotiated. It is payable to Robert Roberts or order, and he has not indorsed it. * * * A note negotiable but not indorsed, transferred by delivery, and a note not negotiable, transferred by delivery, are open to every equitable defense which the maker had against them at the time of transfer; and if the payee could not have recovered at that time the holder cannot. A promissory note, like any other personal property, can be transferred by mere delivery, so as to pass the title and the right to sue in the name of the holder. When a note is payable to order, and is found in the hands of a person not the payee, without the indorsement of the payee, the difference between such a holder and one who holds by indorsement, is that the former is not entitled to the privileges of a *bona fide* holder, while the latter is; a note payable to order passed without indorsement is not taken in the regular course of business, and is subject to the same disabilities as if it had been taken after due, but the title passes sufficiently to maintain a suit in the name of the owner:" Pease et al. v. Rush et al., 2 Minn. 111.

At the time of that decision the Minnesota code was like ours: Stats. Minn. 1849-58, p. 534. To the same effect is Terry v. Allis, 16 Wis. 479, under a statute like ours: Rev. Stats. Wis. 1858, p. 714. Beard v. Dedolph, 29 Wis. 141, supports the same doctrine, although holding also that an indorsement made after maturity of a note, assigned but not indorsed before maturity, relates back to the time of delivery, and protects the assignee against everything subsequent to the delivery. This doctrine is repudiated, however, by many well-considered cases: Clark v. Whittaker, 50 N. H. 475, and cases there cited; Lancaster Bank v. Taylor, 100 Mass. 22. See also Grimm v. Warner, 45 Iowa, 108; Seymour & Co. v. Lyman et al., 10 Ohio St. 285; McCrum v. Corby, 11 Kan. 470; Franklin v. Twogood, 18 Iowa, 515; Patterson v. Cone, 16 Mo. 439; Bocka v. Muella, 28 Mo. 180; Haden v. Rodkey, 17 Kan. 429.

We have considered the questions before discussed upon the theory that a note like the one in suit, indorsed by only one of the two joint payees, is subject to any equities existing in favor of the maker, the same as though it had not been indorsed by either; and such we think is the law.

Such a note is payable to both, or to their joint order. By the law merchant it cannot be transferred except by the joint indorsement of all the payees: Rhymer v. Frickert, 92 Ill. 311, and cases there cited. If a note unindorsed is not transferred in good faith, then one indorsed by a part only is in the same situation. Such a note is surely only transferred in part: 2 Pars. on Notes and Bills,

4, 5; Smith v. Whiting, 9 Mass. 333; Dwight v. Pease, 3 McLean, 44; Bennett v. McGaughy, 3 How. (Miss.) 193; Wood v. Wood, 1 Harrison (Ohio), 428; 1 Daniel on Neg. Insts., sec. 684; Lowell v. Redding, 23 Am. Dec. 546.

We are satisfied that plaintiff is in no better situation than the payees of this note would have been had they brought this suit; and in that case Nicoletti would have been entitled to credit for all payments made according to the agreement entered into at the time of the execution of the notes and mortgage, and before notice of the assignment: Davis v. Neligh, 7 Neb. 82; Becker v. Sawyer, 24 Vt. 464; Brittan v. Bishop, 11 Id. 545.

The judgment and order appealed from are reversed and the cause remanded.

SUPREME COURT OF OREGON.

MONTGOMERY ET AL. *v.* MULTNOMAH RAILWAY COMPANY.

Filed March, 1884.

FERRIES, JURISDICTION OF COUNTY COURT TO ESTABLISH.—The primary object of the statute conferring jurisdiction upon the county courts to establish roads and license ferries for the transportation of persons and property across streams, which obstruct land travel using public ways, is to secure the public accommodation. For the attainment of this end, but as subordinate to it, when a ferry franchise is granted, the right to take lawful tolls is conferred as an equivalent for the obligations to accommodate the traveling public. Although the taking of such tolls is *privati juris*, and incident to the franchise, a ferry is *publica juris* and cannot be created without a license, and is a thing of public interest and use. It can only exist in connection with some highway or place where the public have rights. The grant of a ferry franchise over a stream, to and from a place where there is no highway, or in which the public have no rights, would be void and inoperative.

THE SAME—PRIVILEGES GRANTED BY LICENSE.—When the county court has exercised its jurisdiction by granting a license for a ferry, and a ferry is established, forming a connecting link in the public highway, it has exhausted its jurisdiction as to such highway or places connected, while such franchise exists. Such franchise gives to the person licensed the exclusive privilege of transporting all persons and property between such places. The county court cannot establish another ferry between such places or highways, or between places just outside of or beyond them, designed to accommodate the same traveling public, without violating the exclusive privileges secured by the franchises granted to the ferry already established.

SALE OF FERRY LICENSE.—Whether a ferry license can be assigned without the consent of the granting power, and whether the county court granting the license has power to give such consent, *quere*. If such assignment is void, the right to object to the same, and to the exercise of the franchise by a party to whom it was not originally granted, can only be exercised by the state officers in an appropriate proceeding.

APPEAL from a judgment of the circuit court for Multnomah county. The opinion states the facts.

Geo. H. Williams, for the appellants.

C. B. Bellinger, for the respondents.

LORD, J. The existence of the plaintiffs' ferry, known as the Albina ferry, is admitted by the record. The petition of the defendants rests their application in chief upon the insufficiency of the facilities, as already existing and established, for the accommodation of the public in crossing the river, between the termini of

the Albina ferry. As a link to connect the line of travel between these points, the averment is that the facilities are too limited to meet the present and growing demands of the public convenience. The order of the county court not only assumes the legal existence of the ferry, but undertakes, on account of the proximity of the Montgomery ferry, which its order licenses and establishes to accommodate the same line of travel, and the consequent liability apprehended in the exercise of its franchise of interfering with the passage of the boats of the Albina ferry and the approaches to its landings, to provide for its protection.

The view we take of the question to be adjudicated, as thus presented by the record, renders it unnecessary to notice some of the matters discussed in the briefs of counsel. We shall only examine the record for the purpose of determining whether the county court, to whom the law has confided the authority to grant licenses for establishing ferries upon the conditions therein expressed, has exceeded its jurisdiction or exercised its functions erroneously upon the case made by the record in granting the Montgomery license. The exclusive right of the county court in a proper case to grant a ferry license, when satisfied the same is necessary for the public convenience, is not questioned. The contention is as to the limits within which this power or jurisdiction may be exercised with regard to a ferry already licensed and established. Our statute provides that the county court may grant a license to any person entitled and applying therefor, to keep a ferry across any lake or stream within its respective county, upon being satisfied that a ferry is necessary at the point applied for, which license shall continue in force for a term to be fixed by the court, not exceeding five years: Gen. L. Or., sec. 40, p. 731. But it further provides that every person licensed to keep a ferry shall have the exclusive privilege of transporting all persons and property over and across the stream where such ferry is established, and shall be entitled to all the fare arising therefrom: Id., sec. 51, p. 733.

It is argued that the exclusive privileges which attach to the grant of a license by virtue of this last clause limit and restrict the jurisdiction of the county court in granting ferry licenses to such places only as will not affect injuriously an existing ferry licensed and established by its authority.

This proceeds from the theory that the jurisdiction conferred by the former provisions, and the restrictions placed upon its exercise by the latter, when taken and construed together, so as to give them one effect only, declares or adopts the common-law doctrine as applied to ferry franchises—an able and exhaustive *résumé* of which may be found in the dissenting opinion of Mr. Justice Story in the Charles River Bridge v. Warren Bridge, 11 Pet. 506. It is also contended that the doctrine of the law as applied to ferries by the reasoning of the majority in the decision of the Warren bridge case is not opposed to, but sustains and fortifies this construction. This position is that the plaintiffs failed in that case because their

charter gave them no exclusive privileges, and the court held as against the public such privileges could not be implied, but, *e converso*, where such privileges are expressly conferred the doctrine of the common law would apply.

On the other hand, it is contended that the "exclusive privileges" conferred by our statute are confined to the ferry landings, the place "where such ferry is established," and does not extend on each side so as to prevent the licensing of contiguous and rival ferries, when the county court is "satisfied" the public accommodation requires it; that, in effect, the statute but reiterates in express terms what was decided in the Warren bridge case, and confines the "exclusive privileges" to the landings, or place "where such ferry is established," and that no exclusive privileges can be implied beyond this as against the public, or jurisdiction of the county court to license other ferries contiguous, whatever may be the effect of such competition in withdrawing tolls. In our judgment, the primary object to be accomplished by our statute in conferring jurisdiction upon county courts in their respective counties to establish roads and license ferries for the transportation of persons and property across streams which obstruct land travel using public ways, is to secure the public accommodation. For the attainment of this end, but as subordinate to it, when a ferry franchise is granted the right to take lawful tolls is conferred as an equivalent for the obligations to accommodate the traveling public.

Although the taking of such tolls is *privati juris* and incident to the franchise, "a ferry is *publica juris*, and cannot be created without a franchise, and is a thing of public interest and use": Att'y Gen. v. Boston, 123 Mass. 478.

As a link in the chain of transportation on dry land, a ferry forms a part of a public highway, or a connecting link between places in which the public have rights, and as such it is a thing of public interest, and in which the public have the right of way or use on paying certain specified tolls, regulated and prescribed by public authority. This is evident from the nature of the franchise, and the uses and purposes for which ferries are licensed and established.

A ferry, says Mr. Dane, vol. 2, p. 683, "forms a part of a public passage or highway wherever rivers or waters are to be passed in boats, and being a part of the highway, any obstruction of the use thereof is a nuisance." Angell on Highways, sec. 461. The definition of a ferry, as given by Lord Abinger, in Huzzie v. Field, 2 C., M. & R. 432, 442, is this: A public ferry is a public highway of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. In Newton v. Cabitt, Mills, J., in delivering the judgment of the court, said: "A ferry exists in respect of persons using a right of way where the line of way is across water. There must be a line of way on land coming to a landing place on the water's edge," etc.

In Burlington and Henderson Co. Ferry v. Davis, 48 Iowa, 133, the court says: "A ferry is in some sense an extension of a public road." Mr. Cooley in his work on Constitutional Limitations, 593, says, in reference to the right of the states to lawfully establish ferries over navigable waters, that "this also is only the establishment of a public highway." And in Sullivan v. Board of Supervisors, 58 Miss. 799, Cooper, J., in delivering the opinion of the court, said: "Where a stream crosses a public highway the continuity of the highway is not broken; it does not end on one side of the stream and begin again on the other, but continues across the stream, and the public, for the purposes of travel, have the same right to go on the water over the highway that they have to pass along other portions of it, but as a physical obstruction intervenes, it is necessary that some convenient means of transportation shall be furnished, and the simplest and most economical in many cases is the ferry." See, also, Hudson et al. v. Cusro Land and Immigration Co., 47 Tex. 56; Seal v. Donnelly, 60 Miss. 662; 4 Jones Law (N. C.), 282, 285; Hartford Bridge Co. v. Union Ferry Co., 29 Conn. 229. The principle to be deduced from these authorities of the franchise and the uses and purposes for which a ferry is licensed and established is that a ferry can only exist in connection with some highway or place where the public have rights.

The grant of a ferry franchise for the transportation of persons and property across a stream to and from a place where there is neither highway, or in which the public have no rights, would be void and inoperative. The object of a ferry being to connect highways or places in which the public have rights, when intersected by streams, it becomes, when licensed and established, a part of each highway or line of travel between such places. When, therefore, the county court has exercised its jurisdiction by granting a license at the suggestion of the public convenience, and a ferry is established connecting such highways or places, thus forming a continuous line of transportation, it has exhausted its jurisdiction as to such places or highways while such franchise exists. As a link or part of the highway in the line of travel between such places or highways, the franchise gives, under our statute, to the person licensed to keep the ferry the exclusive privilege of transporting all persons and property between such places or highways. The county court cannot at such places or highways establish another ferry without violating the exclusive privileges secured by the franchise granted to the ferry already established, and which forms a part of such highway, and is designed and required to accommodate all persons, on paying the required tolls, passing along the line of travel between such places or highways. The reason is that the ferry is established for the purpose of taking up the highway, so to speak, and uniting it into one continuous highway or line of travel for the public accommodation, and as a protection for the expense and outlay in thus serving the public convenience, the statute gives the exclusive privilege of carrying all persons and property

coming on the line of such highway to the river bank for transportation, the place "where such ferry is established." There is no room to establish another ferry, for the ferry already established, by forming a part, continues the highway over the water, and occupies that place. In the sense here applied, it may be said that a highway is already laid out over the water "where such ferry is established" during the period for which the franchise is granted, and until it expires, or be revoked, or forfeited, the county court has no jurisdiction to establish another ferry at such place, designed to accommodate the travel passing over such highway "where such ferry is established," for the statute secures the exclusive privilege as to this to the ferry already licensed.

Construing the statute in the strictest sense, by confining the "exclusive privilege" to the place "where such ferry is established," and it being limited either to a highway or a place in which the public have rights, of which the ferry forms a part, the conclusion seems inevitable that the county court, having exercised its jurisdiction by the grant of a license to keep a ferry at such place or highway, cannot exercise it again while such franchise exists. Just outside or beyond this, and not for the purpose of connecting other places or highways in which the public have rights of access, is not within the purview of the authority conferred on the county court by the statute to grant franchises to keep ferries. That would be to establish a ferry where there was neither highway nor public place, and without which the public could not be accommodated, and would necessarily be inoperative and void. Now the ferry which is sought to be established is shown by the record to be designed to accommodate the same traveling public for which the Albina ferry was licensed. It founds its claims to the franchise upon the limited facilities and imperfect accommodations furnished by the existing ferry, to meet the present and growing demands of the traveling public at the place where it is established, and, therefore, the right and the need to establish another ferry at such place for the convenience of the public. There is no pretense that it will form connection with any other place or highway in which the public have rights than the highway connected by the Albina ferry, and of which it forms a part.

It only claims not to occupy the particular spot where the other ferry lands, but it does not deny its proximity to it, and object to serve the same custom, and to form a part of the same highway which the franchise of the Albina ferry now covers. And this is assumed and recognized in the order of the court granting the license to it, for the order only seeks to protect the landings and the passage of the boats of the Albina ferry, but not the exclusive privilege secured to the Albina ferry by the statute as a part of the highway, of transporting all persons and property where it is established. It is the proximity which carries passengers from the same place as where the Albina ferry is licensed, and collects tolls from them, which infringes and violates the exclusive privileges secured

to its franchise. When the proximity is such as to produce this result, it is in effect and substance establishing another ferry at the same place as where the Albina ferry is established, which the county court cannot do without violating the statute which gives these exclusive rights to the Albina ferry at the place where established, and therefore the county court is inhibited from licensing another ferry at that place.

When it is considered that the period for which a ferry license is granted is not to exceed five years, the outlay and expense necessarily involved, the duty the law imposes of keeping safe and commodious boats for transportation, the right of regulating its tolls, and the bond required to be given to better secure and enforce the faithful performance of all the duties and obligations the law imposes and attaches to the franchise in its interests and for the benefit of the public convenience and accommodation, a just and satisfactory reason is found why our statute secures to every person licensed to keep a ferry the exclusive privilege of transportation across the stream where such ferry is established.

In the case before us we are not concerned with the power or jurisdiction of the court to establish ferries to connect other highways or places, although the effect of establishing such by reason of vicinity might be to divert the custom and to diminish the tolls of an existing ferry; nor of the effect of a change of circumstances produced by an increase of population, or of a new neighborhood requiring the opening of new highways, which would carry with it the right to continue the line of these highways across a water highway. We are simply construing our statute with regard to the record before us, for the purpose of ascertaining whether the county court can grant a license to establish a ferry in substance at the same place where one is already licensed and established. The statute gives the exclusive privilege of transportation at the place where such ferry is established, and the establishing of another in substance at the same place is a contradiction of such exclusive privileges, and beyond the power of the court to do. Whether these exclusive privileges conferred by the statute extend beyond the place where the ferry is established, and include the common-law doctrine of exclusive rights of transportation to such an extent on each side as to prevent near and injurious competition, as contended, is not presented by the record before us, nor decided.

We only decide, in construing our statute upon this record, that the court was without authority to grant the Montgomery license, and here we think the case ought properly to have ended. But in the circuit court, it seems that an objection was raised and argued for the first time as to the validity of the assignment of certain interests in the Albina ferry licenses to the Multnomah Railroad Company; and the court held that a ferry license being a personal trust, was not assignable, and therefore such assignment was void.

As this question was argued with much zeal and great ability, we shall only briefly advert to it, although we do not see how the validity

of that transaction was inquirable upon the record in the proceeding. There is no doubt some contrariety of opinion exists in the authorities upon the subject. The Albina ferry license was not granted to the riparian owners. And in Knott v. Frush, 2 Or. 237, it was held that a ferry license granted to another than the riparian owner is a mere personal trust, upon conditions, and that his liability cannot be removed by substitution, but that such license terminates upon the decease of the person to whom it was granted. This decision was the subject of much adverse criticism by counsel. As authorities to sustain its view, it cites Monroe v. Thomas, 5 Cal. 470, and Thomas v. Armstrong, 7 Cal. 286; and these in turn have been approved and followed in Wood et al. v. Truckee Turnpike Co., 24 Cal. 464, and People v. Duncan, 41 Cal. 570. The license is regarded as a special privilege conferred by government upon the individual, and which does not belong to the citizen generally by common right. The grant of such franchise or special privilege to the individual is considered the bestowal of a personal trust and confidence, which cannot be assigned nor be the subject of sale on execution: Sullivan v. Board of Supervisors, 58 Miss. 791; Seal v. Donnelly, 60 Miss. 662; Rogers v. McCoy, 29 Mo. 367; The Mavent, 1 Sprague, 24; Arthur v. The Commercial and Railroad Bank of Vicksburg, 9 Sm. & M. 420; State v. Rives, 5 Ind. L. 307; Amart v. Pittsburg Turnpike Co., 13 Sergt. & R. 210; Lombard v. Cheever et al., 3 Gilman, 473; Herman on Executions, sec. 131 and 361; Angell & Ames on Corp., sec. 191; Redfield on Railways, 419, 422; Freeman on Executions, sec. 179. And again it has been said that a ferry license is in the nature of an appointment to an office, having certain fees annexed to it, to be held at the pleasure of the appointing power: Day v. Stetson, 8 Me. 370. On the other hand, it is contended that the right given under a ferry license is a franchise, which is as much property as any other incorporeal hereditaments. That franchise was, by the common law, said to be a branch of the king's prerogative in the hands of the subject: 2 Shars. Bl. Com. 37. But that in America, it is understood particular privilege conferred by grant from the government and vested in individuals: 3 Kent's Com. 458; People v. Utica Ins. Co., 15 Johns. 387. Chancellor Kent says that "an estate in such franchise, and an estate in lands, rest upon the same principle, being equally grants of a right or privilege for an adequate consideration": 3 Kent's Com. 458. In Conway v. Taylor's Executor, 1 Black, 632, Mr. Justice Swayne said: "A ferry franchise is as much property as a rent or any other incorporeal hereditament or chattel or realty. It is clothed with the same sanctity and entitled to the same protection as other property." In Lippincott v. Alexander, 27 Iowa, 460, it was held that a ferry license is not vacated nor the franchise lost by the death of the party to whom it was granted, but passes to his representatives. This decision is in direct conflict with Knott v. Frush, *supra*, and disapproves the reasoning of the authorities cited to sustain it. It should be observed, however, that the

Iowa statute makes certain provisions for the sale of such franchise as real property upon execution, which do not exist in our statute, and which were referred to in the decision as strengthening the views therein expressed.

In Billings v. Breenily, 45 Mich. 70, it was held that the franchise of keeping a ferry is property, having the valuable incidents of other kinds of property and transferable from the original grantee to others, subject to conditions lawfully imposed, and to such government control as results from its public nature: Bowman's Devisees v. Walker, 2 McLean, 376; Felton v. Deall, 22 Vt. 170; Benn v. Mayor et al., 10 Barb. 223; Ladd v. Choline, 1 Minor (Ala.), 366; Lewis v. Intendant and Town Council of Gainsville, 7 Ala. 85; Peter v. Kendal, 7 Barn. & Cress. 703; Willoughby v. Hoiserdy, 12 C. B. 742; Dundy v. Chambers, 23 Ill. 370.

It thus appears that some diversity of opinion exists in the authorities as to the right to sell or assign a ferry franchise, or whether the same is vacated by death, and that Knott v. Frush, *supra*, is not without authority to sustain it. That it may be done when the consent of the power that granted it has been obtained does not seem to be questioned. But whether the county court to whom the legislature has delegated the power to grant ferry licenses is authorized to give its consent to a sale or assignment of a ferry license upon filing the required bond, or by filing such bond and the acceptance of the same by the court, the assignment would be unassailable, we are not prepared nor is it necessary for us to decide, except that it may not be amiss for us to observe that the statute imposes no restrictions upon the sale or transfer of the franchise; nor is there any promise that, upon the death of the party to whom the license was issued, it shall be vacated and the franchise lost. The statute is simply silent upon that subject. But whether the assignment is void, or the effect of an assignment would be to vacate the license, we do not see how such matters are inquirable in this proceeding. The record both as to the petition and the order of the court recognizes the validity of the existing franchise. No question is raised by the record about the Albina ferry license, or any sale or assignment of its franchise. The only question involved was the authority or power of the court to grant the Montgomery license.

That was the object of and for which the writ of review was sued out, and the only matter necessary to be passed upon. When that was done the court had exhausted its power upon the case made by this record, and decision of matters *dehors* it, without reference to the correctness of the principle decided, was a nullity and ought not to stand. Besides, it would seem to follow that if the franchise is a personal trust and not assignable without the consent of the granting power, as argued and claimed, then the right to object to the transfer of the franchise, and its exercise by a party to whom it was not originally granted, was a right affecting the public which belongs to its officers to take advantage of by an appropriate proceeding, and could not be collaterally assailed here: People v. Dun-

can, 41 Cal. 508; Connar v. Paxon, 1 Black, 168; Edmonson v. De Kalb Co., 51 Ala. 101.

The judgment declaring the Montgomery license void is affirmed, but in all other respects reversed.

NOTES.

To those portions of the community who are interested in the subject of the codification of the laws, the New York *Mail* gives the following information as to the extent to which the New York codes have been adopted in other communities. In most instances the codes have been adopted substantially in detail, and in others in principle: "The first New York code, the code of civil procedure, went into effect on the 1st of July, 1848. It was adopted in Missouri in 1849; in California in 1851; in Kentucky in 1851; in Ohio in 1853; in the four provinces of India between 1853 and 1856; in Iowa in 1855; in Wisconsin in 1856; in Kansas in 1859; in Nevada in 1861; in Dakota in 1862; in Oregon in 1862; in Idaho in 1864; in Montana in 1864; in Minnesota in 1866; in Nebraska in 1866; in Arizona in 1866; in Arkansas in 1868; in North Carolina in 1868; in Wyoming in 1869; in Washington Territory in 1869; in South Carolina in 1870; in Utah in 1870; in Connecticut in 1879; in Indiana in 1881. In England and Ireland by the judicature act of 1873; this judicature act has been followed in many of the British colonies; in the consular courts of Japan, in Shanghai, in Hongkong and Singapore, between 1870 and 1874. The code of criminal procedure, though not enacted in New York till 1881, was adopted in California in 1850; in India at the same with the code of civil procedure; in Kentucky in 1854; in Iowa in 1858; in Kansas in 1859; in Nevada in 1861; in Dakota in 1862; in Oregon in 1864; in Idaho in 1864; in Montana in 1864; in Washington territory in 1869; in Wyoming in 1869; in Arkansas in 1874; in Utah in 1876; in Arizona in 1877; in Wisconsin in 1878; in Nebraska in 1881; in Indiana in 1881; in Minnesota in 1883. The penal code, though not enacted in New York until 1882, was adopted in Dakota in 1865, and in California in 1872. The civil code, not yet enacted in New York, though twice passed by the legislature, was adopted in Dakota in 1866 and in California in 1872, and has been much used in the framing of substantive laws for India. The political code, reported for New York but not yet considered, was adopted in California in 1872. Thus it will be seen that the state of New York has given laws to the world to an extent and degree unknown since the Roman codes followed Roman conquests."

WEST COAST REPORTER.

WHOLE No. 17. APRIL 24, 1884. VOL. II. No. 9.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

RIPARIAN PROPRIETORS AND RIPARIAN RIGHTS ON PRIVATE STREAMS.

In the case of Ferrea v. Knipe[6] the rights of riparian proprietors were not only recognized, but their extent was also partially defined. The controversy was between two owners upon the same stream. The defendant, for the alleged purpose of securing the water for the use of watering his stock and for domestic purposes, had erected a dam, which collected the whole water of the stream in a pond, and prevented any of it from flowing down to the plaintiff's lands below. An action for damages and preventive relief was sustained. Currey, J., delivering the opinion of the court, said (p. 344): "Every proprietor of the land through or adjoining which a water-course passes has a right to a reasonable use of the water, but he has no right to so appropriate it as to unnecessarily diminish the quantity of its natural flow. The use of the water of a stream for domestic purposes and for watering cattle necessarily diminishes the volume of the stream. This is unavoidable, and though by reason of such diminution a proprietor on the stream below fails to receive a supply commensurate with his wants, he is without remedy, because his right subsists subject to the rightful use of the water by his neighbor on the stream above him. But while admitting that a riparian owner, to whom the water first comes in its flow, has the right to use it for domestic purposes, and for watering his cattle, it is proper to observe that he has not the right to so obstruct the stream as to prevent the running of water substantially as in a state of nature it was accustomed to run." *** p. 345: "Though the defendant had the right to use the stream for watering his cattle and for household purposes, he had not the right, under the circumstances, to dam up the creek and spread out the water over a large surface, by which it would become lost by absorption and evaporation to an extent to prevent the stream from flowing to the plaintiff's premises, as it would have done had it not been for the

[6] 28 Cal. 341.

The demurrer was overruled. "The allegation that the plaintiffs were owners, and in possession of the mining claim, was sufficient. The ownership and possession of the claim drew to them the right to the use of the water flowing in the natural channel of the stream. The diversion of the water was, therefore, an injury to the plaintiffs for which they could sue. The principle involved in this case was expressly decided by this court in the case of Crandall v. Woods." The court here expressly decided that a riparian proprietor, merely by virtue of his ownership, is entitled to the use of the water without making any actual appropriation. The common-law doctrine, that the right over the stream arises from riparian ownership and not from any appropriation, is again declared. It is true the land in this case was a mining claim, but the decision was not in the slightest based upon or affected by that fact. In the state of Nevada, the common-law doctrines concerning the riparian rights of private riparian proprietors have been adopted in the most explicit manner by the well-considered decision of the supreme court in the case of Van Sickle v. Haines.[10] The court held that a person acquiring the legal title by patent from the United States, to a tract of land bordering on a stream, obtained as a necessary incident of his ownership, and before making any actual appropriation, full right to the water of the stream as a riparian proprietor, superior and complete as against another party, not a riparian owner, who had made a prior appropriation of the waters of the stream while it was entirely public. Extracts from the very able and instructive opinion in this case will be given under a subsequent head.

The foregoing series of cases shows, beyond a possibility of question or doubt, that prior to and since the adoption of the civil code, the laws of California recognized, protected, and enforced the rights known as the "riparian rights" of private "riparian proprietors" owning lands situated on the banks of natural streams, substantially as they exist at the common law. The rights thus known as "riparian rights" have been defined;[11] they belong alike and equally to all "riparian proprietors" on the same stream, subject solely to the natural advantage belonging to the upper over the lower proprietor;[12] they exist as a necessary incident of ownership, even though the proprietors had not as yet made any actual appropriation or diversion of the water;[13] they entitle each "riparian proprietor" to the usufruct of the water as it flows in the natural channel of the stream, including the right to use so much of it as may be reasonably necessary for such primary purposes as watering his cattle, domestic and household uses without thereby unnecessarily or unreasonably diminishing its natural flow down to the proprietors below him on

[10] 7 Nev. 249.
[11] Pope v. Kingman, 54 Cal. 3.
[12] Id.; Ferrea v. Knipe, 28 Id. 341; Crandall v. Woods, 8 Id. 136.
[13] Creigton v. Evans, 53 Id. 55.

the stream.[14] Whether these riparian rights include the right to use the water for purposes of irrigation is not directly decided nor even considered by these cases.

We are thus furnished with a conclusive answer to a question suggested on a preceding page. I had stated the position maintained by some that the §1422 of the civil code is *not* in reality restrictive and can produce *no* practical effect upon the whole legislation of the code concerning water rights for two reasons; the first of these being, that under the law of California, independently of the code, private "riparian proprietors" have no rights as such to the waters of the adjoining stream. The series of decisions above quoted demonstrates the incorrectness of this opinion. These authorities show most clearly that the law of California, independently of the code, did and does recognize the "riparian rights" of "riparian proprietors" substantially as they exist as the common law. This conclusion is so certain, that no further discussion can render it any more plain. The legislature in enacting §1422, clearly assumed that the then existing law of the state recognized and protected these "riparian rights" of "riparian proprietors."

We are then brought back to a consideration of the question: What are the practical effects, upon the entire legislation of the code, of the restrictive provision contained in § 1422? In support of the position maintained by some, that this clause is *not* restrictive, and can produce no practical effects upon the legislation as a whole, a second ground has been advanced, namely, that the "rights of riparian proprietors" intended to be saved and protected by the section, are simply those which are not inconsistent with the previous sections of the title, and which are not, therefore, taken away and abrogated by these provisions; those rights, in short, which still remain in force after and notwithstanding the preceding and operative sections of the statute. Is this the interpretation which should properly be given to the language of § 1422? In my opinion it is not. Such an interpretation would, in my opinion, be unreasonably forced, and in plain violation of the settled rules governing the construction and interpretation of statutes. In the first place, it is a fundamental doctrine of statutory interpretation, that in every distinct, clear, additional provision, the legislature must be assumed *to have meant something*, to have intended the provision to have *some* meaning, operation and effect, so that it is not wholly superfluous, useless, and nugatory. Nothing but absolute necessity, therefore, should ever admit such an interpretation of a clear, distinct and positive provision as would render it unnecessary, useless, superfluous and nugatory.

The suggested construction of § 1422 would render the whole clause utterly useless, superfluous and nugatory. If it were adopted, the

[14] Pope v. Kingman; Creighton v. Evans; Ferrea v. Knipe; Crandall v. Woods, *supra*.

section would in effect read: "The rights of riparian proprietors, so far as they are not taken away or abrogated by the provisions of this title, are not affected by the provisions of this title." It cannot be supposed that the legislature would deliberately, and by a formal and final section placed at the end of a statute, enact a provision so unnecessary and meaningless. Whatever may have been the riparian rights existing previous to the statute, then, as a matter of course, so far as they were not opposed to the provisions of the statute, so far as they were not taken away, abrogated, lessened or altered by the statute, they would necessarily remain unaffected by its provisions. It needs no express clause to produce this result, which would be inevitable in the absence of such a clause; no clause could make the consequence any more certain or operative. We find the title of the code concluded by a formal, peremptory and sweeping final section in the nature of a proviso or limitation upon the operation of the statute as a whole, and it is simply absurd to suppose that the legislature intended by this section nothing but what would have been equally true if the section had been omitted. The correctness of this conclusion will appear even still more clear from a further consideration. The interpretation which I am examining would render § 1422 wholly without meaning, effect and operation. If the "rights of riparian proprietors" intended to be protected, are simply those which are not inconsistent with the previous sections of the title, which are not abrogated, but which still remain notwithstanding the preceding provisions of the statute, then, I say, this § 1422 is utterly useless, and without any force and effect, because there *are no such* "rights of riparian proprietors" remaining unaffected by the title. If the previous provisions of this title are operative to their full extent, unlimited and unrestricted by the final section, then they must inevitably abolish and abrogate all the "riparian rights," and "rights of riparian proprietors, existing at the common law. The fundamental conception upon which all of the common law rules are based, and all and singular of the special "riparian rights," and rights of "riparian proprietors" created and regulated by these common-law rules, are alike inconsistent with and opposed to the provisions of this title of the code, if these are to have their full and natural meaning and operation, unrestricted by the proviso contained in the final § 1422. And, furthermore, the interpretation in question seems to have been, impliedly at least, condemned by recent decisions of the supreme court. In several of the cases above quoted, the causes of action arose since the title of the civil code concerning water rights went into effect. Under the construction which it is claimed should be given to § 1422, the provisions of this title would have been a complete answer to the plaintiff's contention in all of these cases, and would have absolutely controlled their de-

cision. And yet, in none of these cases, is the title of the code even suggested or referred to by the court. It is not too much to say that these cases are wholly inconsistent with any interpretation of § 1422, which leaves the preceding provisions of this title fully operative, according to their natural and literal import, upon the rights of private riparian proprietors.[15]

The conclusion, then, seems to be irresistible that the legislature intended the § 1422 to have *some* meaning and effect; that they designed it to be a material and substantial limitation upon the otherwise general operation of the preceding clauses of the title. What are its meaning and its effect? A fair and reasonable construction seems to leave no other alternative, but that the section must have all the meaning, force and effect which can result from the full, settled and legal import of all its terms, considered as referring to and acting upon the then existing doctrines of the law established by judicial decisions. In other words, the common-law "riparian rights" of private "riparian proprietors" owning tracts of land upon the margins of natural streams in this state, which have been recognized, declared and maintained by judicial decisions both before and since the code, are not affected by the title of the code; do not in fact come within the purview of its provisions. In short, the whole title has no relation to, nor effect upon, the rights of those private owners who hold tracts of land bordering upon natural streams, but is confined in its operation to the rights of appropriating and using the waters of streams which flow wholly through public lands of the United States or of the state. There seems to be no escape from this construction unless an entirely different meaning is to be given to the words "rights of riparian proprietors" when found in a statute, from that given by the universal consent of all judicial decisions.

The supreme court has uniformly recognized and maintained the distinction between the common right of all persons to appropriate the water of streams while running wholly through public lands, and the rights of private riparian owners who have acquired private titles to lands on the banks of streams. It has recognized the technical terms "riparian rights" and "riparian proprietors," and has defined them as they have been defined and are understood at the common law. The doctrines decided by the supreme court concerning these "riparian rights" have been summarized on a previous page, and need not be here repeated.[16] There can be no reasonable doubt that these "riparian rights" of private owners on the banks of streams are referred to by the § 1422, are

[15] See Ellis v. Tone, 58 Cal. 289: Pope v. Kinman, 54 Id. 3; and in other reported cases decided since the code took effect, but which do not show when the causes of action arose, some reference to this title of the code would certainly have been made, if it had the effect to abrogate all riparian rights; see Creighton v. Evans, 53 Id. 55; Lytle Creek Water Co. v. Perdrew, 1 West Coast Rep. 866.

[16] See *ante* p.

excepted or removed by it from the meaning and operation of the whole title, and are left existing in the law of California as fully and completely as they were before the code. The title of the code thus finds its sole application to the water of streams flowing entirely through public lands, upon the banks of which no private owner has yet acquired title to any tract or parcel of private land.

If it be urged that this construction virtually emasculates the entire title of the code concerning water rights, and renders it virtually inoperative over a large and most important branch of those rights, the answer is that this is the fault of the legislation and not of the construction. It is the duty of courts to take statutes as they are, to expound them according to the plain and natural import of their terms, and not to add to or take from them according to any notions which the judges may have as to what the legislature *ought* to have enacted. In the title of the code under consideration the legislature has undoubtedly shirked its responsibility. Called upon to settle a question of the gravest importance, in which there are directly opposing interests involved, any settlement of which must necessarily be hostile to some large pecuniary interests, the legislature under a mere appearance, a *simulacrum* of settlement, has, in fact, done nothing, but has left all the important questions of private water rights of private riparian owners in exactly the same position which they occupied prior to the code. The failure of the legislature to do what it was supposed and desired by some it should do, can have no effect upon the action of the courts in construing and interpreting the statute as a whole. The court cannot enact a new and different statute.

It thus appearing that the title of the code concerning water rights has no application to nor operation upon the riparian rights of private riparian proprietors who hold the title to tracts of land on the banks of natural running streams in this state; that those rights are left existing as they have been declared by judicial decisions made before and since the adoption of the code; and that those rights have thus been declared by judicial decisions to be substantially the same as the rights created, recognized, regulated and protected by the common-law doctrines relating to the subject; we are now in a position to enquire, with more of detail, what are the nature, extent and limits of the rights held by private riparian proprietors in California; what uses of the water of streams do they confer, permit, or forbid, with special attention to the inquiry whether they permit the use of water for purposes of irrigation, and if so, to what extent and under what limitations. As a preliminary to this proposed examination, I shall quote at some length from a decision made by the supreme court of Nevada, which covers all of the questions. The same physical conditions affecting the use of water

exist in both states, and in both the common-law doctrines concerning the rights of private riparian proprietors are recognized as substantially controlling. These facts alone would recommend the decision to the attention of the courts and profession of California; but the decision itself is so important, and the opinion of Chief Justice Lewis is so able, learned and exhaustive, that no excuse is needed for the long extracts which I have made. If the common-law doctrines still determine and regulate the rights of private riparian proprietors in our own state, it is proper to know what these doctrines are, how they have been settled, and upon what authority they rest. The facts of the case present in a marked manner the distinction between the appropriation of water from streams while flowing wholly over the public lands of the United States, and the rights to the water held by a proprietor who has acquired a title as private owner to a tract of land bordering upon a stream. The opinion shows in the clearest manner the general nature, extent and limits of the rights possessed by such private riparian proprietor as established by the overwhelming consensus of authorities, English and American. Unless I am entirely wrong in the construction placed upon the title in the civil code, and unless the decisions of the California supreme court, heretofore quoted, are to be wholly disregarded, then, as it seems to me, the opinion of Chief Justice Lewis, in its reasoning and its conclusions, applies to and defines the rights of private riparian proprietors in California, with one modification, to be subsequently mentioned, growing out of a more recent statute of congress. The case to which I refer, and from which I now proceed to quote, is Van Sickle v. Haines.[17]

The facts were briefly as follows: In 1857, the plaintiff, Van Sickle, diverted a portion of the waters of Daggett creek, a natural unnavigable stream, by means of a ditch for irrigating and domestic purposes, to be used upon a tract of land in his possession not situated upon the banks of said creek. The diversion was made at a point then on the public land, but the tract of land bordering on the creek and including this point was in 1864 conveyed by patent from the United States to the defendant Haines. In 1865 Van Sickle obtained a patent from the United States for the tract in his possession, on which he used the water. In 1867, Haines constructed a flume on his own land, and by its means diverted the water of the creek for the benefit of his own riparian tract of land, and thereby deprived Van Sickle of the supply of water which he had been using. In 1870 Van S. brought an action, which resulted in a judgment for damages against Haines, and a perpetual injunction restraining him from interfering with the plaintiff's prior appropriation. It should be carefully noticed that the plaintiff, Van Sickle, was not a

[17] 7 Nev. 249.

riparian proprietor. On appeal, the judgment was reversed by the supreme court, and a decree was ordered for the defendant dismissing the suit. The court held, among other points, that, since there can be no title acquired by adverse user against the United States, the time during which a person diverts water from a stream wholly on the public land previous to the issue of a patent to a private riparian proprietor, cannot be set up as an adverse user against such patentee. The same has been held by California decisions.[18] The plaintiff presented a petition for a rehearing, and thereupon a second most able and exhaustive opinion by Lewis, C. J., was delivered, from which I shall quote several passages that seem to bear upon the general questions under discussion. This opinion opens with some preliminary observations which are peculiarly appropriate and instructive (pp. 257–258): "We are unable to understand from the petition what exact condition is assigned to running water in the catalogue of rights or property; or what the nature of the title which may be acquired to it, if any. Much thereof is devoted to showing that there can be no property in running water; that it is, and must of necessity remain common to all; that it is a thing 'the property of which belongs to no person, but the use to all;' and in the same sentence it is said that it 'is *publici juris*, *res communis* and *bonum vacans*.' This *abandon* in the use of legal expressions is evidently the result of a radical misunderstanding of the signification which is given to them in the books of law. True, it is often said that water is *publici juris*, or belongs to those things which are *res communes;* but how can it be either *publici juris or res communis* and also *bonum vacans* is a problem not yet solved in the science of the law. If common property, or, as argued by counsel, something in which no one has an absolute property, but every one has the use, the right to the use must then certainly be in the community; but *bonum vacans* is a thing without an owner of any kind, and which belongs absolutely to the person who may first find or appropriate it, and he has the complete right of property in it as against the world. It is a flat contradiction in terms, to say that running water is at the same time common property and *bonum vacans*. But we have the word of Lord Denman in Mason v. Hill,[19] and of Baron Parke in Embry v. Owen's ex'ors,[20] that it was never considered *bonum vacans*. Nor are these contradictions confined simply to legal terms. The argument proceeds upon the assumption that running water belongs to the community generally, and authorities are cited which are supposed to sustain that doctrine, as the quotation from Blackstone who says, 'water flowing is *publici juris*. By the Roman law, water, light and air were *res communes* and which were defined things, the property of which belong to no per-

[18] Pope v. Kingman, 54 Cal. 3.
[19] 5 B. & Adol. 22.
[20] 6 Exch. 353.

son, but the use to all.' Yet, after arguing to show that water is common property, it is also claimed that a stream may be absolutely appropriated by the first person who may wish to use it. In other words, that water, instead of being something which belongs to all in common, as is argued at first, is a thing which belongs absolutely to him who first appropriated it, to the extent even that, if it be necessary for the purpose for which the appropriation is made, it may be completely consumed. Surely, the two propositions are as irreconcilably contradictory as any that can be named. As an illustration, it is argued that running water is like the air, to which certainly all have an equal right, and with which no one has the right to interfere to the injury of another. But in this case the right is claimed by Van Sickle to deprive the appellant of the stream, which in the ordinary course of things he would be enabled to enjoy and to appropriate it exclusively to himself. If running water be like the air, then surely no one has the right to interfere with it in its natural state to the prejudice of others. When positions so utterly contradictory are assumed, the real questions in the case are likely to be involved and obscured, rather than elucidated." The following observations concerning the influence which the "public interests" should have upon the dicisions of cases involving private rights, are of weighty importance in this community as well as in Nevada and every other state. While courts most certainly have a legislative function, since the great body of common law and of equity has been built up by courts, it should never be forgotten that courts do not rightfully possess the power of legislating *from motives of mere policy or expediency*. The duty of courts is to declare and protect private rights of suitors by applying or extending some established principle or doctrine to new conditions of facts. The court say (p. 259): "Before proceeding to an investigation of the legal questions really involved in the case, we may state, once for all, that the fact that the case is of great interest to the public, whose rights, it is claimed, 'are seriously disturbed by the decision,' is a consideration which, in very doubtful cases, may, and perhaps should have some weight with judicial tribunals. But that the interests of the public should receive a more favorable consideration than those of any individual, or that the legal rights of the humblest person in the state should be sacrificed to the weal of the many, is a doctrine which, it is to be hoped, will never receive sanction from the tribunals of this country. The public is in nothing more interested than in scrupulously protecting each individual citizen in every right guaranteed to him by the law, and in sacrificing none, not even the most trivial, to further its own interests. Every individual has the right, equally with the public at large, to claim a fair, impartial consideration of his case; for the rights of the public are no

more sacred or entitled to greater protection in law than those of the individual; and, therefore, in actions between individuals, the consideration of public interest has weight only when there is grave doubt as to where the right lies. This doctrine, which would justify the courts in depriving a person of a civil right to-day for the public good, might to-morrow force them to sacrifice his life to the clamor of a mob, which would deprive Haines of his property at one time, might operate against Van Sickle at another. As in this case we have no doubt whatever as to what should be our conclusion; the fact that it may injuriously affect the public can have no weight in its consideration. Happily, however, we do not think the decision, if properly understood, will produce the general disastrous results apprehended by counsel." Coming to the merits of the case, the learned chief justice states the material questions to be considered and determined (p. 260). "As the appellant claims the water of Daggett creek as an incident to the land patented to him by the United States, and as it is admitted that he could get only such title and right as was vested in the United States itself, it becomes necessary to ascertain what is the nature of the rights of the federal government to the public land, and we purpose to show: 1st, that the United States has the absolute and perfect title; 2d, that running water is primarily an incident to, or part of the soil over which it naturally flows; 3d, that the right of the riparian proprietor does not depend upon the appropriation of the water by him to any special purpose, but that it is a right incident to his ownership in the land to have the water flow in its natural course and condition, subject only to those changes which may be occasioned by such use by the proprietors above him, as the law permits them to make of it; 4th, that the government patent conveyed to Haines not only the land but the stream naturally flowing through it; 5th, that the common law is the law of this state, and must prevail in all cases where the right to water is based upon the absolute ownership of the soil." The chief justice follows this statement by an elaborate argument and citation of authorities showing that the United States has the absolute title in fee simple in all the public lands, to the same extent and in like manner as any private owner has; and that this title includes all the incidents and power of absolute private ownership (pp. 261–264). As the correctness of these conclusions is undoubted, it is unnecessary to quote this portion of the opinion. He then proceeds to consider the right to water as an incident of ownership (p. 264): "Being absolute owner of the soil, the source of all title thereto, and entitled to all the remedies for its protection and preservation which are given to any individual owner, it certainly cannot be maintained that the United States is not equally entitled to everything which is naturally such an inseparable incident to the land, that it is frequently spoken of as a part of the

soil itself. Such an incident is a natural water course. It passes by deed of the soil without any mention, and forms as marked a feature of the land through which it passes as the trees upon it or the vegetation which it nourishes. Nothing more readily recommends itself to the understanding than that an element which the laws of nature have connected with the freehold, and which, without any effort on the part of man, clothes it with refreshing verdure—when without it there must be only forbidden nakedness—creating fertility and productiveness where otherwise there would be only sterility; at once administering pleasure and affording profit—is necessarily a part of or incident to his land. This is the natural effect of running water, independent of any use which may be made of it in administering to the immediate wants of man and beast. How frequent is it that small streams of water are found to add immeasurably to the value of estates, even where no particular use is made or intended to be made of them. It is very seldom indeed that they do not to some extent enhance the value of real property, and they are frequently esteemed invaluable. * * * How can it be said, then, that a water course is not essentially a part of the freehold itself.

J. N. P.

[TO BE CONTINUED.]

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

MACNAUGHTON *v.* SOUTH PACIFIC COAST R. R. CO.

March 24, 1884.

REMOVAL OF CAUSES—CITIZENSHIP OF PARTIES.—The petition for the removal of an action on the ground that the parties are citizens of different states must show that such ground of removal existed both at the time of the commencement of the action and at the time of the application for removal. A petition which only alleges that the defendant is, and always has been, a citizen of California, and that the plaintiff *is* a citizen of Missouri is insufficient.

THE SAME—AMENDMENT OF PETITION.—The citizenship of the parties, under such circumstances, are jurisdictional facts, and must be alleged in the petition. If such allegations are not made, whether the petition may be amended in the circuit court so as to show them *quære*. If the power to allow such amendments be conceded, it is not a matter which the party removing can demand as a legal right, but only a matter for the exercise of a sound discretion by the court. Such an amendment should not be allowed where, after an amendment of the petition in the circuit court, the record in each court, would show upon its face jurisdiction which would authorize it to proceed to final judgment.

THE SAME—APPLICATION WHEN SHOULD BE MADE.—This action was commenced in the fourth district court, of the state of California, on August 1, 1879; defendant demurred August 22, 1879. The demurrer was overruled. It answered September 12, 1879. Plaintiff demurred to that part of the answer, setting up new matter as a defense, October 2, 1879. The new constitution of California of 1879 having in the mean time taken effect, the case was transferred into the superior court as the successor of the district court, and on January 23, 1880, was assigned to department No. 7 of the superior court. On March 22, 1880, the demurrer to the answer was sustained. An amended answer was filed April 1, 1880, which put the case at issue. The constitution of 1879, and the statutes passed in pursuance thereof provide that "the superior courts shall always be open (legal holidays and non-judicial days excepted) and they shall hold * * * regular sessions commencing on the first Mondays of January, April, July and October, and special sessions at such other times as may be prescribed by the judge or judges thereof." On January 21, 1884, the defendant filed a petition to remove the case to the United States circuit court, on the ground that the parties were citizens of different states. *Held*, that under the act of congress of 1875, providing that the application for removal must be made "before or at the term at which said cause could be first tried," the application in this case came too late; that the four general sessions of the superior court required to be held are "terms" within the meaning of the act.

Motion to remand. The opinion states the facts.

H. N. Clement, for the plaintiff.

Gordon Blanding, for the defendant.

SAWYER, CIRCUIT JUDGE. This action was commenced in the fourth district court of the state of California, on August 1, 1879. Defendant demurred August 22d, 1879, and the demurrer was overruled. Defendant having answered, plaintiff demurred to that part of the answer, setting up new matter as a defense, October 2d, 1879. The new constitution of California of 1879, having in the meantime taken effect, the case went into the superior court, as successor to the state district court, and on January 23, 1880, was assigned to department No. 7 of the superiorcourt. On March 22, 1880, the demurrer to the answer was sustained, with leave to amend. An amended answer was filed April 1, 1880, which, under the code of civil procedure, put the case at issue, and it was ready for trial.

On January 21, 1884, the defendant filed a petition to remove the case to the United States circuit court, on the ground that the plaintiff is a citizen of Missouri, and the defendant a citizen of California.

The petition alleges that "there is in this action a controversy between citizens of different states, to wit: a cotroversy between your petitioner, the defendant herein, which said defendant was at the time of the commencement of this action, ever since has been,

and now is a corporation duly organized and existing under and by virtue of the laws of the state of California, and which said defendant is a citizen of the said state of California, and the *plaintiff* herein, *who is* a citizen of the state of Missouri."

The proper bond was filed; and a copy of the record obtained by petitioner, and filed in the circuit court February 7, 1884, the state court having made no order and taken no action upon the petition. The plaintiff moved to remand the case to the state court, on the grounds:

1. That it is not shown by the petition that plaintiff was a citizen of Missouri at the time of the commencement of this suit.

2. That it appears from the record that the application was not made "before or at the first term at which it could have been tried," or within the time required by law.

3. That defendant has not used due diligence in making application for removal.

The supreme court has repeatedly held that on a removal the record must show that the citizenship of the parties of different states must exist both at the time of the commencement of the suit, and at the time of the application for removal. In this case it does not appear but that both plaintiff and defendant were citizens of California when the suit was commenced. It simply shows that plaintiff was a citizen of Missouri at the time of the application for removal, which is four years and nearly ten months after the commencement of the suit. Clearly, the record does not show jurisdiction in this court, or a proper case for removal on the ground of citizenship, and the case must be remanded on that ground.

The present constitution of California, which went into effect on January 1, 1880, five months after this suit was commenced, provides that the superior court "shall be always open (legal holidays and non-judicial days excepted)," and the code of civil procedure (sec. 73), adapted to the new constitution, provides that "the superior courts shall always be open (legal holidays and non-judicial days excepted), and they shall hold their sessions at the county seats of the several counties, or cities and counties, respectively. They shall hold *regular sessions*, commencing on the first Mondays of January, April, July, and October, and special sessions at such other times as may be prescribed by the judge or judges thereof; *provided*, that in the city and county of San Francisco the presiding judge shall prescribe the times of holding such special sessions."

Under these provisions of the code and constitution, it is insisted by defendant that there are no terms of court in California, and that the provision of the act of congress of 1875, that the application for removal must be made "before or at the term at which said cause could be first tried," can have no application in said state; that a removal from any state court of California, therefore, is in time if the application be made at any time before the trial, no matter how long it may have been ready, or in a condition for trial. I am unable

to take this view. Congress undoubtedly intended to require prompt action, and to provide that unless the party avails himself of the right promptly, after a reasonable opportunity to try the case has been had, his right to remove shall be cut off, or waived. In this district it has always been held by the circuit court that the respective separate general sessions of the courts to be held four times in each year, provided for by the statutes, are "terms," within the reason and meaning of the act of congress. There is no magic in the word "terms," or in the words, the courts "shall always be open." Courts of chancery, and some other courts, are always open for many purposes, though not always in session; yet they have regularly defined terms. The regular sessions of the superior courts, commencing at regularly appointed periods, are substantially terms. They are terms, at least, in my judgment, within the reason and meaning of the act of congress, and this construction will be adhered to in this circuit, until overruled by the supreme court. The cause must be remanded on this ground, also.

In some of the counties, by rule of court, new calendars are made up for every month, and the calendar is called anew and trials thereon begun on the first Monday in each month. It is by no means certain that the special sessions provided for in the act, and in those cases where monthly calendars are provided for by rule, such special and monthly sessions would not, also, be held to be terms, within the meaning of the act of congress. However that may be, the regular sessions must certainly be regarded as terms for the purpose of the removal of causes.

At the argument of the motion to remand, the court declared that the petition for removal was insufficient, for the reason that it did not show that petitioner was a citizen of a state other than the state of California, at the time of the commencement of the suit, whereupon the counsel for petitioner stated that this jurisdictional fact existed, and asked leave to amend the petition so as to properly state the facts. Several cases from the circuit courts were cited, wherein it was held that the circuit court had authority to allow the substitution of a new bond, to cure defects in the bond filed in the state court, and, also, to allow the petition to be amended so as to show the proper jurisdictional facts, when not shown by the record brought from the state court and filed in the circuit court. The filing of a new bond is merely to correct an *irregularity* in the proceedings. It is not a jurisdictional fact in this court. Generally the main object of a bond has been accomplished by the filing of the record in the circuit court, before the motion to remand has been made. I have heretofore thought it proper to allow an imperfect bond to be corrected in the circuit court, or any other matter of mere irregularity, not affecting the jurisdiction of the court. But, although aware that some circuit judges have adopted a different practice, I have never in this circuit allowed a petition which did not show the jurisdictional facts to be amended in such way as to show jurisdiction.

I am not prepared to say that the Court has not power to allow such an amendment to be made; but if the power be conceded, it is not a matter which the party can demand as a legal right, but only a matter for the exercise of a sound discretion by the court. It has been said by some judges, that they see no reason why an amendment showing the jurisdictional facts, should not be allowed to the petition in the circuit court, that is not equally applicable to the case of a bill originally filed in the circuit court, which omits to properly state the jurisdictional facts depending upon citizenship, or otherwise. In my judgment, there is a very important distinction, that does not appear to have attracted the attention of the courts in the cases hitherto reported. Take the present case for example. The record in the state court shows a case over which that court has jurisdiction, and it does not show a proper case for removal, or any case of which this court has jurisdiction. The supreme court has decided that, whenever the proceedings in the state court have been perfected, so as to show upon the record of that court that the petitioner is entitled to have his case removed, all jurisdiction of the state court ceases, and all subsequent proceedings in the case are illegal and void, even if it has refused to make any order for the removal; and that no order of removal is necessary. The jurisdiction of the state court is suspended, or superceded, the moment the proceeding showing a proper case for removal have been perfected. But the supreme court has also held the correlative proposition to be true, that the state court is not bound to renounce its jurisdiction, or let go its hold upon the case, until its record shows upon its face a proper case for removal, and that the jurisdiction of the United States court has attached; that the state court is authorized to proceed until its own record shows that it has lost jurisdiction, and the jurisdiction of the circuit court has attached. Now, in this case, the record of the state court shows jurisdiction in that court, and does not show jurisdiction in this court. The state court is, therefore, fully authorized to proceed to a final judgment, which will be valid. The record in this court does not show jurisdiction in this court, but, if the petition be amended here, as desired, jurisdiction will be shown by the record in this court. Its jurisdiction appearing on the record, it can, also, regularly proceed to final judgment. Thus each court proceeding on its own record, has jurisdiction, and the result may be, two final valid judgments, entirely different, or even opposite judgments, with no error in the record upon which either judgment, or decree, could be reversed on writ of error, or appeal. That state courts may proceed when its record does not show a valid removal, is evident from the fact that in a number of cases they have proceeded even after a valid removal; and their judgments in such cases have been reversed on that ground by the supreme court. In my judgment, in such cases as this, the circuit court, in the exercise of a sound discretion, should not permit a case to be thus embarrassed by an amendment to the petition, so as to show a proper case for removal, and juris-

diction in the circuit court, when these conditions are not shown in the record of the state court. The law as to averments of citizenship, has been laid down so often, and been so long settled, that those who fail to make the proper allegations are entitled to little indulgence on account of the oversight. Although there is no ground to suspect anything of the kind in this case, there is reason to believe, that the right to remove is sometimes exercised, not for the purposes of justice, but just the opposite, to obtain delay, and to hinder and obstruct the administration of justice by the enormous expense and inconvenience of litigating five or six hundred miles, more or less, from home. In my judgment in this circuit, at least, a pretty strict rule should be adhered to, in requiring a clear case for removal to be made out in the first instance in the court where the suit is brought; and that the court to which a removal is made should not be lax in allowing defective records to be made good by amendment after removal. This is the principle heretofore acted upon in this court.

For the reasons indicated, leave to amend the petition so as to show jurisdiction is denied, and the cause remanded to the state court, with costs.

SUPREME COURT OF NEVADA.

MARTIN *v.* VICTOR MILL AND MINING COMPANY.

Filed, March 26, 1884.

JUDGMENT OF THE LOWER COURT REVERSED upon a review of the evidence.

APPEAL from a judgment of third judicial district court, Esmeralda county, entered in favor of the plaintiff, and from an order denying defendants motion for new trial.

P. Reddy and *J. F. Boller*, for the appellant.

D. J. Lewis, *Curler & Bowler* and *Wells & Taylor*, for the respondent.

BELKNAP, J. During the periods mentioned in the complaint, the defendant was operating a mine in Esmeralda county. Its general business was intrusted with the superintendent, A. J. Rhodes, who was also the proprietor of a store of general merchandise at Belleville, a point about seven miles from the mine. Plaintiff was foreman at the mine, and also conducted a boarding-house, at which the employees of defendant boarded. He purchased supplies for the boarding-house from Rhodes, and in his complaint alleges, at various times loaned and advanced moneys to defendant and to its use. The complaint embraces several distinct causes of action arising upon these demands.

The nature of the business relations between plaintiff and Rhodes, and the manner in which the transactions were conducted, may be shown by extracts of plaintiff's testimony taken from the record.

He said: "During all the time that Mr. Rhodes kept the store at Belleville, namely, up to the last month of the year 1879, he traded with Mr. Rhodes, taking credit for his labor and claims against the company, and drawing goods, wares and merchandise and money from Mr. Rhodes against said claims." Again: "That he procured the signatures of the men and put his own signature in receipt for labor performed for the months and the years mentioned in said exhibits (the pay rolls) at the request of Mr. Rhodes, the superintendent, and that Mr. Rhodes agreed to pay them for their time, and to give them credit in his store for anything they wanted up to the amount of the claim each had."

Rhodes testified "that Martin traded with him from September, 1875, up to the third day of May, 1878. I think that Martin drew all his supplies for his boarding-house from witness' (his) store, and was charged on witness' books for all such supplies. That Martin would turn in his time and claims against the defendant to him, and that he would give Martin credit for it, and that he (witness) would take the company for it. Sometimes Martin would owe him, and sometimes he would owe Martin. * * * That from the third day of May, 1878, up to the time he closed his store in Belleville, which was some time in October, 1879, Martin continued to trade at his store, and afterwards traded for about three months at his store at New Boston.

"That Martin would sometimes pay the men the money for their time, and bring it to witness and have it credited on the store books, and that Martin would draw supplies against it.

"That the course of dealing was as follows: Martin was permitted to draw whatever he wanted out of his store, either money or goods, which was charged to Martin on his books.

"Whenever Martin had any claim against the defendant for his time, or the time that he (Martin) had purchased from the men, that he would take it in payment and credit Martin on the books with the amount.

"That the dealing was between him and Martin, and that he (witness) looked to the company to obtain his pay on these claims."

These were the only witnesses who testified upon this subject, and there is no conflict in their testimony. If we are to be governed by it—and we have no alternative—it is manifest the judgment cannot be sustained, because plaintiff had continued to transfer all his demands against defendant to Rhodes so long as Rhodes continued store-keeping. Rhodes closed his store about the commencement of the year 1880. The testimony shows that since that time plaintiff has paid large sums of money to defendant's use, but the complaint admits credits aggregating ten thousand three hundred and forty-two dollars, and there is nothing to fix the time when they were given. The total credits exceed the advances made since January, 1880, and *non constat* that defendant has not paid all of its indebtedness to plaintiff.

Upon the oral agreement respondent claimed that an examination of the record would disclose the fact that the judgment given by the district court was for a balance due plaintiff after paying Rhodes, and that the transfer of demands to him was only to the extent of paying plaintiff's indebtedness. In his cross-examination Rhodes testified "that at various times, while plaintiff was acting as foreman of the defendant, the witness, as superintendent of defendant, requested plaintiff to pay sums of money to men who were working for defendant, and that plaintiff did so. And that it was understood and agreed between witness and plaintiff that all such advances and board bills of the men working for defendant were to be credited to plaintiff on the books of witness to the extent of what plaintiff might then owe witness."

If this piece of evidence established the fact that the demands against defendant were transferred only to the extent of plaintiff's indebtedness to Rhodes, still, there is nothing in the record tending to show a balance in favor of plaintiff.

The judgment must be reversed for the reasons stated.

As some of the questions made upon this appeal may arise upon a retrial, it is proper that they should be settled now.

I. The pay-rolls offered in evidence were admissible. The number of days' work and the amount due each man, and set opposite his name, was in frequent instances altered, but the alteration was immaterial to the issue to which the proof was directed. The instruments purported to be receipted monthly pay-rolls of defendant for a portion of the time embraced by the transactions between the parties, and were offered as tending, in connection with the other evidence, to prove the fact that plaintiff, as well as others, were accustomed to receipt for the amounts due them each month, and without receiving the money from defendant, take credit upon the books of Rhodes for that amount. No question of the number of days' labor performed each month, or of the amount due, was involved, but simply the course of business in the respect stated.

II. The letters and receipts offered in evidence by plaintiff were admissible—the former as tending to establish an indebtedness; the latter, in connection with the oral testimony, as tending to prove payments made by plaintiff for defendant. The receipt of A. Mack & Co. must be excepted from this general statement, as there is no proof to connect this payment or matter with defendant.

III. The finding that two thousand dollars was loaned to defendant is unsustained by the evidence. No authority was shown in Thomas Martin to borrow money for defendant, now was it shown that defendant received the money. The statement in Coye's letter of July 13, 1881, does not identify this loan, but appears to refer to money paid to the men, and not to Martin.

IV. Plaintiff should not have been allowed his per diem for the time he was absent.

V. The finding touching the account stated is correct as the question is presented by the record. The objectionable matter is not

itemized; if errors exist they do not affect all of the items of the transaction and invalidate the whole account.

Whether, under the pleadings, the account is subject to attack, or whether the facts authorize its correction, are matters upon which we express no opinion because the questions were not made.

The judgment and order of the district court are reversed, and a new trial ordered.

SUPREME COURT OF OREGON.

STATE *v.* SWAYZE.

Filed February 25, 1884.

LARCENY OF CATTLE—INSTRUCTIONS.—In a prosecution for the larceny of cattle, where the defendant claims that at the time of the taking, the cattle were lost and abandoned and had no owner, and there is evidence to sustain such claim, an instruction is erroneous which charges the jury that "the taking of the animals with intent to appropriate the entire dominion over them and convert them to the takers use, raised a presumption of a guilty and felonious intent."

THE SAME—NATURAL MARKS—OWNERSHIP.—The finder of personal property lost or mislaid, which has such marks of ownership upon it as will enable him to determine who the owner is, must restore it, and will be deemed guilty of larceny, if with such knowledge of the true owner he takes it with intent to convert it to his own use and deprive the owner thereof. But the natural marks on live animals are not presumed to be marks of ownership.

THE SAME— IMMATERIAL DISCREPANCIES IN TESTIMONY.—An instruction that "immaterial discrepancies between the testimony of witnesses to the same point do not necessarily show that one had sworn falsely, and you (the jury) should not regard mere slight variances between witnesses as showing that they have not spoken the truth" is erroneous, as such variances may be sufficient to enable the jury to determine the degree of credit to which each is entitled, and answer such purpose equally as well as contradictions of a graver character.

APPEAL from the circuit court of Baker county. The opinion states the facts.

Barham & Ramsey, for the appellant.

P. H. D'Arcy, for the respondent.

WATSON, C. J. This appeal is from a judgment of imprisonment upon a conviction for larceny of a cow and calf. The evidence given at the trial appears, in the bill of exceptions forming part of the record in the case. Hindman, the prosecuting witness, claimed the animals as his property, while the appellant contended they were lost or abandoned animals and had no owner. Under this claim he drove them off the range and put his brand upon them and then turned them back upon the range again. After this Hindman put the cow and calf in a Mr. Louis' corral and sent word to appellant who came and threw the cow and examined her for marks and brands. Appellant still disputed Hindman's ownership and afterwards drove the animals out of Louis' field where Hindman left them and put them in his own field. He afterwards turned them back on the range.

There is nothing in the circumstances of the case or the conduct of the appellant, as shown by the evidence in the record before us, which seems to us sufficient to impugn the appellant's good faith in making such claim.

The animals were not branded, and the evidence as to the cow having been marked previous to the time appellant assumed dominion over her is not very satisfactory. His testimony that the cow had been known and recognized as an estray by the stockmen in the vicinity for four or five years previously, and that he had been informed by his neighbors that she was an estray, does not appear to have been contradicted on the trial. And no act of concealment from which either consciousness of guilt or a disposition to avoid any responsibility for his conduct in the premises can be inferred, is shown. There was evidence that the animals were the property of Hindman, as alleged in the indictment.

Upon this state of the case before the jury the court charged, in effect, that the taking of the animals out of the range with intent to appropriate the entire dominion over them and convert them to the taker's use, raised a presumption of a guilty and felonious intent, and that it would be the duty of the jury to so find unless there was something else in the evidence to rebut the presumption. The court also charged that "property which has such natural marks, as cattle or domestic animals, can never be considered as having no sign or mark about them by which their owner can be discovered or recognized, as may be the case with money or chattels, which may be like a thousand others."

These instructions taken together it seems to us precluded the jury from finding any other verdict than one of guilt. And we think in view of the facts in evidence before the jury they were certainly erroneous and prejudicial to the appellant's rights. The circumstances of the taking and conversion were all before the jury. They might have found therefrom that such act was done under such a state of facts as justified the appellant in believing, and that he did actually believe, that the animals were lost or abandoned property. And if the jury had been satisfied that such was the case from the proofs before them they should have acquitted the appellant. For he could not be held liable criminally for an act done under such a misapprehension, although the animals did turn out to be Hindman's property. 2 Bish. Crim. L. 879, 881, 882.

Many of the circumstances attending the taking and interference with the property by the appellant, if not all, tended to negative the charge of felonious intent, and when the court told the jury "that the taking of such live animals out of the range with intent to appropriate the entire dominion over them and convert them to the taker's use cannot be presumed to be in good faith" and a little further on in his charge that such taking was presumtively felonious, the tendency of such instructions, if not their real intention was, to deprive the appellant of the benefit of such exculpatory circumstances in his defense. But the instruction as to "natural marks" on this class of live animals goes even farther. Under the rule it announces there can be no defense upon the ground of mistake in taking and converting such property as having been abandoned or lost, if it turns out not to be such in fact. The rule is doubtless

well settled that the finder of personal property lost or mislaid, which has such marks of ownership upon it as will enable him to determine who the owner is, must restore it and will be deemed guilty of larceny, if with such knowledge of the true owner he takes it with intent to convert it to his own use and deprive the owner thereof.

Now if the natural marks on live animals are to be considered such marks of ownership as the instruction plainly assumes, then every taking with intent to convert to the taker's use where the property is not in fact lost or abandoned by the owner no matter what the appearances may be, will be larceny.

But this simply confuses marks of ownership with those of identity. An owner of such live animals may identify by such natural marks, while they afford no indication whatever as to the ownership. The court also charged the jury: "That immaterial discrepancies between the testimony of witnesses, to the same point, do not necessarily show that one had sworn falsely, and you should not regard mere slight variances between witnesses as showing that they have not spoken the truth." We suppose the court only intended this as a caution to the jury not to give too much importance to contradictions between witnesses not calculated to materially affect their credit, and did not intend it to be understood as an inflexible rule for their guidance. But the instruction was so worded that the jury might readily conclude that they were bound to follow it according to its literal meaning, and it may have influenced their verdict.

Taken as it reads, it is clearly wrong. "Mere slight variances," between witnesses may, in many instances, be sufficient to enable the jury to determine the degree of credit to which each is entitled, and answer the purpose equally as well as contradictions of a graver character. For these reasons we are of the opinion the appellant's conviction was improper, and the judgment of the circuit court should be reversed.

Judgment reversed.

WHITE v. HOLLAND ET AL.

Filed February 25, 1884.

LEASE TO COMMENCE IN FUTURO—STATUTE OF FRAUDS.—A lease of land for a year, to commence *in futuro*, is "an agreement not to be performed within a year,' within the meaning of the statute of frauds, and must be in writing; otherwise it is invalid.

APPEAL from a judgment of the circuit court for Multnomah county.

On January 20, 1881, the respondents made a parol lease of certain premises to the appellant for the term of one year, to commence on March 1, ensuing. Before the latter date, however, they disclaimed their agreement and refused to give possession. The appellant then brought this action for damages for breach of the agreement, alleging the foregoing facts in his complaint, and upon

a trial by jury obtained a verdict for $500. The court below set the verdict aside, and afterwards rendered judgment on the pleadings for the respondents. Both these rulings were made on the ground that the parol lease was an agreement not to be performed within a year, and therefore invalid under the statute of frauds adopted in this state.

This appeal was taken from such order and judgment.

A. H. Tanner, for the appellant.

Wm. Strong & Sons, for the respondent.

By the COURT.

WATSON, C. J.: The principal question presented by this appeal is whether a parol lease of lands for a year, to commence *in futuro*, is "an agreement not to be performed within a year," within the meaning of our statute of frauds, and therefore invalid.

This identical question appears to have been already decided in the affirmative by this court in a previous case: Pulse v. Hamer, 8 Or. 251.

The distinction which appellant's counsel has sought to draw between the two cases is manifestly unsound. The facts stated in the opinion in that case raise the precise question presented here, and the principle announced is equally applicable to both. But if the point could be regarded as still open, we should not hesitate to adopt the views of the court in that case as correct under the provisions of our statute. These provisions must be construed with reference to the context as it appears in the code. The code itself is an original act, and the rule of construing by the context is fully applicable. These provisions are found under the title "of indispensable evidence." They cover all the subjects usually embraced in the statute of frauds adopted in other states, and they stand in such order and connection that there is no ground for saying, as in the later decisions in New York and those of Iowa, that the declaration that "an agreement that by its terms is not to be performed within a year from the making thereof is void," applies only to personal property and choses in action, and does not affect transfers or leases of realty. If this provision does apply to leases of real property in this state, and we can perceive no reason from the context from excluding them from the operation of such general language, then it will accord with all the authorities to hold the lease involved in this action invalid.

For a lease for a year to commence at a future time is "an agreement that by its terms is not to be performed within a year *from the making thereof:* Wolf v. Dozer, 22 Kan. 436; Atwood v. Norton, 31 Ga. 507; Delano v. Montague, 4 Cush. 42.

We think, therefore, that it must be regarded as settled in this state that a parol lease of real property for a year, to commence *in futuro*, is invalid, as being in conflict with such provision.

The judgment of the circuit court is affirmed.

SUPREME COURT OF UTAH.

HILL ET AL. v. SEAGER.

Filed April 15, 1884.

REPLEVIN OF JOINT PROPERTY.—Personal property incapable of division, and owned by two or more joint owners, or tenants-in-common, cannot be replevied by one or more of such owners from the owners who have the exclusive possession thereof.

APPEAL from a judgment of the district court, entered in favor of the defendant. The opinion states the facts.

TWISS, J. This is an action to recover possession of a horse described in the complaint, and therein alleged to be the joint property of the plaintiffs and the defendant who were jointly entitled to the possession of the same; but that the defendant being in possession thereof converted it to his own use and refused to permit the plaintiffs to use or to exercise any control over or to have possession of the horse, either by themselves or jointly with the defendant. That the plaintiffs being entitled to the immediate possession of the horse demanded possesion of the same of the defendant, who refused to deliver it to them. Whereupon they pray judgment for the possession of the horse, or in case it cannot be delivered, for the value thereof—the sum of one hundred and fifty dollars.

To this complaint the defendant demurs and assigned among other grounds of demurrer "that the complaint does not state facts sufficient to constitute a cause of action."

The statutes of this territory have somewhat changed the law of replevin, but contain no provision sufficiently radical to permit one joint owner to replevy from his co-tenant or joint owner their indivisible property, the possession of which one of them is as much entitled to as the other.

The rule of law that indivisible personal property owned by two or more joint owners or tenants in common cannot be replevied by one or more of such owners from the other or others is quite uniform and almost without exception: Wells on Replevin, 86 and note; Davis v. Sottich, 46 N. Y. 393; Walker v. Funne, 28 Ala., 373; Kimball v. Thomson, 4 Cush, 441–447.

The plaintiffs rely upon Schwartz v. Shuiner, 47 Cal. 6. This case was under a statute providing that tenants-in-common "may jointly or severally bring or defend any civil action for the enforcement or protection of the rights of such party" and was in form replevin for seventeen-thirtieths of the furniture used in a hotel; the complaint also containing all the allegations essential in trover, all of which were sustained by the findings, and the findings expressed all the facts in the case. The court reversed the judgment of the district court which was for the defendant "with direction to render judgment for the plaintiff *on the findings*."

That case is distinguishable from this in this respect. It was brought to recover a certain specified part of a property susceptible

of division; but it is unsatisfactory in any view that may be taken of it as an authority in this case, especially if read in the light of Hewlett v. Owens et al, 50 Cal. 474 in which the court (speaking of the parties) says: "Being tenants in common, neither could under the circumstances appearing in this case maintain replevin against the other nor against the vendee of the other." This is in harmony with the almost unbroken current of authority and not inconsistent with the California statutes.

If a joint tenancy of the plaintiff and defendant in the demanded property is disclosed by the allegations of the complaint, the suit cannot be maintained: Wells on Replevin, p. 88, sec. 154; and under our practice act the issues tendered by such allegations may be raised and decided on demurrer: C. L. sec. 1265.

The judgment of the district court in sustaining the demurrer is correct and should be and is affirmed.

HUNTER, C. J. and EMERSON, J., concurred.

ANTHONY ET AL *v.* SAVAGE.

Filed January 31, 1884.

DEPOSITION—ADMISSIBILITY OF, AT SUBSEQUENT TRIAL—A deposition taken pending the action is admissible at the trial thereof, although subsequent to the taking of such deposition the complaint has been amended, provided the subject matter of the action and the issues therein have remained substantially the same.

IDENTITY OF DEBT SUED ON—EVIDENCE OF—In an action founded on a promise to pay a debt barred by the statute of limitations, evidence to identify the indebtedness with the promise is admissible.

Appeal from an order of the district court granting the plaintiffs a new trial. The opinion states the facts.

TWISS, J. This case was commenced in October, 1876. Upon trial the plaintiffs recovered a verdict, and from the judgment thereon the defendant appealed to this court, where the case was reversed and remanded: 2 Utah, 466.

Since then two amended complaints have been filed. The record including the affidavits presents a mixture of statement, testimony, objection and rulings, orders and exceptions thereto, from which it is quite difficult to separate the material points of law at issue from the confused and immaterial mass of matter contained in what is called a "transcript on appeal."

The amended complaint, upon which the last trial was had, was filed in September, 1880, and contained in substance allegations that on the thirteenth day of October, 1873, the defendant was indebted to the plaintiffs in the sum of $2,112.60 upon certain business dealings and transactions between them; that at sometime before the tenth day of October, 1874, and subsequent to the thirteenth day of October, 1873, the defendant, in consideration of said indebtedness, in writing acknowledged such indebtendess and promised to pay the same to the plaintiffs in a reasonable time thereafter;

that upon such acknowledgment and promise the plaintiffs gave and allowed to the defendant until the second day of October, 1876, in which to pay the same, and that defendant has wholly neglected to pay the whole or any part thereof save and except only the sum of seven hundred and four dollars and twenty cents, and asks judgment for the alleged balance of fourteen hundred and eight dollars and forty cents.

The defendant in his answer denies that there ever was at any time any business transactions between the plaintiffs and defendant out of which said alleged indebtedness did or could arise; denies the alleged indebtedness on the thirteenth day of October, 1873, and the existence of the said alleged balance of indebtedness, or any part thereof, and alleges that said supposed cause of action did not accrue within four years next preceding the commencement of this action. Under the direction of the court, the jury found a verdict for the defendant. A motion for a new trial was made and sustained, from which order of the court sustaining the motion and granting a new trial, appeal is taken to this court.

Upon the trial the plaintiffs offered to read in evidence the depositions of Vincent M. Wilcox and Charles Both, on file in the case, which it seems were taken at the instance of the plaintiffs, sometime pending the action. The record contains no part of these depositions, and therefore this court has no knowledge as to their competency as evidence in the case, but they were offered for the purpose of showing the origin and existence of a debt due from the defendant to the plaintiffs, and an acknowledgment of and promise to pay it by the defendant to the plaintiffs, and the identification of it as the debt sued upon. To the reading of which the defendant objected, on the ground that the allegations of the original complaint had, by the two amended complaints, been so changed that the particular issues of the case at the time made another case, and that the depositions were not taken with reference to the issues as they were at the time of trial.

From the several complaints, offers to introduce testimony, objections thereto, and the arguments of counsel, it is quite clear that the indebtedness claimed by the plaintiffs to be due to them from the defendant, has all of the time been the same, however it may have been described or claimed to have been evidenced in the original or amended complaints.

The allegations of the complaints have been changed to meet and overcome the objections of the defendant, and to conform to the rulings of the court; but the subject matter of the action has always been an alleged acknowledgement and promise to pay an alleged indebtedness resulting from or growing out of business transactions between the plaintiffs and the defendant, whether described as an account stated, or a promise in writing to pay the debt; in all of the complaints the identity of the cause and original indebtedness have been the same: Perin v. Keene, 19 Me. 355; Brackett v. Crook, 24 N. H. 173; Carroll v. Cook, 8 Ser. and R. 287; Stetman v. Mudgett, 10 N. H. 338; Buxton v. Edwards, 134 Mass. 567-578.

Therefore the objection to the depositions was not good; as the purpose for which they were offered was material to the issues such part of them (if any) as would sustain the issues should have been admitted. As the depositions are not before us we do not undertake to determine that the testimony of the deposing witnesses or any part thereof was admissible, we pass only upon the objection raised.

The plaintiffs offered to read in evidence three bills of exchange dated respectively on the eleventh of Dec., 1869, the eighteenth of January, 1870 and eighteenth of Feb., 1870, each for the sum of seven hundred and four dollars and twenty cents drawn by the plaintiffs upon, and accepted by Savage & Ottenger, which offer was accompanied with the assertion on their part that they would prove if permitted that Savage & Ottenger were at the date of the drawing and acceptance of the bills of exchange partners—that subsequently in the fall of 1870, they dissolved, and by the terms of dissolution, Savage was to pay these bills of exchange, and that the indebtedness evidenced by them was the identical indebtedness which the defendant had promised to pay to the plaintiffs which promise is the basis of this action. This evidence the defendant objected to, and the court sustained the objection.

A debt is a sum of money due from one person or party to another. The offer on the part of the plaintiffs to introduce testimony tending to show an indebtedness from Savage to the plaintiffs in 1870, accompanied with an offer to prove that the defendant promised to pay the plaintiffs the identical indebtedness evidenced by these bills of exchange was an offer to introduce testimony tending directly to sustain the issue on the part of the plaintiffs, and the testimony should have been admitted.

There are several other assignments of error, but as the foregoing is, in our opinion, decisive of the case, we express no opinion as to the others.

The order of the court sustaining the motion for a new trial should be and is affirmed.

HUNTER, C. J., and EMERSON, J. concurred.

BOOK REVIEWS.

DESTY'S FEDERAL PROCEDURE. A manual of practice in the courts of the United States, embracing the provisions of the constitution, the revised statutes and amendments thereto relating to federal courts; together with the rules promulgated by the supreme court of the United States. With notes of decisions. By Robert Desty, attorney at law. Sixth edition, revised. Sumner Whitney & Co., San Francisco. 1884.

HAWES ON PARTIES TO ACTIONS. The law respecting parties to actions, legal and equitable. By Horace Hawes, counselor at law. Sumner Whitney & Co., San Francisco, 1884.

BOONE ON REAL PROPERTY. A manual of the law of real property, including also general rules of law relating to the purchase and sale of real property, or law of vendor and purchaser, as determined by the leading courts of England and the United States. By Charles T. Boone, LL. B., author of "Law of Corporations," etc. Sumner, Whitney & Co., San Francisco. 1883.

STEWART ON MARRIAGE AND DIVORCE. The law of marriage and divorce, as established in England and the United States. By David Stewart, of the Baltimore bar; joint author of Stewart & Carey's "Law of Husband and Wife in Maryland." Sumner Whitney & Co., San Francisco. 1884.

The foregoing four books are the latest additions which Sumner Whitney & Co. have made to their Practitioner's Series. Besides the works mentioned above, this series now includes Boone's Law of Corporations; Desty's American Criminal Law; Desty's Removal of Causes; Desty's Federal Constitution; Lubi's Equity Pleading; Barber's Principles of Law of Insurance; Desty's Shipping and Admiralty; Desty's Commerce and Navigation. The publishers have also in press, or in active preparation, the following: Boone on Mortgages; Stewart on Domestic Relations; Reardon's Dicey on Domicile; Hutchinson on Negotiable Instruments; Newmark on Sales; Wade on Trust; Baylies on Damages, and Campbell on Agency. The publishers announce their intention to continue this series until every important title of the law has been covered.

The value of this series to the practicing lawyer can hardly be overestimated. The books of which it is composed, while not pretending to be exhaustive treatises, claim to be, and are, succinct statements of the existing law on the subjects of which they respectively treat. They are all written on the same general plan, the aim of their authors being,

as stated by Mr. Boone in has preface to the Law of Corporations, "to discard all obsolete law on the one hand, and to avoid all disquisitions as to what the law ought to be on the other." As a result of this plan it has been found possible to keep the size of the volumes within reasonable limits.

The foregoing remarks are applicable to all of the works included within this series. Of Mr. Desty's Federal Procedure a few more words of commendation are needed.

The first edition of this book appeared in 1875. It met with deserved favor from the profession, and five editions were rapidly exhausted. These facts are the strongest possible evidence of the merits and necessity of Mr. Desty's work, and render an extended criticism thereof unnecessary. It need only be said of the present edition that it is a great improvement on its predecessors. The form of the work has been recast, and it has been increased in size from four hundred and forty-seven to nine hundred and seventy pages. This increase is mainly due to the great number of citations added. Statutes subsequent to the revised statutes, and relating to the subject-matter of the book, are set forth *in extenso* in an appendix. The publishers promise that all future amendments to statutes and rules will be printed in the same style and presented to purchasers who send in their names for such purpose. The index covers a space of about ninety pages, and is a model for thoroughness and convenience of reference.

NOTES.

The president has appointed Judge Brewer, of the supreme court of Kansas, to fill the vacancy in the eighth circuit, caused by the resignation of Judge McCrary. The appointment has been approved by the profession in general, who have long been familiar with the judicial ability of Judge Brewer. It was a particularly happy one, in so far as no political or personal interest appears to have influenced the appointment. Judge Brewer is forty-six years of age. He was born in Asia Minor in 1836. He removed to the west in 1858. After serving as United States commissioner for some time, he was elected judge of probate in 1862. In 1864 he was elected to the district court for the first judicial district of his state, and in 1868 prosecuting attorney for his county. In 1870 he was elevated to the supreme court of the state, where he has since remained, having been re-elected in 1876 and 1882. He is a nephew of Judge Field of the United States supreme court.

The supreme court of the United States has just decided an important case of interest to the large number of Americans who visit Europe, and in returning bring with them a replenished wardrobe, which they desire to have admitted free of duty. The facts of the case and the rulings of the court are as follows: William Astor, plaintiff in error, a citizen of the United States, arrived from a visit to Europe, late in September, with his family, by vessel, and brought with him wearing apparel bought there for his and their use, to be worn here during the season then approaching, not excessive in quantity for persons of their means, habits and station in life, and their ordinary outfit for winter. A part of the articles had not been worn, and duties were exacted on all these articles. This court holds that under section 2,505 of the revised statutes, exempting from duty "wearing apparel in actual use, and other personal effects not merchandise," the proper rule to be applied was to exempt from duty such articles as fulfilled the following conditions: First, wearing apparel owned by the passenger and in condition to be worn at once without further manufacture; second, brought with him as a passenger, and intended for the use or wear of himself or his family who accompanied him as passengers, and not for sale, or purchased or imported for other persons, or to be given away; third, suitable for the season of the year which was immediately approaching the time of arrival, and not exceeding in quantity, quality, or value what the passenger was in the habit of ordinarily providing for himself and his family at that time and keeping on hand for

his and their reasonable wants, in view of their means, habits, and station in life, even though such articles had not been actually worn. The judgment of the circuit court was reversed, and the cause remanded with instructions to award a new trial.

In *Ex-parte* Crow Dog, U. S. Sup. Ct., October and December, 1883: 109 U. S. (Davis) 556, the supreme court of the United States applied the rules that in the interpretation of statutes, clauses which may have been repealed may still be considered in construing the provisions that remain in force (citing Bramwell, L. J., in Attorney-General v. Lamplough, L. R., 3 Ex. D. 223–227; Hardcastle on Statutory Law, 217; Bank for Savings v. Collector, 3 Wall. 495–513; Commonwealth v. Bailey, 13 Allen, 541; Bates v. Clark, 95 U. S. 204), and that implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old (citing Wood v. The United States, 16 Pet. 342; Davies v. Fairbairn, 3 How. 636; United States v. Tynen, 11 Wall. 88; State v. Stoll, 17 Wall. 425). * * * The rule is, *generalia specialibus non derogant.* "The general principle to be applied," said Bovil, C. J, in Thorpe v. Adams, L. R., 6 C. P. 135, "to the construction of acts of parliament is that a general act is not to be construed to repeal a previous particular act unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in Fitzgerald v. Champenys, 30 L. J., N. S., Eq. 782; 2 Johns. and Hem. 31–54, "that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention to do so."

A strong case of the application of the latter rule was made by the same court in Townesend v. Little, U. S. Sup. Ct., Oct. and Dec., 1883: 109 U. S. (Davis), 504, where the territorial act under which a deed of the property was made to A by the mayor, directed that "deeds of conveyance of the same shall be executed by the mayor of the city or town, under seal of the corporation." A general act of the territory at the time the deed was made required deeds to be witnessed. The deed to A bore the corporate seal, as required by the special act, but was not witnessed: *Held*, that the special act controlled the general act, and that the deed was good: Citing Pease v. Whitney, 5 Mass. 380; Nichols v. Bertram, 3 Pick. 341; The State ex rel. Fosdick v. Perrysburg, 14 Ohio St. 472; Lowdon, &c. Railway v. Wandsworth Board of Works, Law Rep. 8 C. P. 185; Bishop on the Written Laws, sec. 112a).

WEST COAST REPORTER.

WHOLE No. 18. MAY 1, 1884. VOL. II. No. 10.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

RIPARIAN PROPRIETORS AND RIPARIAN RIGHTS ON PRIVATE STREAMS.

That it is so, the authorities bear abundant witness. We do not wish to be understood as saying that there is such an absolute property in the water that the whole stream may be destroyed by a riparian proprietor, so that others below him will be deprived of it; but that it is an incident of his land to the extent that he has the right to have it continue to flow in its natural course, subject to such changes only as may be occasioned by such use of it as the law allows the various proprietors to make, as it passes along, and which will be hereafter more fully explained. In this sense only is the right to be understood, when spoken of in the authorities about to be quoted." The opinion then quotes numerous authorities, and it may not be inappropriate to copy those which are cited from American decisions. After quoting the general definitions given by Lord Coke and by Mr. Angell, the Chief Justice proceeds (p. 266): "The supreme court of Ohio says:[1] 'The uses of the waters of private streams belong to the owners of the land over which they flow. They are as much individual property as the stones scattered over the soil.' Chancellor Kent says:[2] 'A right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold of which no man can be disseized but by the lawful judgment of his peers, or by due process of law.' It is said in the note to *ex parte* Jennings:[3] 'The general distinction deemed of so much excellence and importance by these learned judges, and which at this day no lawyer will hazard his reputation by controverting, is that rivers not navigable, that is fresh water rivers of what kind soever, do of common right belong to the owners of the soil adjacent, to the extent of their land in length; but that rivers where the tide ebbs and flows, belong of common right to the state.' In Wadsworth v. Tillotson,[4] speaking of the rights to a water course, the supreme court says: 'This right is not an easement or appurtenance, but is inseparably annexed to the soil, and is parcel of the land itself.' Chief Justice Shaw says:[5] 'The right to flowing water

[1] 10 Ohio 297.
[2] Gardner v. Village of Newburgh, 2 Johns Ch. 166.
[3] Cow. 543.
[4] 15 Conn. 372.
[5] Elliott v. Fitchburgh R. R., 10 Cush. 193.

is now well settled to be a right incident to property in the land.' In another case the same judge says:[6] 'It is inseparably annexed to the soil, and passes with it, not as an easement or as an appurtenance, but as parcel. Use does not create it, and disuse cannot destroy nor suspend it.' The supreme court of North Carolina says:[7] 'The right is not founded in user, but is inherent in the ownership of the soil, and when a title by use is set up as against another proprietor, there must be an enjoyment for such a length of time as will be evidence of a grant.' * * 'The common right here spoken of is not that existing in all men in respect to things *publico juris*, but that common to the proprietors of the land on the stream. And, as between them, the use to which one is entitled is not that which he happens to get before another, but it is that which, by reason of his ownership of the land on the stream, he can enjoy on his land and as appurtenant to it.' The supreme court of Vermont say:[8] 'The owner of land has rights to the use of a private stream running over his land peculiar to himself as owner of the land, not derived from occupancy or appropriation, and not common to the whole community. It is the right to the natural flow of the stream. Of this right he can not be deprived by the mere use or appropriation by another, but only by grant, or by the use or occupancy of another, for such length of time as that therefrom a grant may be presumed.'" The right to the water of running streams being thus an incident of ownership by a riparian proprietor is held by the United States as completely as by any private owner, and necessarily passes to its grantee by the patent which conveys the full legal title to the tract of land bordering on the stream. In examining still more closely the nature of the right, and showing that it does not depend upon actual use or appropriation of the water by a riparian owner, the learned chief justice most ably proceeds as follows (pp. 268–272): "If a stream be an incident to the land, it can no more be diverted, simply because it cannot be presently used by the person owning the land, than he can be deprived of any other property for the same reason. The whole argument on this point evidently originates out of an utter misunderstanding of what is meant by the language, when it is said that the riparian proprietor 'has no property in the water itself, but simply a usufruct while it passes along.' The reason for this expression is this, that as each proprietor has a right to the flow of the stream through his land as it was wont to flow, as it is the common property of all the owners of the soil through which it passes, no one of them can have such a property in the water as will entitle him to consume or divert it all from those on the stream below him, as he might do if he had an absolute property in the water itself; hence the expression so often used. It is, however, never employed as limiting the entire right

[6] Johnson v. Jordan, 2 Met. 239.
[7] Page v. Williams, 2 Dev. & Bat 55.
[8] Davis v. Fuller, 12 Vt. 190.

of the riparian proprietor to the *mere use* of the water; he has another right, and one which is universally admitted; that is, the right to have the stream continue to flow through his land, irrespective of whether he *may* need it for any special purpose or not. He has the right to the natural benefit which a stream affords, independent of any particular use, for the fertility which its natural flow imparts to the soil.

In other words, his right has a double aspect; first, the right of having the course of the stream continued through his land, which is absolute and complete, as against all the world; and, secondly, the right to make such use of the water, as it passes through his land, as will not damage those who are located on the same stream, and are entitled to equal rights with himself. If this be not the character of his right, what is to be understood by the maxim too often quoted, and which lies at the foundation of water rights, *aqua currit et debit currere ut currere solebat?* This is substantially that no man has the right to divert a stream from its natural course; for to say that water should be permitted to run as it used to, is a prohibition upon all to divert it from its course, and thus the very maxim shows the proprietors have the right to claim that the stream shall be permitted to run through their land in its natural channel independent of whether they make any particular use of it or not. Suppose there be a waterfall or water-power upon a tract of land, and it may be supposed that the tract is valuable only for a mill site, but is not presently used; will it be said that its whole value may be destroyed by the diversion of the water, or that a valuable mineral spring which is not yet used may be abstracted from it, and that the owner had no remedy, simply because he had not appropriated it to some useful purpose when the diversion or abstraction took place? Indeed, the authorities are, without exception, that the right to have the water flow in its accustomed channel does not depend upon the fact that any special use is or may be made of it by the proprietors; and no case, no dictum, and no intimation of opinion to the contrary, when, rightly understood, can be found in the books. It is said by Mr. Phear,[9] 'that every riparian proprietor has a right, whether he uses the stream or not, to have its natural conditions within his own limits preserved from sensible disturbances arising from acts on the part of the riparian proprietors, whether above or below, or on the opposite banks.' The court of king's bench say:[10] 'The proposition that the first occupant of running water for a beneficial purpose has a good title to it, is perfectly true in *this* sense, viz., that neither the owner of the land below can pen back the water, nor the owner of the land above divert it to his prejudice. In this, as in any other case of injury to real property, possession is a good title against a wrongdoer, and the owner of the land who applies the stream that

[9] Phear on Water Courses, p. 31.

[10] Mason v. Hill, 5 B. and Adol. 11.

runs through it to the use of a mill newly erected, or to other purposes, if the stream is diverted or obstructed, may recover for the consequential injury to the mill. *But it is a very different question whether he can take away from the owner of the land below one of its natural advantages*, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil even where unapplied, and deprive him of it altogether by anticipating him in its application to a useful propose. If this be so, a considerable part of the value of an estate might at any time be taken away; and by parity of reasoning a valuable mineral spring might be abstracted from the proprietor in whose land it rises, and converted to the profit of another.' Mr. Justice Creswell says:[11] 'It appears to us that all persons owning lands on the margin of a flowing stream have, by nature, certain rights to use the water of that stream, whether they exercise those rights or not.' And Lord Ellenborugh says:[12] 'The general rule of law as applied to this subject is, that independent of any particular enjoyment used, or to be had by another, every man has a right to have the advantage of a flow of water in his own land.' The supreme court of Massachusetts says:[13] 'If the use what one makes of his right in the stream is not a reasonable use, or if it causes a substantial and actual damage to the proprietor below by diminishing the value of his land, though at the same time he has no mill or other work to sustain present damage, still, if the party then using it has not acquired a right by grant, or by actual appropriation and enjoyment for twenty years, it is an encroachment on he right of the lower proprietor for which an ac tion will lie.' The learned Chief Justice Ruffin of North Carolina says upon this point:[14] 'The argument of the counsel, however, assumes that the right to water can be acquired only by use, and therein we think consists its error. The *dicta* on which he relies had reference to the cases of prescriptive title, or where the party had only the rights of a possessor. But it is not true that the right to water is acquired only by its use and that it cannot exist independent of any particular use of it. That doctrine is correctly applied to the air and to the sea, or such bodies of water as from their immensity cannot be appropriated by individuals, or ought to be kept as common highways for the constant use of the country and the enjoyment of all men. In such case particular persons cannot acquire a right, that is a several and exclusive right, by use or any other means; but with smaller streams it is otherwise. They may still be *publici juris* so far as to allow all persons to drink the water and the like, and also so far as to prevent a person to whose land it comes from thus consuming it entirely by applying it to other purposes than those for which it is conceded to every one *ad lavandum*

[11] Sampson v. Hadinott, 1 C. B. N. S. 611.
[12] Bealy v. Shaw, 6 East. 208.
[13] Elliott v. Fitchburgh R. R. *supra*.
[14] Pugh v. Wheeler, 2 Dev. & Bat. 50.

et potandum, as to divert or corrupt it.' And the supreme court of New York says:[15] 'A person through whose farm a stream naturally flows is entitled to have it pass through his land, although he may not require the whole or any part of it for the use of machinery. Upon any other principle this right to the stream, which is as perfect and indefeasible as the right to the soil, would always depend upon the use, and a party who did not occupy the whole for special purposes, would be exposed to have the same diverted by his neighbor above him without remedy, and which diversion by twenty years' enjoyment would ripen into a prescription right beyond his control, and thereby defeat any subsequent use.' Such is the invariable rule, iterated and reiterated through all the books, and of which there seems to be no denial. These cases show that the owner of soil can insist upon having the stream continue to run through his land as it was wont, independent of any special use of it. The fact, as stated by Ch. J. Ruffin, that he is necessarily and at all times using the water running through his land, in so far at least as the water imparts fertility to the soil and enhances its value, is a sufficient user to entitle him to claim that he shall not be deprived of it." The learned judge then proceeds to discuss at length the effect of certain territorial legislation, but this portion of his opinion I omit, since it has no bearing upon any general questions. The conclusion of his opinion touches upon a subject of great interest in the state of California, and I shall therefore quote it at length (pp. 284–287): "It is said that the rule which is adopted in this case may be the rule of the common law, but that it is not applicable to our situation, and therefore should not be followed. We have shown that a stream is an incident of the land through which it naturally flows; that it is, in fact, a part of the soil itself; that the right to have it continue to flow is as sacred a right as that to the soil itself; that being so an incident of the land, it necessarily passes by conveyance of the land. Such being the law, we are unable to understand how or by what authority this court can say the patent of the United States does not convey as complete and perfect a title to its patentee in the state of Nevada as it does elsewhere. There is no rule within our knowledge which would justify a court, independent of any common-law principle, in holding that the appellant Haines should not have the benefits of a stream of water which the paramount proprietor of the soil grants to him by its letters patent. It might as well be said that the courts can deprive him of the land itself by holding that it did not pass by the patent, as to rule so respecting that which is universally admitted and held to be an inseparable and valuable incident to it. But *perhaps* it is an unwarranted conclusion drawn from our opinion in this

[15] Crocker v. Bragg, 10 Wend.; See, also, Corning v. Troy Iron and Nail Factory, 40 New York, 191.

case, namely; that the water of a stream could not be used by the riparian proprietor for *irrigation*, which is thought to be inapplicable to the condition of things in this state. To this it may be answered, first, that no such decision has been made, nor has anything of the kind been intimated; second, whatever the common-law rule may be, whether applicable or not, it is made the law of this state, and is as binding on us as is any statute ever adopted by the legislature; and therefore we have no more power to annul or repudiate it, then we have to disregard a legislative act. The first legislature of the territory of Nevada (see Stats. of 1861, p. 1), declared that 'the common law of England, so far as it is not repugnant to or inconsistant with the constitution or laws of the United States, or the laws of the territory of Nevada, shall be the rule of decision in all courts of this territory.' Our state constitution adopted this by section 2 of the schedule. Hence, although the common law might, in the opinion of judges, be inapplicable, still, if not in conflict with the constitution or laws of the United States, or the constitution or laws of Nevada, it must nevertheless be enforced. But suppose that decision should necessitate the adoption of the common law respecting the manner in which running water may be used by those having the right to it; although it may operate unjustly in some cases, still, *as a general rule, none more just and reasonable can be adopted for this state.* It is a rule which gives the greatest right to the greatest number, authorizing each to make a reasonable use of it, providing he does no injury to the others equally entitled to it with himself; whilst the rule of prior appropriation would authorize the first person who might choose to make use of or divert a stream, to use or even waste the whole to the utter ruin of others who might wish it. The common law does not, as seems to be claimed, deprive all of the right to use, but on the contrary allows all riparian proprietors to use it in any manner not incompatible with the rights of others. When it is said that a proprietor has the right to have a stream continue through his land, it is not intended to be said that he has the right to *all* the water, for that would render the stream which belongs to all the proprietors of no use to any. What is meant is, that no one can absolutely divert the whole stream, but must use it in such a manner as not to injure those below him. As the right is equal in each owner of the land, because naturally each owner can equally enjoy it, so one must exercise that right in himself without disturbing any other above or below in his natural advantages. Chief-justice Shaw says: [16] 'The right of flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris* of such a character that whilst it is common and equal to *all through whose land it runs*, and no one can obstruct or divert it, yet, as one of the beneficial gifts of providence, each proprietor has

[16] Elliott v. Fitchburgh, R. R., 10 Cush. 193.

a right to a just and reasonable use of it as it passes through his land; and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a just and reasonable use, it cannot be said to be wrongful or injurious to a proprietor lower down, whose said just and reasonable use may often be a difficult question, depending on various circumstances. * * * It has sometimes been made a question whether a riparian proprietor can divert water from a running stream for purposes of irrigation. But that we think an abstract question, which cannot be answered either in the affirmative or negative as a rule applicable to all cases. That a portion of the water of a stream may be used for the purpose of irrigating land, we think, is well established as one of the rights of the proprietor of the soil along or through which it passes. Yet a proprietor cannot, under color of that right, or for the actual purpose of irrigating his own land, wholly obstruct or divert the water course, or take such an unreasonable quantity of water, or make such unreasonable use of it as to deprive other proprietors of the substantial benefits which they might derive from it if not diverted or used unreasonably.' This is the doctrine uniformly recognized both in England and in the United States, and is the necessary result of the general principles universally recognized respecting running water. Whether the right to irrigate land can in this state be considered a 'natural want,' is a point in no wise involved in this case, and which, therefore, does not call for decision." In conclusion, the learned judge shows that the early decisions in Nevada and a series of cases in California have no bearing whatever upon the questions concerning riparian rights, since they related exclusively to the appropriation of water of streams wholly public, by parties who were not riparian proprietors. It has already been shown that the California courts make the same distinction. As throwing light upon the discussion, and as supporting his positions, the chief-justice cites a long list of cases, which for purposes of reference I have thought proper to place in the foot note.[20]

J. N. P.

[TO BE CONTINUED.]

[20] Mason v. Hill, 2 B. & Adol. 305; 5 Id.1; Sampson v. Hadinott, 1 C. B. N. S. 611; Emberry v. Owen, 6 Exch. 353; Wright v. Howard, 1 S. & S. 190; Davis v. Gitchell, 50 Me. 602; Heath v. Williams, 5 Id. 602; 25 Id. 209; Blanchard v. Baker, 8 Greenl. 253; Davis v. Fuller, 12 Vt. 178; Snow v. Parsons, 2 Williams, 459; Tillotson v. Smith, 32 N. H. 90; Gerrish v. New Market Man. Co. 10 Fost. 470; Ingham v. Hutchinson, 2 Conn. 584; Parker v. Hotchkins, 25 Id. 321; Wadworth v. Tillotson, 15 Id. 366; King v. Tiffany, 9 Id. 161; Elliott v. Fitchburgh R. R. 10 Cush. 191; Tyler v. Wilkinson, 4 Mason, 397; Webb. v. Portland Man. Co. 3 Sumn. 189; Gardner v. Village of Newburgh, 2 Johns. ch. 163; Ex-parte Jennings, 6 Cow. 518; Canal Appraisers v. People, 17 Wend. 570; 5 Id. 423; Rogers v. Jones, 1 Id. 237: People v. Canal Appraisers, 13 Id. 355; Crocker v. Bragg, 10 Id. 260; Arnold v. Foot, 12 Id. 330; Commrs. v. Kimpshall, 26 Id. 404; Corning v. Troy Iron Works, 34 Barb. 486; 40 N, Y. 204; Campbell v. Smith, 3 Holst. 140; Plainliegh v. Dawson, 1 Gill 544; Pugh v. Wheeler, 2 Dev. & Bat. 50; Board of Trustees v. Haven, 11 Ill. 554; Moffitt v. Brewer, 1 Green (Iowa), 348.

CIRCUIT COURT, DISTRICT OF NEVADA.

UNITED STATES v. REILLEY.

April 7, 1884.

INFORMATION FOR EMBEZZLEMENT BY POSTMASTER.—The circuit court has jurisdiction to try offenders for misdemeanors and offenses not capital or otherwise infamous, such as embezzlement by a postmaster, under section 5483 of the revised statutes, upon informations filed by leave of the court. Whether an information presents a proper case for granting leave to the United States attorney to file it, is a question for the exercise of a sound discretion by the court.

AN INFORMATION FILED BY LEAVE OF THE COURT WILL NOT BE STRICKEN from the files where it is verified by the direct positive affidavit of the United States attorney, and upon being arrested upon a warrant issued thereon, the prisoner has been examined and held to answer for the offense charged therein.

MOTION to strike an information from the files. The defendant was charged by an information filed by the United States attorney, with the crime of embezzlement, in having as a postmaster paid to his assistant a sum less than the salary to which he was by law entitled and compelling such assistant to receipt for a sum greater than that received by him, contrary to the provisions of section 5483 of the revised statutes. The further facts appear in the opinion.

Trenmor Coffin, United States attorney, for the United States.

W. W. Bishop, for the defendant.

SAWYER, C. J. Motion to rescind the order made by U. S. District Judge Hillyer granting leave to file an information for embezzlement by a postmaster, and to strike the information from the files, the case having been transferred to the circuit court for trial.

I have no doubt that the court has jurisdiction to try offenders for misdemeanors and offenses not capital or otherwise infamous, upon informations filed by leave of the court; and, that the offenses charged in this case, are not infamous. Whether the information presents a proper case for granting leave to the United States attorney to file it, is a question for the exercise of a sound discretion by the court. Generally, in this circuit, unless for some substantial reason the court otherwise determines, it has been required that the party charged shall be examined and held to answer by some committing magistrate, or else that evidence showing probable cause should be made to appear in some proper form before granting leave. In this case the information was verified by the direct positive affidavit of the United States attorney, and upon being arrested upon a warrant issued thereon, the prisoner was examined and held to answer for the offense set out in the information. I think the circumstances are sufficient to justify a refusal to vacate the order granting leave, and to strike the motion from the files. For authorities sustaining this action see Spear on the Law of the Federal Judiciary, p. 406, and the authorities there cited. See also U. S. v. Shepard, 1 Abb. U. S. Rep. 437; U. S. v. Waller, 1 Saw. 701; U. S. v. Block, 4 Saw. 211; In Re Wilson, 18 Fed. Rep. 33; Thatcher's Practice, U. S. Cir. Courts 650–2, and cases cited.

Let an order be entered denying the motion.

SUPREME COURT OF ARIZONA.

MILES ET AL. v. MCCALLAN, ET AL.

Filed April 1884.

JUDGMENT FOR THE PLAINTIFF ON THE PLEADINGS can not be rendered when the answer denies any of the material allegations of the complaint, or sets up new matter constituting a defense.

THE FINDINGS SHOULD BE CONFINED TO THE CONTESTED FACTS and determined from the evidence. Findings as to facts admitted by the pleadings are unnecessary.

APPEAL from a judgment of the first district court for Pinal county, entered in favor of the plaintiffs. The opinion states the facts.

Horace L. Smith, for the appellants.

No appearance for the respondents.

FRENCH, C. J. This is an action under the statute to quiet title to a mining claim.

Both the complaint and answer are verified. The answer expressly admits certain allegation of the complaint, but expressly and specifically denies the more material allegations. It also sets up new matter as a separate defense which if established by proofs would be fatal to plaintiffs' action.

The practice of expressly admitting in an answer, portions of the complaint is not commendible because it is entirely unnecessary and adds to the length of the answer without affecting any useful result. The silence of the answer as to any allegation of the complaint affects precisely the same result and shortens and simplifies the pleadings.

What is *not denied* is admitted and there can be no reason for expressly admitting it.

A motion for judgment on the pleadings was made by plaintiffs and granted by the court. This was clearly error. The answer specifically denies both the ownership and the possession of plaintiffs, and the original location by plaintiffs' grantors. These are material allegations without proof of which the plaintiffs cannot maintain their action.

The separate answer presents another bar to any judgment on the pleadings. In passing upon the motion for judgment on the pleadings the court files findings of fact, and apparently bases its judgment upon such findings. Strictly there can be no findings of fact when the judgment is upon the pleadings. Such judgment rests upon the pleadings. A finding of fact is a determination of a fact by the court, which fact is averred by one party and denied by the other, and this determination must be founded on the evidence in the case. Such facts as are properly averred on the one side and properly denied on the other constitute the issues in the case. All findings outside of these issues are of no legal force or value. The findings should be confined to the contested facts and their determination obtained from the evidence in the case.

Facts admitted by the pleadings may be referred to, mentioned or recited, but this should be done in such a way as to distinguish them from the findings on the controverted facts without recurrence to the pleadings.

Judgment reversed and cause remanded for trial on the issues raised by the pleadings.

PINNEY, J. I concur in the judgment but think it immaterial whether the answer admits or is silent as to portions of the complaint.

SUPREME COURT OF WASHINGTON TERRITORY.

BAKER ET AL. *v.* MCALLISTER.

Filed December, 1879.

FINDING OF THE LOWER COURT WILL NOT BE DISTURBED when there is evidence to support it.

A SALE OF PERSONAL PROPERTY IN THE POSSESSION OF THE VENDOR carries with it a warranty of title, including a warranty against incumbrances.

BREACH OF WARRANTY OF TITLE—RECISSION.—Where personal property is sold with warranty of title, and at the time of sale the same is subject to a lien not known to the vendee, by reason of which said property is taken and kept from the vendee, without negligence or fault on his part, such taking will of itself, at the option of the vendee, work a recission of the contract of sale, and be a good defense to an action for the purchase price.

THE SAME—PAYMENT OF LIEN BY VENDEE.—The vendee under such contract need not discharge the existing lien. If, however, he does so, the amount so paid should be set off against the purchase price.

ERROR to the third district court. The opinion states the facts.

McNaught Bros., for the plaintiffs in error.

Thomas Burke and W. H. White, for the defendant in error.

HOYT, J. This was an action, brought by plaintiffs in error, who were plaintiffs below, to recover from the defendant a balance alleged to be due for goods sold and delivered; defendant answered admitting the greater portion of the plaintiffs demand and setting up by way of set-off, a sum, alleged to be due for lumber sold and delivered by the defendant to the plaintiffs, much more than enough to balance the claim of plaintiffs.

The trial of the cause resulted in a judgment for the defendant, which is now here for review. Numerous errors are assigned, but I shall only examine those growing out of the action of the court below, in holding the plaintiffs liable to the defendant for the value of a lot of about seventy-two thousand feet of lumber piled in the mill yard of the defendant, as from the conclusion to which I have come, in regard to those, it is not necessary that I pass upon the others.

All the evidence introduced upon the trial is returned with, and made a part of the transcript, and while that, relied upon to show that plaintiffs had ever purchased from defendant this particular lot of lumber, is not very satisfactory, and if I were passing upon it here as a new question, I might come to a different conclusion than

did the court below, in regard thereto, yet as there is evidence in the transcript, tending to show such purchase, this court would not distort the judgment on the ground that such sale had not been sufficiently established, and I am therefore compelled to investigate the question growing out of the state of the title to this lot of lumber, at the date of said purchase. This particular lot of lumber is charged to the plaintiffs upon the books of defendant, which are in evidence, as of the 22d day of February, 1877, and in the absence of other proof, as to the time of the sale, this must (all cost as against the defendant) be taken as the time when the sale was consummated.

Now it clearly appears from the evidence that, at this time, there were certain liens upon said lumber, for labor of some of the men engaged in the manufacture thereof, and there is nothing in the record tending to show that plaintiffs had any knowledge of the existence of such lien at the date of such sale. It further appears from the evidence, that these liens were duly foreclosed, and the entire amount of said lumber absorbed in the satisfaction thereof, and that the defendant in this action was made a defendant in the proceedings to foreclose said liens, and appeared therein, and contested the same, also that said lumber was taken possession of by a receiver, appointed in said foreclosure suits, before there was any adjudication as to the amount of said liens, and sold to satisfy judgments rendered in said suits, long before the expiration of the time in which the said defendant could prosecute an appeal from said judgment, and it nowhere appears, from said evidence, that said defendant ever requested, or in any way authorized the plaintiffs to pay the amount of said liens to the holders thereof, or that he ever in any way informed them how much of said liens, as claimed by the holders thereof, was due from him, or that any part thereof, was so due. These facts all clearly appear from an inspection of the record, and in regard thereto, there has been little or no dispute between counsel. It also clearly appears that at the time the lumber was sold, it was in the possession of the defendant. The important question which this court has to decide, is whether or not under the facts above stated the defendant should have recovered of the plaintiffs the price of said lumber.

The sale of the lumber carried with it a warranty of title. For whatever may be the law, as established by recent decisions in England, there is, in my opinion, no doubt but what it is the settled law of this country that the sale of property in the possession of the vendor carries with it a warranty of title, which warranty extends to incumbrances. See Brown v. Pierce, 97 Mass. 46; Williamson v. Sammons, 34 Ala. 691; Ward v. Colvin, 1 Head, 506; Linton v. Porter, 31 Ills. 107; Fawcett v. Osborn, 32 Ills. 411; Boyd v. Whitfield, 19 Ark. 447; Chisin v. Woods, Hardin, 531; Hewance v. Vernoy, 6 Johns. 5; Sweet v. Colgate, 20 Johns. 196; McCoy v. Artcher, 3 Barb. 323; Doe v. Stannion, 1 Mees and W. 701; Vibbord v. Johnson, 19 Johns. 78; Coolridge v. Brigham, 1 Met. 551; Willing v.

Peters, S. and R. 181; Dean v. Mason, 4 Conn. 428; Tipton v. Triplett, 1 Met. (Ky.) 570; and Boyse v. Briscoe, 13 B. Mon. 474.

The existence of the said liens then constituted a breach of the defendant's warranty of title to the lumber, and the only remaining inquiry is as to what were the rights of the plaintiffs in regard to such sale on account of such breach. It is conceded by counsel for defendant that for such a breach of warranty the vendee may at any time before the delivery of the property to him, rescind the contract and refuse to accept the goods. This being so it must in my opinion follow as a matter of reasoning that where goods are delivered and accepted by the vendee without any knowledge of the existence of the facts constituting a breach of warranty, that upon the discovery of such facts he shall have the right to rescind the contract upon tendering back the property purchased. And upon both principle and authority, I think, that where property is sold with warranty of title, upon which there was at the time of the sale a lien of any kind not known to the vendee, by reason of which said property is taken and kept from the vendee, without negligence or fault of any kind on his part, such taking will of itself, at the option of the vendee, work a recission of the contract of sale, and be a good defense to an action for the purchase price. See De Freeze v. Trewper, 1 Johns. 274; Dresser v. Ainsworth, 9 Barb. 619; Blaisdell v. Babcock, 1 Johns. 518; and Read v. Staton, 3 Haywood, 159.

Was it then the duty of the plaintiffs to have discharged those liens and thus have prevented the lumber in question having been sold to satisfy the same? I think not. For while it is true that they probably had a *right* (at their peril that they paid no more than was actually secured by said liens,) to have paid the same, and would have been entitled to have the amount of such payments, set off as against the purchase price, yet, in the absence of any information from the defendant, or any final adjudication by the courts as to the amount of said liens until after the property had been taken from them, thereunder, and sold, it would not be reasonable to hold that they were in duty bound to pay whatever was claimed by the lienors and then take their chances of having a part or the whole of such payment set off against the purchase price. While it is now well settled, that in cases similar to the one under consideration the vendee *may*, where the amount of the lien has been finally adjudicated, or is agreed to by the vendor, pay the amount and discharge the property and compel repayment by the vendor; yet it is far from being settled by adjudication that it is his *duty* so to do, and I think that there cannot be a single case found which holds that it is the *duty* of the vendee to thus protect the property where, as in this case, the vendee at the time of purchase had no knowledge of the existence of the lien and in the absence of any agreement by the vendor or adjudication by the courts as to the amount thereof.

In the case of Harper et al. v. Dotson et al., 53 Iowa, 236, the amount of the lien which constituted the breach of warranty had been established by a decree to which the vendees were parties, and

which they had by authority of the vendor confessed, yet the court, while holding that under such circumstances the vendees had a *right* to discharge the lien and recover of the vendor the amount thereof, and while they say that in a case in Pennsylvania, the court had under like circumstances, held that it was the *duty* of the vendee so to do, yet they expressly and notably refuse to go to the extent that said Pennsylvania court had, but contented themselves with holding as above stated. If then, as it would seem from this Iowa case, and others above cited, there is doubt about its being the *duty* of the vendee to protect the property where the amount of the lien is thus conclusively established, I think that it follows conclusively, both in reason and upon authority, that in a case like the one under consideration, there would be no such duty devolving upon the vendees. See cases above cited.

It follows, from what I have said, that the lot of lumber in question was taken from the plaintiffs, without negligence or fault on their part, by virtue of the liens existing at the time of the sale to them, and was all absorbed by such liens, which taking and absorption, upon principle and authority, constituted a rescission of the contract at the option of the vendees, and was a valid defense to the action for the purchase price.

The court below, therefore, in my opinion, erred in overruling said defense and allowing defendant to recover the purchase price of said lot of lumber, for which error the judgment rendered below must be reversed and a new trial granted.

SUPREME COURT OF CALIFORNIA.

No. 8919.

LEAHY v. SOUTHERN PACIFIC R. R. CO.

In Bank. Filed April 24, 1884.

SUMMONING OF JURORS.—When jurors have not been drawn or summoned to attend the session at which the action is tried, the court may order a sufficient number to be forthwith drawn and summoned to attend court, or by an order entered on its minutes, direct the sheriff forthwith to summon so many good and lawful men of the county to serve as jurors as might be required.

EVIDENCE OF THE CONDITION OF THE REMAINS OF THE DECEASED is admissible in an action for damages for a negligent killing.

REFUSAL TO GIVE INSTRUCTIONS ASKED FOR will not be reviewed on appeal, unless an exception is taken to the action of the trial court.

VERDICT WILL NOT BE DISTURBED when there is a substantial conflict of evidence.

APPEAL from a judgment of the superior court for Santa Clara county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

L. D. McKisick, for the appellant.

D. M. Delmas, for the respondent.

SHARPSTEIN, J. Jurors not having been drawn or summoned to attend the session at which this action was tried, the court was

authorized to order a sufficient number to be forthwith drawn and summoned to attend court, or by an order entered in its minutes direct the sheriff forthwith to summon so many good and lawful men of the county to serve as jurors as might be required: C. C. P. 226. The court adopted the latter method. This constitutes no error in law, nor even irregularity in the proceedings of the court.

The exception to the ruling of the court on the defendant's objection to evidence, of the condition of the remains of the deceased, cannot be sustained.

On the question of defendant's negligence there was sufficient evidence introduced by the plaintiff to justify the court in submitting it to the jury.

The motion for non-suit was properly overruled.

Several instructions were asked by the defendant and refused by the court. But it does not appear that any exception was taken. In the absence of an exception, none of said rulings can be reviewed here.

On the trial certain facts were established beyond controversy:

1, The plaintiff's intestate, Leahy, was killed while in the employment of the defendant as a brakeman on one of its freight trains.

2. There was a flaw or crack in the hub of the wheel, which said Leahy had to turn in order to set up the brake for the purpose of checking the movement of the train.

3. The hub of said wheel was rendered more liable to break by reason of said flaw or crack.

4. If it broke while the brakeman was setting up the brake there would be great danger of his being precipitated between two cars and killed.

The jury were justified in finding that the death of said Leahy was caused by said wheel breaking while he was in the act of setting up the brake.

Defendant's counsel, however, insist that the flaw or crack in the hub of said wheel was invisible so long as said wheel was in place, and that there is no evidence which tends to prove that said wheel was not sound and safe when placed in position; and that the evidence shows that defendant employed a competent person to inspect said wheel, and that the same was inspected by him as often as a due regard for the safety of the brakeman required that it should be. The plaintiff introduced some evidence which tended to show that said flaw or crack could not have been difficult of discovery when said wheel was in place; and the jury had before it the broken wheel, as well as other wheels of the same kind, and it is impossible for us to say how much the jury may have been aided thereby in determining whether said flaw or crack might have been discovered by the exercise of due diligence on the part of defendant. Upon that question we think there is a substantial conflict of evidence.

It is further claimed on behalf of defendant that notwithstanding said flaw or crack, said wheel could not have been broken by said

Leahy if he had not, in violation of a rule of defendant, used a lever or club to set up the brake; and there is evidence tending to prove that Leahy had a club of that description on the train of which he was a brakeman. One witness testified for the defense that on the morning of the accident he saw a brakeman on the defendant's train at or near the time and place where Leahy was killed "setting up a brake on top of a box-car with a club." If the jury had given full credit to the testimony of this witness, it would doubtless have found that Leahy was the brakeman whom the witness saw on that occasion. Another witness for the defense testified that he found a brakeman's club about ten hours after the accident, on the railroad track within twenty-nine steps of the place where he had previously found Leahy's body. That the club so found had been Leahy's is not disputed. There was evidence tending to prove that it was dangerous to use such a club in setting up brakes.

The plaintiff in rebuttal introduced a witness who testified that he saw Leahy just before the accident going towards the wheel which broke, and that when within four feet of it he had no club. Another testified that he, with many others, walked up and down the track where, and soon after, the accident occurred, and that he saw no club, although it was a subject of conversation between him and some of those who were with him. The plaintiff's counsel insists that it is highly improbable that this witness and those who were with him would have overlooked a club, about which they were conversing, if it had been on the track, at the point and in the position where defendant's witness testified to finding it. It is further contended that the jury might well have doubted the accuracy of the witness who testified to having seen a person on the train of which Leahy was a brakeman, setting up a brake with a club. That witness was an engineer who, at the time, had charge of a locomotive to which was attached a train of cars then in motion, on a road which, at that point, runs near defendant's road. As both trains were moving at some distance from each other, it is claimed that he was not in a position to observe accurately the actions of a brakeman on the neighboring train. There were circumstances which the jury might properly consider in determining whether Leahy used a club in setting up the brake on that occasion. The jury had an opportunity for observing the appearance and manner of the witnesses introduced by both sides, and of inspecting the club and broken wheel. Experiments also were made in the presence of the jury, the result of which may have greatly influenced their verdict. How much enlightenment the jury may have derived from these circumstances cannot be estimated by this court. Therefore, a case is not presented in which we would be authorized to hold that the evidence is insufficient to justify the verdict of the jury and the decision of the court on motion for a new trial.

Judgment and order affirmed.

THORNTON, J., ROSS, J., MCKEE, J., and MORRISON, C. J., concurred.

MYRICK, J., dissenting: As I understand the testimony, there is no conflict as to the proposition that the deceased was, at the time of the occurrence, endeavoring to "set up" the brake with the use of a brake-club; that the use of a club was prohibited by the defendant, and that such use contributed directly to the calamity. I therefore dissent.

As to the other points referred to in the foregoing opinion, I agree with my associates.

NOTES.

In Shay v. Thompson, Wisconsin Supreme Court, 18 N. W. Rep. 473, it was held that where two voluntarily fight each other, either may recover from the other for the injury suffered. The court said: "The parties own adjoining farms, and had a personal difficulty concerning the sufficiency of the line fence between their respective farms. On a certain Sunday in August, 1882, they met, quarreled about the fence, and fought. Although they were both old men, it is but just to say they fought with great spirit and brutality. The defendant is the larger and probably the stronger man, and had the best of the fight. He gouged both eyes of the plaintiff, and it is claimed that the sight of one of them is permanently impaired. This action is to recover damages for such injuries. * * * The jury were also instructed as follows: 'If two, in anger, fight together, each is liable to the other for the actual injury inflicted. If you find that the plaintiff and defendant by common consent, in anger, fought together, and that the plaintiff was actually injured in said fight by the defendant, the plaintiff is entitled to recover from the defendant the actual damages resulting from said injury, but not exemplary damages.' This instruction is fully sustained by the authorities cited by counsel for the plaintiff. These are 2 Greenl. Ev., § 85; Comm. v. Colberg, 119 Mass. 350; S. C., 20 Am. Rep. 328; Adams v. Waggoner, 33 Ind. 531; Stout v. Wren, 1 Hawks. 420; Bell v. Hansley, 3 Jones' Law (N. C.), 131; Exodus, xxi, 18, 19. These authorities go upon the principle that the fighting being unlawful, the consent of the plaintiff to fight is no bar to his action, and he is entitled to recover. We believe the rule is one of sound public policy, and we do not hesitate to incorporate it into the jurisprudence of this State."

WEST COAST REPORTER.

WHOLE No. 19. MAY 8, 1884. VOL. II. No. 11.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

RIPARIAN PROPRIETORS AND RIPARIAN RIGHTS ON PRIVATE STREAMS.

The decision in Van Sickle v. Haines is subject to some modification in respect to one of its conclusions, by the legislation of Congress. The court expressly held that a patent granted by the United States to a private person conveying the full legal title to a tract of what had been public land situated on the bank of a stream, although all the rest of the land on its banks was still public, *ipso facto*, and necessarily, so far as the patentee's riparian rights to the stream were concerned, cut off and annulled all rights to use the waters of the same stream as a *public* stream acquired by prior appropriation and held by parties who were not private riparian proprietors. The reasons for the conclusion were, that the appropriation of the waters of streams running over the public lands was wholly permissive; the right of the appropriator could never become complete against the United States by adverse use, but it was a new license or privilege, subject to be revoked and abrogated at any time by the United States, and that a patent, by which the full legal title of the United States with all of its incidents was conveyed to the patentee, necessarily clothed such patentee with all rights over the land which had belonged to the United States, and conveyed to him the land entirely free from all claims to the water of the stream growing out of the prior appropriation and uses. On principle and in the absence of contrary legislation, the correctness of this ruling cannot be doubted. It has, however, been modified within certain limits by a statute of congress, referred to twice in a previous number. This statute provides, in substance, that the waters of public streams may be appropriated, under local customs and laws for various purposes connected with mining; and that when such appropriations have been made from the waters of a public stream, patents subsequently issued by the United States to private persons, shall be subject to the rights of the appropriator, and conditions reserving or protecting such existing

rights shall be incorporated into the patent.[1] The result is, that when the waters of a stream flowing wholly over the public land have been appropriated for a purpose recognized and protected by the statutes of congress, and a patent is subsequently issued by the United States to a private person conveying the title to a tract of land on the banks of the same stream, the patentee takes his title and must enjoy his rights as a riparian proprietor subject and subordinate to the already existing rights of the prior and actual appropriator. On the other hand, whenever the waters of a stream flowing wholly over the public land have not been appropriated at all for any purpose, or whenever they have been appropriated for a purpose not recognized and protected by the congressional legislation, and a patent is issued by the United States to a private person conveying a tract of land on the banks of the same stream, in either case the patentee obtains, as incidents of his title, the full and complete rights of a private riparian proprietor on the stream. His title to the extent of his right as riparian proprietor is paramount to any subsequent appropriation from the stream as a public stream; and his rights in the stream are as perfect and complete when he is the sole private proprietor on its banks, as when all the lands on its banks are held by private owners.

Assuming, as has been shown, that the "riparian rights" of private "riparian proprietors" on natural running streams in this state of California, are expressly excepted from the operation of the title concerning water rights in the civil code, are wholly untouched by its provisions, and are left existing in every respect as though it had not been enacted, we are now in a position to ascertain, with more certainty and definiteness, the nature and extent of these rights, and what uses of the waters they confer upon or withhold from the "riparian proprietor."

The series of decisions heretofore cited show most conclusively that all of the fundamental common law doctrines concerning the riparian rights of private riparian proprietors, which were so fully and ably expounded in the Nevada case, have been adopted by the California court, and recognized as forming a part of the California law. While the reasons for these doctrine have not been explained at such length in the California cases, and while the authorities upon which they rest have not been so exhaustively quoted, yet, upon a comparison of the various decisions, it will appear, beyond a possibility of a doubt, that all of the essential and important doctrines of the common law as discussed and formulated by the Nevada court in the case of Van Sickle v. Haines, have been accepted and affirmed by the supreme court of California in repeated decisions. To present this conclusion in the clearest light, I give, even at the expense of repeating what has already been said, a brief summary of those dicisions.

[1] R. S. of U. S. sec. 2338.

It is held that the right of the private riparian proprietor is an incident of his ownership of land on the bank of the stream, and exists as a necessary consequence of such ownership, and does not in the slightest depend upon the fact of an actual appropriation of the water having been made by himself or by any other riparian proprietor on the same stream.[2] The right to the water is not an absolute property in all the water, authorizing any riparian proprietor to consume it entirely; it is a right that the stream should continue to flow along in its natural channel as it has been accustomed to flow, and give the riparian proprietor the *usufruct* of the water as it passes along his land bordering on the stream; and this right belongs equally to all the private proprietors on the banks of the same stream, subject only to the advantage which position gives to those higher up the stream over proprietors lower down.[3] The law recognizes certain *natural* uses which are paramount to all others, and these include the use of water for household and domestic purposes, washing, drinking, cooking, etc., and its use for watering stock. It may be doubted whether these "natural uses" embrace anything more than these two purposes. From these paramount *natural* uses originates the *only* advantage which the common law gives to one riparian proprietor over another or others on account of his relatively superior position. A proprietor higher up on the stream may use as much of the water as is reasonably necessary for his own domestic and household purposes and for the watering of his own stock, even though the amount left flowing down the stream is thereby so much diminished that there is not enough left to supply the needs of the lower proprietor or proprietors for the same purposes. But the use for these purposes by a proprietor higher up the stream must be reasonable in amount, and reasonable in its methods and instrumentalities.[4]

In addition to these natural and paramount uses, which necessarily consume the portion of water used, each riparian proprietor, by virtue of his *usufruct*, may use the water of the stream as it passes along by or through his land, for any other lawful purpose, provided he returns all of the water, undiminished in amount and undeteriorated in quality, into the natural channel of the stream before it leaves his own land and enters upon that of the adjacent proprietor below him; and provided, also, he does not thereby interfere with the similar and equal right of the proprietor upon the immediately opposite bank of the stream where his own land abuts upon only one bank—that is, when the stream does not flow through his own land. In this manner any riparian owner may use the water of a stream for propelling machinery on his own land, provided he returns all the water into the natural channel before it leaves

[2] Pope v. Kingman, 54 Cal. 3; Creighton v. Evans, 53 Id. 55; Ferrea v. Knipe, 28 Id. 341.

[3] Id.

[4] Id: see Ferrea v. Knipe, *supra*.

his own land, and does not impair its quality; and to this end he may construct a dam in the stream upon his own land, provided he does not interfere with the land of proprietors above him by the backwater, and does not invade the rights of a proprietor immediately opposite to himself on the other bank of the stream. These rights are conferred by the common law upon all of the proprietors owning lands upon the same stream. Any proprietor may, of course, obtain more extensive rights by grant from others, or by prescription. How far the right of the riparian proprietor includes the right to use and consume the water for purposes of irrigation, remains to be considered. *J. N. P.*

[TO BE CONTINUED.]

CIRCUIT COURT, DISTRICT OF NEVADA.

Union Trust Company of New York
v.
Nevada and Oregon Railroad Company.

Moran et al. v. McMurray et al.

March 29th, 1884.

Railroad Bonds—Over Issue.—Where a railroad company had contracted that it would not issue its first-mortgage bonds in excess of ten thousand dollars per mile of completed road, but, subsequent to the sale of its first-mortgage to that extent, it did issue its bonds in excess of such an amount; *Held*, that such over issue was void as against the holders of the bonds regularly issued to the extent limited, none of the holders of such over-issue being innocent purchasers, for value.

R. M. Clarke, for the complainants.

W. E. F. Deal and *Wm. Webster*, for the respondents.

Sabin, D. J. The above entitled suits are submitted upon the same testimony.

The first entitled suit was brought in this court by the Union Trust Company of New York, to foreclose a certain trust deed, executed by the Nevada and Oregon Railroad Company to secure the payment of certain first-mortgage bonds (three hundred and ten in number, of the denomination of one thousand dollars each) and coupons, executed by said railroad company, in the payment of which default had been made. In that suit an interlocutory decree was entered August 7, 1883, final decree being reserved until the testimony should be taken and submitted in the two cases.

The second suit was brought by complainants, who are the owners of said three hundred and ten bonds, secured by said trust deed, foreclosed in the first-named suit.

The object of this second suit is to have declared fraudulent and void, as against complainants, an issue of one hundred and forty-seven bonds of said railroad company (of the value of one thousand dollars each), and claimed by respondents to be equally secured by said trust deed with the three hundred and ten bonds held by complainants.

The pleadings are somewhat voluminous. The bill alleges that on the 25th of April, 1881, said railroad company duly executed three thousand bonds, of the value of one thousand dollars each, bearing eight per cent. interest, payable A. D. 1930, interest payable semi-annually, and, in default of payment of interest when due, the principal should become due at the option of the holder of the bonds.

On the same date said railroad company, to secure the payment of said bonds, duly executed to the Union Trust Company of New York, in trust for the bondholders, a mortgage upon its franchise and property in the state of Nevada. These bonds were to be of no validity until certified to by said trust company. The trust company certified to only six hundred of these bonds. Of these bonds, so

certified, complainants purchased three hundred and ten, for value, paying therefor, as shown by the testimony, two hundred and forty-eight thousand dollars.

The bill further alleges that these bonds were so purchased by complainants on the distinct and positive agreement, by said railroad company, that no more than ten thousand dollars of said bonds should be issued for each completed mile of said road, as the same should be built; that only thirty-one miles of said road were ever completed; that said railroad company wrongfully procurred from said trust company the two hundred and ninety bonds, remaining from said six hundred bonds so certified, and has in fraud of the rights of complainants wrongfully disposed of one hundred and forty-seven of the same.

The respondents deny that said railroad company ever made or entered into any agreement by which it was limited to an issue of bonds at the rate of ten thousand dollars per mile of completed road, or at any limited rate whatever. And it alleges that respondents are *bona fide* purchasers of said one hundred forty-seven bonds, without notice, for value, and are entitled to all of the benefits arising to them as such.

In examining the testimony it will be well, to avoid confusion, to note these facts in reference to the date of the organization of the "Nevada and Oregon Railroad Company," the defendant in this action, and the organization of "The Nevada and Oregon Railroad Company," the predecessor in interest of said company, defendant. The names of the companies are the same, excepting that the definite article "the" is not prefixed to the railroad company defendant in this suit.

"The Nevada and Oregon Railroad Company" was organized in Nevada on the first of June, 1880. Its object was to construct a railway, three hundred miles in length, more or less, with various branches. The proposed line of railway was divided in "divisions," with appropriate names for each division. The portion of the line extending from Reno to Beckwith Pass, and northerly, was called the "Reno division," and is so named and called by witnesses in the testimony. On the twenty-sixth of August, 1880, this company entered into a contract with one Thomas Moore for the construction of the road. By that contract said company agreed "that fifty-year-eight-per-cent. first-mortgage bonds, to the extent only of ten thousand dollars per mile, and capital stock to the extent of only twenty thousand dollars per mile for the first one hundred and eighty-five miles will be issued."

In providing for making payments to Moore for the work when completed, said contract further provided for the payment to him of "one hundred thousand dollars in lawful money, and three hundred and ten thousand dollars in the first-mortgage bonds, and four hundred and fifty thousand dollars in the capital stock of said railroad stock, for the Reno division, as far as Beckwith Pass, being thirty miles, more or less.'

On the fourth of December, 1880, said railroad company and said Moore entered into another contract in reference to building the road.

This contract provided that the Reno division should be first constructed from Reno to Beckwith Pass, the company to pay at a certain prescribed rate should the distance exceed thirty-one miles.

Section 6 of this contract is as follows: "The company shall deposit with a trustee in New York, on or before January 10, A. D. 1881, ten thousand dollars in cash and the four hundred and fifty thousand dollars stock, and on or before January 25, 1881, the three hundred and ten thousand dollars in first-mortgage bonds."

Section 7. "Nothing in this contract is to be construed as abating or impairing any portion of the contract of August 26, A. D. 1880, which is hereby extended in all matters not conflicting with the provisions of this instrument," etc. * * * *

Section 8. "The entire stock to be issued upon the line from Reno to the temporary terminus, as herein stated ('at a point near Beckwith Pass;' see sec. 1), shall be limited to six hundred thousand dollars, without reference to any excess in distance over thirty miles, and the first-mortgage bonds upon the same to three hundred and ten thousand dollars."

On the same day, December 4, 1880, said company and said Moore entered into another contract, by which Moore was to construct one hundred and seventy miles of said road from Beckwith Pass to the Oregon line "on the same basis as agreed upon for the first thirty miles of said division," and the company agreed to pay therefor "a total of five hundred thousand dollars in cash and one million seven hundred thousand dollars in first-mortgage bonds, the same being total issue upon said line and two million eight hundred and fifty thousand dollars in the capital stock."

The issue of first-mortgage bonds being at the rate of ten thousand dollars per mile.

On the first day of February, 1881, said Moore and said company entered into another contract, the company having failed to make payments, as stipulated in the former contract, for work done by Moore on this line from Reno to Beckwith Pass—these thirty-one miles.

Section 3 of this contract provided: "The party of the second part is to deliver to the party of the first part the four hundred and fifty thousand dollars of stock as soon as engrossed and certificates can be signed, and the three hundred and ten thousand dollars first-mortgage bonds as soon as engrossed and can be properly signed, and all on or before March 31, proximo."

This contract was not to impair any former contracts made between the parties.

On the twenty-fifth day of April, 1881, the "Nevada and Oregon Railroad Company" was organized, the company defendant in this action. Its object was the same as that of "The Nevada and Oregon Railroad Company." It was the successor of the last-named cor-

poration, and by transfer and assignment it succeeded to all its rights, property, franchises and contracts, and debts also.

By contract entered into with Moore on the twenty-sixth of April, 1881, the defendant corporation adopted, ratified and confirmed all of the contracts hereinbefore mentioned, and renewed them in all respects with Moore.

On the twenty-fourth of May, 1881, Moore and the defendant corporation extended for one year the contract entered into by Moore and "Nevada and Oregon Railroad Company" for the building of the one hundred and seventy miles of road from Beckwith Pass to the Oregon line.

Moore went on under these various contracts, and graded thirty-two miles on the first section north from Reno, and commenced grading on the one hundred and seventy miles running north from Beckwith Pass. He also laid about seventeen miles of track from Reno northerly, and provided certain rolling stock and other materials.

Moore became embarrassed, and on about November 16, 1881, abandoned his contracts and left the state.

From that time forward the company assumed the management of the road and conducted its future operations as best it could. The company was in a very embarrassed condition. It was largely in debt and without money or resources of any kind to meet its liabilities. It had attempted to build and equip a railroad, without first having provided any adequate means for so doing.

On the twenty-fifth of March, 1882, Moore, as party of the first part, the railroad company, defendant, of the second part, D. W. Balch, H. J. McMurray, A. H. Manning, W. F. Berry and C. A. Bragg, of the third part, and Alvin Burt, as trustee, of the fourth part, entered into an agreement, the object of which was to adjust, as therein provided, the then unsettled business matters between Moore and the railroad company.

This contract recognizes the fact that the railroad company had issued to Moore these three hundred and ten first-mortgage bonds; that he had negotiated them with Moran Brothers, complainants in the second above entitled suit; that he had been paid for two hundred and ten of said bonds by Moran Brothers, and that they held the remainder of said bonds, subject to contract with Moore, to be paid for as the road was completed.

By this contract Moore surrendered his rights in these bonds for the benefit of the railroad company, which subsequently drew the money due upon them. Section 11 of this contract is as follows:

"The parties of the second and third part hereby covenant and agree for themselves and the other stockholders, and for the creditors of the party of the first part, as follows, viz.: * * * (*b*) That no second mortgage shall be made, issued or recorded upon said railroad or any portion thereof.

"That the issue of first-mortgage bonds thereon shall be limited to ten thousand dollars per mile of completed road, or such as

amount that the annual interest charge thereon shall not exceed eight hundred dollars per mile of completed road, and also that the issue of capital stock of said company shall be limited to twenty thousand dollars per mile of said railroad."

Pursuant to this contract, on the twenty-sixth of April following, Moore and Moran Brothers joined in a communication to Balch, as president of said railroad company, informing him of the terms upon which he can, as the road is completed, draw upon complainants for seventy-five thousand dollars, the balance due upon these one hundred bonds. These funds were so drawn, and with them the road was completed—the thirty-one miles.

It should be noted that this contract of May 25, 1882, was entered into by Balch, as president of and on behalf of said railroad company, pursuant to a resolution of the board of directors of said company, adopted January 13, 1882, prior to his departure from Reno to New York for the purpose of endeavoring to effect a settlement of the business of the company. And this contract, if not formally ratified by the directors of the company by resolution adopted to that effect, was actually ratified by the company by its acting upon it—carrying out, to some extent at least, its provisions, and accepting the benefits arising therefrom, and especially in drawing and using the balance due upon the one hundred bonds paid by Moran Brothers after its execution.

Now all of these various contracts conclusively show this, that this railroad company, defendant and its predecessor, had repeatedly contracted with Moore, and promised and held out to the public that upon no part of the line of its road should there be issued more than ten thousand dollars in first-mortgage bonds for each mile of completed road. It was upon this condition and agreement that Moran Brothers purchased these bonds. Charles Moran, one of the complainants, testifies that the railroad company issued its circulars to that effect; that he saw them; that this limitation was the condition in the purchase of the bonds; that they would not have advanced eleven thousand dollars per mile upon the road. He is supported in this by the testimony of Moore, Fowler and Balch, and by every contract in evidence executed either by the railroad company, defendant, or by its predecessor, and subsequently ratified by the Nevada and Oregon Railroad Company. And this testimony is wholly uncontradicted.

Can we believe that these complainants did, or that any business man or firm would, make advances to this or any railroad company upon its first-mortgage bonds and no limit be fixed upon the amount of issue of such bonds?

These various contracts, in evidence, were affirmed and reaffirmed by this railroad company, defendant, in every subsequent transaction wherever the issue of first-mortgage bonds is mentioned.

The limitation upon the issue of first-mortgage bonds is the sole condition which gave the bonds value and made it possible to negotiate them; and whoever purchased any of these first-mortgage

bonds upon the faith of this railroad company, as pledged in these contracts with Moore, limiting the amount of issue, is as much entitled to the benefit of those contracts in this respect as though they had been made with the purchaser himself.

These contracts, though private as to Moore, inure to the benefit of all in privity with him in the purchase of any of those bonds upon the faith of the company therein plighted.

If this corporation, defendant, can now set those contracts aside, can absolve itself from its obligations, repeatedly affirmed, and especially so by its contract of March 25, 1882, and after it has drawn from complainants, Moran Brothers, seventy-five thousand dollars by virtue of that contract—if this can be done is it not time that men cease to enter into contracts?

The directors of this railroad company knew of these contracts; they were officially bound to know of them, and had affirmed all of them which were made prior to the organization of the corporation, defendant.

It is manifest from the evidence that they knew and realized that the issue of these first-mortgage bonds was limited to ten thousand dollars per mile of completed road, and it cannot be seriously contested.

Moore abandoned his contracts and left the state in November, 1881.

The company then undertook the management and completion of the thirty-one miles of road. The position of the directors was far from being a pleasant one. Many of them had advanced their entire means to aid the company, with then, but little prospect or hope of recovering their advances. The directors were importuned and harassed by creditors of the company on every side.

Upon this point Balch, president of the company, testifies: "One time, I remember, we were in session, and a lot of fellows came in there and wanted to hang us. That is the kind of talk we had."

These one hundred and forty-seven bonds had not then been issued; they were issued afterwards. Was it "that kind of talk" which finally caused them to be issued, and against the better judgment of the board of directors?

From March 25, 1882, to November 20, following, the board had been acting under the contract of date March 25, 1882, made between Moore, the company, Balch and others and Burt, recognizing its obligations and accepting its benefits. But the affairs of the company grew no better during this time, and on the twentieth of November a resolution was adopted by the board directing the president of the company to draw these two hundred and ninety bonds from the trust company and to negotiate them. It is not a matter of surprise that he found no sale for them for cash—no one who wished to part with his money for them.

It cannot be contended, under the evidence, that any of the holders of these one hundred and forty-seven bonds, respondents in this second suit are, in any legal sense, innocent purchasers

thereof for value. Not one of them was sold to any of said respondents for cash. Not a dollar changed hands upon their transfer. They were each and all of them issued to persons who held pre-existing claims, or demands, against the company, or against the directors, or against Moore, which had been assumed by the company, or for services rendered, or to be rendered to the company. There is no conflict of testimony on this point. Some of the respondents merely hold them as security for debts due them from the persons to whom they were originally issued.

The creditors of the company evidently took the bonds, as they were all the company had to give, and the company issued them with a liberal hand.

I cannot but hold that this issue of these one hundred and forty-seven bonds was, and is, wholly fraudulent and void as against Moran Brothers, complainants in this second suit.

And such is the judgment of the Court thereon.

To hold otherwise would be doing great wrong, not only to complainants, but to all persons who repose faith in the solemn contracts and obligations of men or corporations.

The legality of the issue of these two hundred and ninety bonds, and the disposal of these one hundred and forty-seven of the same, is the real matter to be determined in this suit.

It is immaterial to complainants what might be the judgment of the court upon the action of the board of directors in auditing and allowing against the railroad company the various claims and demands, aggregating this large sum of one hundred and forty-seven thousand dollars. This subject is not properly before the court in this suit. The single issue here is, and in which both parties are alike interested, are the holders of any of these one hundred and forty-seven bonds entitled to come in and share with Moran Brothers, complainants, in the proceeds arising from the sale under the trust deed, foreclosed in the first entitled suit.

The court has adjudged that they are not—at least not until complainants shall be first paid the amounts due them, with interest and costs, from the proceeds arising from such sale.

A large amount of testimony has been taken upon this outside issue, but the court does not feel called upon to decide or consider this branch of the case.

The railroad company defendant, or the stockholders therein, might seek to avoid and set aside the action of the board of directors, in assuming any or all of the claims and demands which were, by the board of directors, audited and allowed against the company.

But the voice of the company is not heard in its own behalf in this case. The personal interest of the directors in this suit has risen superior to that of the company which they represent. A very large majority, in amount, of the claims audited and allowed by the board of directors, and for which these bonds were issued, were the personal claims and demands of the directors themselves—and embraced almost every conceivable demand.

Should any one care to examine, in the light of the law, the action of this board of directors in the management of the affairs of the company, the following authorities will be found applicable and instructive: Pierce on Railroads, pp. 36, 40; Field on Corporations, secs. 162 to 167, 172 to 175 and notes; Perry on Trusts, 207, 814; City of San Diego v. S. D. & L. R. R. Co. 44 Cal. 106; Wilbur v. Lynd, 49 Cal. 290: Forbes v. McDonald, 54 Cal. 98; Chamberlain v. W. G. Co. Id. 103; 1 L. C. in Equity (H. & W.), 208–222; C. C. Co. v. Sherman, 30 Barb. 553; Wardell v. Railroad Co. 103 U. S. 651.

Tested by these authorities, the action of this board of directors would, in many respects, be subject to criticism, at least.

Let final decrees be entered in each of the above entitled cases, in accordance with the opinion herein expressed.

CIRCUIT COURT, DISTRICT OF OREGON.

DUNDEE MORTGAGE AND TRUST INVESTMENT CO. *v.* HUGHES.

Decided April 25, 1884.

LIABILITY OF ATTORNEY ON EXAMINATION OF TITLE TO REAL PROPERTY.—A applied to a money lender for a loan of three thousand dollars and offered his note therefor, secured by a mortgage on certain real property; B. the attorney of the money lender, examined the title to the real property and furnished the latter a certificate to the effect that A's title was good and the property unincumbered, and thereupon the loan was made on the terms proposed; subsequently and before the maturity of the note it was assigned to the plaintiff, who foreclosed the mortgage and sold the property, when it was found that it was incumbered by a prior mortgage, so that the plaintiff did not realize the amount of his debt by four thousand seven hundred and ninety-four dollars and thirty-five cents. *Held*, that there was no privity of contract between B and the plaintiff, and that he was not liable to the latter for the loss.

ACTION for damages. The opinion states the facts.

William H. Effinger, for the plaintiff.

Ellis J. Hughes, in propria persona, for the defendant.

DEADY, J. This action is brought to recover among other things, damages to the amount of five thousand three hundred and twelve dollars and thirty-five cents, for losses alleged to have been sustained on two loans on note and mortgage amounting to three thousand three hundred dollars, upon the certificate of the defendant, as an attorney at law, concerning the title of the borrower to the mortgaged premises and the condition of his estate therein.

From what I conceive to be the legal effect of the statement of the first clause of action in the complaint as amended, it appears that "about" April 28, 1877, the Oregon and Washington Trust Investment Company, was a corporation formed under the laws of Great Britain, and resident in Dundee, Scotland, and engaged in loaning money in Oregon upon note and mortgage; that the defendant, who was then a practicing attorney in this state, was employed by said corporation to examine the title and condition of the real property offered as security by any one applying to said corporation for

loan; that at this time a loan of three thousand dollars was made by said corporation to C. W. Shaw, on his promissory note payable to its order on June 1, 1882, with interest at the rate of ten per centum per annum, and secured by a mortgage on certain real property then owned by said Shaw, upon which the defendant certified there was no prior lien or encumbrance; that on December 19, 1879, said corporation "amalgamated" with the plaintiff and "assigned" thereto "all its mortgages," including "all claim, right and interest to or in or growing out of this loan to Shaw," who is now "the owner and holder thereof," of which the defendant had notice; that in 1882 the plaintiff requested the defendant "to foreclose said mortgage," and in the course of the proceeding therefor it was ascertained and determined by the decree of this court that the same was subject to a prior mortgage on the premises, so that the whole amount realized by the plaintiff on said loan was nine hundred and thirty-eight dollars and twenty-five cents; and that said Shaw is insolvent.

The second cause of action, as appears from the original complaint, is upon a certificate given by the defendant to the Oregon and Washington savings bank, another British corporation engaged in loaning money in Oregon on note and mortgage, as to the title of property taken by said corporation, as a security for a loan of three hundred dollars made to H. H. Howard on November 27, 1876, on his promissory note payable on December 1, 1877, with interest at the rate of twelve per centum per annum, to the effect that said Howard was the owner in fee of the same and that it was unincumbered; that in 1883 said corporation "found out" that said property was not owned by said Howard, so that the whole amount of said loan was lost; that Howard is insolvent, and the plaintiff is now "the assignee" and "owner" of all the "assets" of said corporation.

The defendant demurs to both these statements, for that they do not contain facts sufficient to constitute a cause of action.

In the first statement it is alleged that the loss arising from the insufficiency of the security for the loan was sustained by the O. & W. T. I. Co., and that the defendant now owes to said corporation the full amount thereof, to wit, four thousand seven hundred and ninety-four dollars and thirty-five cents; and it is also alleged that the plaintiff is now "the owner and holder" of the mortgage, notwithstanding it appears that the same has been "foreclosed" and merged in a decree of this court and partly satisfied from the proceeds of the mortgaged premises; and notwithstanding the further allegation, that the defendant "now owes" the amount of this loss to the O. & W. T. I. Co.

But none of these contradictory allegations are admitted by the demurrer, except such as the law adjudges to be true (Freeman v. Frank, 10 Abb. 570;) and those which are mere conclusions of law and not thereby admitted at all: Branham v. The Mayor, etc., 24 Cal. 602; Hall v. Bartlett, 9 Barb. 297.

This action is brought upon the hypothesis that the defendant is now liable to the plaintiff for this loss, but the allegation that he "now owes" the amount thereof to the O. & W. T. I. Co. is utterly at variance therewith. He cannot be liable on this account to both of them at the same time.

Again, it is alleged that the defendant "guaranteed" that the Shaw property was clear of incumbrance. But this is a mere conclusion of law, and the facts stated do not support it. Upon these, the transaction is simply an employment of the defendant by the O. & W. T. I. Co. to examine and report upon the title and condition of real property offerred as security for a loan by the latter.

Prima facie, there is no element of guaranty involved in such employment. The defendant only undertook to bring to the discharge of his duly reasonable skill and diligence. He did not warrant or guaranty the correctness of his work any more than a physician or a mechanic does.

It is admitted that if the O. & W. T. I. Co. had sustained loss by the negligence or want of skill on the part of the defendant in this matter, the right to recover damages for the same might be assigned to the plaintiff and it could maintain an action thereon. But taking the facts of the case according to their legal import, and construing contradictory allegations according to the law of the case, the plaintiff does not sue as the assignee of a cause of action accruing to the O. & W. T. I. Co. during its existence and ownership of the Shaw note and mortgage.

The only thing assigned by the latter was this note and mortgage, and nothing appearing to the contrary, presumably the consideration therefor was equal to its par value. It does not appear then that the assignor ever lost anything by reason of the incorrectness of the defendant's certificate. Nor could the insufficiency of the surety be absolutely, if at all, determined until the maturity of the note in 1882, while the assignment to the plaintiff was made in 1879.

The only question then really in this case is whether the defendant is liable on this certificate to any one but his employer, the O. & W. T. I. Co.

The defendant maintains that he is not, while the plaintiff contends he is; not on the ground of privity of contract between them, or that it was aware of the existence of the certificate, or ever acted on it or was misled by it, but on the ground that the certificate was a necessary preliminary to the contract of loaning, and, therefore, an integral part of that contract, operating, of course, as an assurance or security to the person about to make the loan, but as much a part of the transaction as the mortgage itself.

This question has been decided by the supreme court in Savings Bank v. Ward, 100 U. S. 195.

The case was this: A, an attorney employed by B to examine and report on the title of the latter to a certain lot of ground, certified that it was "good," upon which certificate B procured a loan from C and gave a mortgage on the property as security. It turned out

that B had parted with the title to the property prior to the date of the certificate—a fact that, in the exercise of reasonable care, might have been learned from the records. The security having proved worthless, and B being insolvent, C lost his money and brought suit against A for damages.

The court held in the language of the syllabus: "That there being neither fraud, collusion or falsehood by A, nor privity of contract between him and C, he is not liable to the latter for any loss sustained by reason of the certificate."

True, Mr. Chief Justice Waite, with whom concurred Justices Swayne and Bradley, delivered a dissenting opinion, not upon the general question however, but on the special ground, that it appeared that A gave his client the certificate in question with knowledge or reason to know that he intended to use it in a business transaction with a third person as evidence of the facts contained therein, and was, therefore, liable to each person for any loss resulting from a reliance on such certificate in any particular, which might have been prevented by the exercise of ordinary care and skill on the part of A.

But that is not this case. The defendant prepared this certificate at the instance and for the use of his client, the O. & W. T. I. Co., and none other. Nor was there anything in the nature of the business that informed him, or gave him any reason to believe, that any other person would be called upon to act upon it or part with any right or thing of value on the strength of the representations contained in it. Such a certificate made at the instance of the owner of the property may be used to influence a third person to make a loan thereon. But a certificate made for the information of the lender is presumably made for his use alone, and when the loan is made and the security accepted it is *functus officio*—has performed its office.

The defendant is liable to the O. & W. T. I. Co. for any loss sustained by it on account of any error or mistake in the certificate, arising from a want of ordinary professional skill and care in the preparation of it, and not otherwise. But he is not so liable to the plaintiff or any third person. There is no privity of contract between them or any relation whatever.

This ruling is also maintained in Houseman v. Girard M. B. & L. Association, 81 Pa. St., 256, in which it was held that the recorder of deeds is liable in damages for a false certificate of title, but only to the party who employs him to make the search and not his assignee or aliens. And in Winterbottom v. Wright, 10 Mee. & Wels. (Excheq.), 109, it was held that although the maker of a carriage is liable to the person for whom he makes it, for any loss or injury arising directly from negligence in its construction, that he was not so liable to any third person who might use the same, for the reason there was no privity of contract between them.

The statement of the second cause of action is of the same character as the first; and it is also defective in not stating absolutely

that the certificate is untrue. The allegation that in 1883 the bank "found out" that Howard did not own the property is not in form or effect an averment that he did not own the same and had not title thereto at the date of the certificate. It does not appear to have been "found out" in any judicial proceeding that the certificate was untrue in this respect; and while it may, nevertheless, be shown in this action to be a fact, it must first be alleged, so that issue can be taken on it.

Because, in 1883, the bank was of the opinion that Howard had no title to the land, that did make it so, and the statement of that irrelevant matter is not an allegation by the plaintiff that he was not the owner thereof.

Neither does it appear that the bank ever made any assignment of this note and mortgage to the plaintiff or of any claim that may have accrued to it against the defendant for a loss sustained by it on account of any error in this certificate. The allegation that the plaintiff is now the "assignee" and "owner" of the "assets" of the bank is far too vague and indefinite to include this note and mortgage, or such claim, if there is one. The owner of what "assets?" For aught that appears, the bank may have parted with this note and demand before the plaintiff became the owner of its assets. Unless it is shown when the assignment was made, and that the bank was then the owner of this "asset," the plaintiff does not show itself entitled to maintain this action, even upon its theory of the law and the defendant's liability. The allegation that the plaintiff is "now" the assignee and owner of the assets of the bank implies, it is true, an assignment at sometime, but it cannot be assumed in favor of the plaintiff that it was more than a day before the commencement of this action—January 9, 1884.

But there is no direct allegation in the statement of any loss on the mortgage or of the facts necessary to show one. The statement that the loan was lost to the bank, appears to be a mere inference from the fact that the bank was of the opinion that the mortgagee had no title.

And if there was such allegation, and it appeared therefrom that the loss was sustained by the plaintiff, the defendant is not liable for it; while if it was sustained by the bank the defendant is not liable to the plaintiff therefor, unless it should further appear that the right of action thereon has been duly assigned to it.

The demurrer is sustained to both statements.

SHIVELY v. WELCH ET AL.

Decided April 21, 1884.

DECISION OF THE TIDE LAND COMMISSIONERS.—The commissioners under the acts of 1872 and 1874, to dispose of the state tide lands, were authorized to decide who was entitled, in certain cases, to be preferred as a purchaser thereof, and their determination of the matter cannot be questioned elsewhere, except for an error of law or a fraud extrinsic and collateral to the contest, by which a full and fair hearing of the matter was prevented.

SETTLER UNDER THE DONATION ACT.—It does not appear that James Welch was ever a "settler" under the laws of the provisional government or the donation act upon the donation patented to John M. Shively and wife; and if he was, upon his abandonment of all such claim thereto in 1860, and before he was entitled to the grant, his wife had no interest in it or the consideration received therefor.

CONVEYANCE TO ONE PERSON UPON A CONSIDERATION MOVING FROM ANOTHER.—In 1860 John M. Shively, in consideration that James Welch abandoned his claim to be a "settler" upon the former's donation claim, conveyed a certain portion thereof to said Welch, and a like portion, including blocks 5 and 13 in "Shively's Astoria," to his wife Nancy: *Held*, that Nancy did not hold said blocks under her husband but the grantor, Shively, and therefore she was entitled under the acts of 1872 and 1874 (Ses. L. 129, 76) to purchase the tide land in front of said blocks, although her husband had quit-claimed the same to Shively in 1850.

Suit to declare the defendants trustees and for a conveyance. The opinion states the facts.

Frederick K. Strong, for the plaintiff.
E. C. Bronaugh, for the defendants.

DEADY, J. This suit is brought by the plaintiff, John M. Shively, to have the defendants, Nancy Welch, James W. Welch, Joseph N. Dolph and W. W. Upton, declared to be the trustees of the plaintiff for certain tide lands conveyed to said Nancy by the commissioners for the sale of school lands, under and by virtue of the act of October 28, 1872 (Ses. L. 129), on August 28, 1876—the same being known as block 111, in front of shore block 13, in the town of Astoria, Oregon, and the west half of each of the blocks 41, 46 and 145 lying in front of the west half of block 5 in said town, and of the alleged value of more than five thousand dollars.

The cause was heard on a demurrer to the amended bill, from which latter it appears: That in March, 1844, the plaintiff, John M. Shively, was a "settler," under the laws of the provisional government, on a tract of public land on the south bank and near the mouth of the Columbia river, containing 640.56 acres, and laid off a town thereon containing 121 blocks divided into lots, and extending from ordinary high water to the southward, and commonly known as "Shively's Astoria;" and on April 18, 1845, he bargained and sold by an instrument in writing to James Welch the undivided one-half of said land and blocks except about twenty lots; that prior to March 13, 1850, the plaintiff, with the consent of Welch, laid off additional blocks, numbered from 122 to 150, both inclusive, the same being situate almost wholly in front of said tract of land and between ordinary high and low water mark; and on said day said Shively and Welch divided the premises, so far as surveyed, into blocks, between them, and by their deeds quit-claimed the same to each other. That upon the passage of the donation act (September 27, 1850; 9 stat. 497) the plaintiff became and was a qualified, married "settler" on said land under said act, and had been such

settler for more than four years prior thereto, to the knowledge of said Welch, who, nevertheless, now disputed the plaintiff's right to hold said land as a donation under said act, by reason of the premises; and for the purpose of settling said dispute on Fepruary 18, 1860, the plaintiff and his wife, Susan L., in pursuance of an arrangement with said Welch to that effect, conveyed by deed, with a general warranty, to the latter and his wife Nancy each one-fourth of the unplatted portion of said donation and certain of the blocks aforesaid, in number about one-fourth of the whole number surveyed. That the conveyance to said Nancy included the blocks 5 and 13 aforesaid, and was made to her at the request of her husband, and upon the consideration and for the purposes aforesaid, and not otherwise, and thereupon said Welch ceased and withdrew his opposition to the plaintiff's claim to the premises as a donee under the donation act, and thereafter, on January 24, 1866, a patent was duly issued thereunder, conveying the east half of the donation to the plaintiff and the west half to his wife Susan L. That blocks 111 and 145 are wholly below ordinary high tide, and were represented on the map of "Shively's Astoria" as being each 300 feet square, bounded on all sides by streets and were included in the quit-claim of March 13, 1850, made by Welch to the plaintiff, and said block 111 is immediately in front and north of the shore block 13 in the west half of said donation, from which it is separated on said map by Wall street, while block 145 is immediately in front and north of shore block 5 in the east half of said donation, from which it is separated on the map by Hemlock street; that both Wall and Hemlock streets are now below ordinary high water mark, and block 13 is more than one-fourth and block 5 near one-sixth below said line; but in 1856, at the date of the official survey of the Shively donation, a small portion of the west end of Wall street was above the meander line, while such line ran diagonally through the whole length of Hemlock street in front of block 5, so as to leave about three-fourths of the same above said line, and about one-fifth of block 13 was below said line.

On March 7, 1881, the plaintiff and wife conveyed the latter's half of the donation, with certain exceptions not material to this case, to Milton Elliott, and on the day following he conveyed the same to the plaintiff.

On September 3, 1875, Nancy Welch applied to the commissioners of the state for the sale of school land to purchase the tide lands lying in front of blocks 5 and 13, under the state act of October 28, 1872, "to provide for the sale of tide and overflowed lands on the sea and shore coast" (Ses. L. 129), and the act of October 29, 1874 (Ses. L. 76)) amendatory thereof, as the owner of said blocks, and represented that said tide land was not held by any person claiming by, through or under her, or any one through whom she claimed, which representation the bill alleges to have been false to the knowledge of the party making it, who then knew, as it is alleged, that the plaintiff was the "equitable owner" of the property and entitled to

purchase the same from the state, and that about August 28, 1876, she obtained from said commissioners a conveyance of the tide land in front of block 13 and the west half of block 5, including block 111 and the west half of block 145, while the plaintiff at the date of both said application and conveyance was an applicant in due form of law for the purchase of said tide lands, and was the only person entitled to purchase the same under said act.

On October 19, 1876, the defendants James Welch, Joseph N. Dolph and W. W. Upton procured a conveyance from said Nancy Welch of an undivided one-fourth of said tide lands; and it is alleged that the "title" of said Nancy is "fraudulent and void," as against the plaintiff, and that the conveyance to her co-defendants was made without consideration, and received by them with full knowledge of the premises.

The defendants for cause of demurrer to the amended bill, among others, allege: First, that the question of who was entitled to the conveyance from the state was determined by the commissioners, and their decision, in the absence of fraud, cannot be reviewed by the court; second, that Nancy took the land and blocks conveyed to her by the plaintiff "free from any contracts of her husband concerning the appurtenances or riparian rights belonging to said land;" and third, that there is no equity in the bill.

The location of blocks 41 and 46 is not definitely shown by the bill, but it may be gathered therefrom that they are in front of block 5 and beyond block 145, in which case they are in deep water and below the line of ordinary low tide, and, therefore, not tide lands. Besides, it appears from the bill that block 41 is in the deed of February 16, 1860, executed by the plaintiff and wife to Nancy Welch, with warranty, which estops the plaintiff from now claiming any right or interest therein as against said Nancy.

This being so, counsel for the plaintiff consents that the bill may be considered dismissed as to these two blocks.

The act of 1872, under which Nancy Welch purchased the tide land in question, provides that the owner of any land fronting on or bounded by the shore of any "bay, harbor or inlet on the sea coast" of Oregon, shall have the right to purchase from the state all the tide land belonging thereunto in front of such owner (sec. 1).

The commissioners for the sale of school lands—the governor, treasurer and secretary of state—are authorized to sell such lands to the owner of the land that abuts or fronts thereon on proof of such ownership (secs. 2 and 3). And if the application to purchase is not made by the owner within twelve months from the passage of the act, then such tide lands may be purchased by any citizen or resident of Oregon (sec. 5),

By the amendment of 1874 section 1 was extended to tide lands on rivers and their bays in which the "tide ebbs and flows," excluding the Wallamet, "the tide and overflowed lands" on which, were thereby directly granted to the owners of the adjacent property; and section 5 was amended so as to allow the adjacent owner three

years from the passage of the act within which to apply for the purchase of tide lands; and to provide that upon an application to purchase by any one other than the owner of the adjacent land or his grantee, notice thereof shall be given to such owner or grantee, and to any person in the possession of such tide lands, or the improver of the same, who shall have sixty days after service of such notice to make application for the purchase of such lands, which application shall have preference over all others; and all applications to purchase tide lands shall be accompanied by an affidavit of the applicant "setting forth the fact that such land is not held by any other person under a deed from said applicant or any person under whom he holds."

The land in the territory of Oregon, including the beds and shores of the navigable waters below ordinary high tide or water, belonged, prior to the admission of the state into the union, to the United States, as proprietor, and was subject to its jurisdiction as sovereign. Upon the admission of the state into the union, such bed and shores, not otherwise disposed of by the United States, became the property of the state in its sovereign capacity and subject to its jurisdiction and disposal: Pollard v. Hagan, 3 How. 228; Barney v. Keokuk, 94 U. S. 336; Shively v. Parker, 9 Or. 504.

The United States, so far as appears, never undertook to dispose of any of the shore or tide lands in Oregon, during the territorial period, and, therefore, upon the admission of the state into the union, on February 14, 1859, (11 stat. 383), the same became subject to the control and disposition of the latter. In pursuance of this power, the state has provided for the sale and disposition of these lands by the passage of the act of 1872 and the amendment of 1874. Under them, Nancy Welch, as the owner of the adjacent highland, became the purchaser of the parcels of tide land, known in this suit as blocks 111 and the west half of 145.

But it is alleged that the purchase was fraudulent on her part, because she falsely represented herself to be entitled to purchase the same in preference to the plaintiff. It does not appear from the bill in what this fraud consists or wherein her representation, as to her qualifications, is false, otherwise than that her conclusion from the admitted facts, as to her right in the premises, may have been erroneous.

But the question of Nancy Welch's right as a preferred purchaser arose before the commissioners charged with the disposition of the land upon due notice to the plaintiff, who, I suppose, had the right and did contest the matter before them, and their conclusion or action in the premises cannot be questioned unless for error in the construction or application of the law, or for some fraud extrinsic and collateral to the contest, by which the plaintiff was prevented from having a fair and full hearing before the commissioners. At least such is the rule laid down by the national courts in regard to similar proceedings before the officers of the land department: Ai-

ken v. Ferry, 6 Saw. 79; Vance v. Burbank, 101 U. S. 519, and cases there cited.

In the course of the business before the commissioners the question arose and was contested as to which of the two applicants was entitled to purchase from the state the tide land in question. Their action in determining such a question is in all respects analagous to that of the officers of the land office in determining a contest before them, and should receive the same consideration when questioned in the courts.

Now, there is no such fraud alleged or pretended, as would vitiate the decision of the commissioners in this case. So far as appears, Nancy did nothing to prevent a full and fair hearing of the matter by the commissioners or to hinder or prevent the plaintiff from presenting his claim to them in the best possible light. Presumably, the facts concerning the alleged rights of the adverse applicants were presented to the commissioners as here stated, and there as here, there being no dispute about them, they as a question of law decided the contest in favor of Nancy. And now, whether the matter of law was correctly decided by them is the only question in this case.

It is admitted that Nancy was the owner of the adjacent highland, but it is claimed that the tide land was "held" by the plaintiff under a deed not from Nancy, but from James Welch, under whom it is claimed she "held" the highland, and therefore her right to purchase was subordinate under the act to that of the plaintiff. The argument in support of this proposition is, that Welch having in March, 1850, quit-claimed the tide blocks one hundred and eleven and one hundred and forty-five to the plaintiff, and the latter having in February, 1860, at the instance and request of said Welch and upon a consideration moving from him, conveyed the blocks five and thirteen to Nancy, therefore Nancy "held" the same under said Welch, the same person under whom the plaintiff "held" the tide land included in the quit claim of 1850.

Leaving out of consideration the fact that neither Shively nor Welch ever had any right to or interest in this tide land, or any right to purchase the same until and except for the act of 1872; and that their quit-claims of 1850 did not estop either of them from asserting and maintaining, as against the other, any after acquired estate or interest in them or right to purchase the same from the state, (Rawle on Cov. 409; Van Rensselaer v. Kearney, 11 How. 322; Fields v. Squiers, 1 Deady, 379; Lownsdale v. Portland, Id. 15,) it is very clear that Nancy Welch never "held" the blocks five and thirteen under her husband James Welch; but I cannot rest this conclusion upon the argument made in its support by the counsel for the defendants.

That argument is this—James Welch, at the date of the conveyances to him and his wife in 1860 was a "settler" on the premises under the donation act and in the compromise then made between himself and Shively, in which he abandoned his claim to be such

"settler," the one-half of the land and blocks conveyed by Shively in consideration of such abandonment, was conveyed to Nancy, because, as Welch's wife, she was jointly interested with him in the land upon which he was a settler under the donation act, and, therefore, the consideration for the conveyance from Shively to her moved from her and not her husband, whereby she "holds" under the former and not the latter.

But there is no warrant upon the facts stated in the bill, particularly when considered in the light of contemporaneous history, for concluding that Welch was ever a "settler" upon this land under either the donation act or the laws of the provisional government. True, he lived upon it, but only as the purchaser of certain parcels of the same or an interest thereof under and from such a settler—John M. Shively. After the passage of the donation act in September, 1860, he probably ascertained that his quit-claim from Shively was not sufficient to pass the after-acquired estate which the latter took under the donation act, and, therefore, as a means of compelling him to make the same good, Welch may have threatened and probably did set up to be a "settler" on the land under the donation act. The effect of this claim was at least to embarrass and delay Shively in the assertion and maintenance of his right, as such settler, in the land office. Hence the so-called compromise, by which Welch abandoned his opposition to Shively's claim to the donation and the latter conveyed to Welch and wife with warranty, that which he had quit-claimed to the former in 1850.

But even if Welch had been the "settler" on the land, his wife had no interest in the premises until he had complied with the law, so as to be entitled to the grant. His abandonment of the claim prior to that time was his own act and for his own benefit. She had nothing to relinquish or abandon: Lamb v. Starr, 1 Deady, 360; Vance v. Burbank, 101 U. S. 520.

But Nancy Welch having acquired these blocks 5 and 13, by a direct conveyance from Shively, she "holds" them under him. In other words, she derives her title to them from him. And it is altogether immaterial who furnished the consideration for such conveyance. Because a husband for any reason—as love and affection or a sense of justice—furnishes the means to enable his wife to acquire property or even purchases the same outright and directs the conveyance to be made to her, she does not "hold" under him. Welch was not the owner of the property and she is not his grantee. They are not privies in estate—there is no devolution or transmission of any interest in the property from him to her. But she holds under the grantor in the conveyance through which she derives her title and right, and to which her husband is a stranger.

It follows that Nancy Welch's representation or claim that the tide lands in question were not "held" by any person under a deed from her or any person under whom she "held," was true in point of both fact and law, and the commissioners did not err in preferring her as a purchaser to the plaintiff. The plaintiff is not entitled to any relief on this bill, and the same is dismissed.

SUPREME COURT OF CALIFORNIA.

No. 10,973.

EX PARTE KELLY.

In Bank. Filed April 28, 1884.

BATTERY—JUDGMENT IMPOSING FINE, WITH SUBSTITUTIONAL IMPRISONMENT.—A judgment of a justice of the peace imposing a fine upon a defendant convicted of battery, and ordering a substitutional imprisonment until such fine be paid, as provided in section 1446 of the penal code, cannot direct that the defendant, while so imprisoned, perform labor on the streets, or other public works of the city of Los Angeles. Such judgment is not authorized by the act of February 20, 1872, amending the charter of said city.

THE SAME—DISCHARGE ON HABEAS CORPUS.—Such judgment is a unit, and if one portion of it is without the jurisdiction of the justice, the judgment is void, and on an application for a writ of habeas corpus the defendant should be discharged. On such proceeding the supreme court cannot exscind the void portion from the judgment and order what remains to be carried into execution.

APPLICATION for a writ of habeas corpus. The opinion states the facts.

J. F. Godfrey, for the petitioner.

S. M. White, contra.

THORNTON, J. Application for a writ of *habeas corpus*. The petitioner was accused and convicted of a battery, and the court rendered the following judgment:

"In the court of the justice of the peace, for the township of Los Angeles, in the county of Los Angeles, state of California—R. A. Ling, J. P.

"The people of the state of California, to the sheriff of the county of Los Angeles, greeting:

"Whereas, John Kelly has this day been convicted before me, R. A. Ling, justice of the peace for the township of Los Angeles, county of Los Angeles and state of California, of the crime of battery, committed in said Los Angeles township, on or about the third day of April, A. D. 1884; and whereas, upon such conviction, I did consider and adjudge that for said offense the said John Kelly be fined in the sum of six hundred and fifty dollars, or be imprisoned in the county jail of said Los Angeles county, in the proportion of one day's imprisonment for every dollar of the fine until the fine be satisfied, not exceeding six hundred and fifty days, and the defendant to be discharged on payment of such portion of said fine not satisfied by imprisonment at rate above specified; and whereas, the said John Kelley, although requested to pay said fine, has not paid the same, these are therefore to command you, the said sheriff, to take and receive the said John Kelly and imprison him in the county jail of Los Angeles county, in the proportion of one day's imprisonment for every dollar of the fine, until said fine be satisfied, not exceeding six hundred and fifty days, and the defendant to be discharged on payment of such portion of said fine not satisfied by imprisonment at the rate above prescribed. And the said defendant, while so imprisoned, perform labor on the streets or other public works of the city of Los Angeles.

"Given under my hand, at the township of Los Angeles, in the county of Los Angeles, this fourth day of April, A. D. 1884.

"R. A. LING,

"Justice of the peace in and for Los Angeles township and county, and state of California."

Battery is a misdemeanor and "is punishable by fine not exceeding one thousand dollars, or by imprisonment in the county jail not exceeding six months, or by both:" Penal Code, sec. 243.

It was manifestly not the intention of the justice of the peace who tried the cause to impose both fine and imprisonment as a penalty. If that had been his intention he would not have provided in the judgment for the discharge of the defendant on payment of the fine, or such portion of it as remained unsatisfied, after crediting the defendant with that portion of the imprisonment suffered, at the rate of one dollar a day.

It was clearly the intent to impose a penalty of a fine, and in case it was not paid, imprisonment until the fine was satisfied, at the rate indicated in the judgment. This is justified by section 1446 of the penal code, which reads as follows: "A judgment that the defendant pay a fine, may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine." This section of the statute certainly allowed a substituted mode of paying the fine, and it may well be styled a substituted punishment in case of non-payment, qualified as to payment and discharge of the defendant as in the judgment entered in this case.

But this statute nowhere allows any addition to this substituted mode of payment. We look in vain to find any authority, in any tribunal, in the penal code or any other code, to annex to this substitution of incarceration for coin, any other punishment. We find no power in the justice to add, as is done by the judgment, that the defendant while so imprisoned, perform labor on the streets or other public works of the city of Los Angeles.

This portion of the judgment is clearly beyond and outside the jurisdiction of the tribunal which rendered it.

Now the judgment is a unit, and if one portion of it is without the jurisdiction of the justice, the judgment is void. We see no authority in this court on this proceeding, to hold a portion of a judgment surplusage, because not authorized by law, to exscind such portion from the judgment, and order what remains to be carried into execution. The judgment must be passed on as a whole, and if any material portion of it is in excess of the jurisdiction of the court, the judgment is void. Further, what authority has this court to say, on an application for a discharge under the writ of habeas corpus, that the judgment of the court is any other than the judgment rendered. If we have authority to exscind one portion, what portion shall it be? What portion shall be held to be the judgment of the justice and what portion not? The judgment entry comes before us as one thing, one portion as well attested as the

other, and as such we must construe it, and if one portion of the judgment is without authority of law, we have no power under this writ, whatever may be the power of the court on an appeal, to exscind a portion of the judgment and hold what remains to be the judgment of the court.

It follows from what has been said above that the petitioner is entitled to be discharged.

On the argument our attention was called to the sixth section of the act of 1872. The act is entitled "An act to amend the charter of the city of Los Angeles," and was approved February 20, 1872: (See acts 1871-2, p. 129.) The sixth section has no reference to the case of a judgment imposing the penalty of a fine and imprisonment until the fine be satisfied at a certain rate per day. It only has reference to a case where the penalty is solitary confinement in the county jail.

It was contended before us that the section above mentioned has been sometime ago repealed. As to this we say nothing. It is unnecessary to pass on this point.

The prisoner is entitled to his discharge, and it is so ordered.

SHARPSTEIN, J., MCKINSTRY, J., and MCKEE, J., concurred.

No. 10,835.

PEOPLE, etc. v. BURT.

In Bank. Filed April 28, 1884.

NEW TRIAL—CONFLICT OF EVIDENCE.—An order granting a defendant a new trial, after a verdict convicting him of embezzlement, will not be reversed, when the evidence is conflicting.

Appeal from an order of the superior court for the city and county of San Francisco, granting the defendant a new trial. The opinion states the facts.

Charles B. Darwin, for the appellant.

Henry E. Highton, for the respondent.

THE COURT. This is an appeal taken by the People from an order of the superior court granting the defendant a new trial, after he had been found guilty of the crime of embezzlement. The learned judge who tried the case and heard all the evidence was not satisfied with the verdict of the jury, and, therefore, set the same aside and granted a new trial. There was a conflict in the evidence, and we are not disposed, under the circumstances of this case, to interfere with the action of the trial court. In People v. Ashnauer, 47 Cal. 98, the court say: "It is well settled that this court will not deal with a question of the mere preponderance of evidence." see, also, People v. Gill, 45 Id. 285.

Order affirmed.

No. 9,212.

LORENZ ET AL. v. JACOBS ET AL.

Department One. Filed April 29, 1884.

ACTION BY PRIOR APPROPRIATOR—ESSENTIAL AVERMENTS.—A complaint by a prior appropriator of water, which alleges the ultimate fact of the legal right in the subject-matter of the action as being in the plaintiff, need not allege the subordinate facts tending to prove such ultimate fact, such as the date of the plaintiffs' location, or the location, size, grade or capacity to carry water, of any of his ditches.

WRONGFUL DIVERSION OF WATER—INJUNCTION.—Where any one of two or more co-owners in the use of the waters of a stream, which has been appropriated by them for a beneficial purpose, diverts for use a greater quantity of the water than of right belongs to him, so as to perceptibly reduce the volume of water flowing in the stream and to materially diminish the quantity to which the others are entitled, in consequence of which they are damaged and their rights violated, such parties are entitled to an injunction enjoining the wrongdoers from diverting the water to their injury.

RECORD OF FORMER JUDGMENT—ADMISSIBILITY OF.—In an action where the question at issue is the quantitative interest of the parties in the natural flow of a certain stream, the record of a former action of partition wherein certain of the present plaintiffs' and defendants were parties, and where issue was joined as to their respective interests, is admissible as against such parties.

APPEAL from a judgment of the superior court for Trinity county entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

Taylor & Tinnin for the appellants.

Wheeler, Williams and *Philbrook*, for the respondents.

MCKEE, J. The assignments of error, which have been argued upon this appeal, are:

1. That the complaint does not contain facts sufficient to constitute a cause of action.

2. That the court erred in admitting in evidence, against defendants' objections, the record of a former judgment.

I. The complaint is not artistically drawn. Yet in its verbiage the following facts, although defectively and illogically stated, sufficiently appear, viz: That in 1882 the plaintiffs were the exclusive owners, by prior appropriation, of the right to divert and use all the water of a stream called "Connor creek," except a sluice head of twenty inches, or "so much as will flow without pressure through an aperture ten inches in length and two inches in height," and the surplus of the natural flow of the stream not appropriated by the plaintiffs; that "in the vicinity of Red Hill, Trinity county, state of California," the plaintiffs had constructed four ditches, which connected with and tapped the creek, by means of which they brought the water from the creek "to the mining ground in that locality," for use in mining and other useful purposes; and that while engaged in the exercise of their right the defendants disturbed them in its enjoyment, by wrongfully diverting so much of the water of the creek in excess of the "sluice-head," to which they are first entitled, as to materially diminish the quantity which the plaintiffs are entitled to have flow through their ditches to their mining ground for mining purposes; and this wrong the defendants threaten to continue so as to deprive the plaintiffs of their right to the use

of the water of said creek; therefore the plaintiffs ask that the defendants be adjudged to pay damages for their wrongful acts in the past, and be perpetually enjoined from continuing to commit them in the future.

It is urged that the complaint is fatally defective, because it contains no distinctive averments of the date of location, location, size, grade, or capacity to carry water, of any of the plaintiffs' ditches; and because it contains no averment that "Connor Creek," or any of the ditches are in the county of Trinity. But all these are subordinate facts tending to prove the ultimate fact of the legal right in the subject-matter of the action asserted by the plaintiffs. As subordinate facts they are not essential to the statement of the cause of action. When a state of facts is relied on to constitute a cause of action, it is sufficent to allege the facts simply, without setting out the facts tending to prove them. If the facts stated are sufficient to constitute a cause of action, their sufficiency cannot be successfully assailed by a general demurrer for imperfect averments of the facts. Such errors in pleading can be reached only be special demurrer. In the presence of a general demurrer a complaint is sufficient which shows that the plaintiffs have a clear legal right in the subject-matter of the action, and that the right is being materially injured by the wrongful acts complained of.

Here, the injury complained of is in the improper diversion of the water of a water course by the defendants as co-owners with the plaintiffs in the flow of the water; and the law is well settled that where any one of two or more co-owners in the use of the water of a stream, which has been appropriated by them for a beneficial purpose, diverts for use a greater quantity of the water than of right belongs to him, so as to perceptibly reduce the volume of water flowing in the stream, and to materially diminish the quantity to which others are entitled, in consequence of which they are damaged and their right violated, such parties are entitled to an injunction enjoining the wrongdoer from diverting the water to their injury: Story Eq. Juris, sec. 927.

II. By his answer each of the defendants asserted a right to use the water to a greater extent than the plaintiffs admitted belonged to them. The question therefore at issue in the case was the quantitative interest of the parties, plaintiffs and defendants, in the natural flow of the creek. Upon that question the plaintiffs gave in evidence, over the exception of the defendants, the judgment-roll in a former action, in which Henry Lorenz, one of the present plaintiffs, Nicholas Lorenz and Jacob Liebrandt were plaintiffs, and Bartol and Henry Jacobs (two of the present defendants), and David Evans and Charles H. Bartlett (two of the present plaintiffs) were defendants, for the partition, or sale, if a partition could not be had, of one of the ditches, mentioned in the complaint in this case, and "the first flow of the water of the creek, known as 'Conner creek,' to the extent of one thousand inches on a grade of two inches to the rod." To that action the parties defendant appeared and

answered. By his answer Henry Jacobs denied that "he was a tenant in common with the plaintiffs of the property described in the pleadings, or otherwise, or at all, or that he had or claimed any estate or interest therein." That answer raised an issue upon which evidence was taken. Upon the proof the court found for the defendant Henry; and, after finding that all the other defendants were tenants in common with the plaintiff, of the property sought to be partitioned, the court, after it had ascertained and determined the extent of the interest of the respective tenants in common, ordered a sale of the property, and a distribution of the proceeds between them according to their respective interests. A sale was had, which was afterwards confirmed, and final judgment was regularly entered.

The ditch property which was sold under that judgment was part of the property involved in this case. The judgment determined that all the parties in that action, except the defendant, Henry, were tenants in common in the property, and that the defendant, Henry, was not a tenant in common, and had no interest in the property. But these facts were directly put in issue and were found. The finding of the last fact would have been unnecessary if the defendant, Henry, had filed a disclaimer and had had the action dismissed as to him; but he did not. He took issue with the averment of the plaintiff's complaint. That was not the formal renunciation of all claim to the subject matter in the suit, which is known in law as a disclaimer: De Uprey v. De Uprey, 27 Cal. 335; Brooks v. Calderwood, 34, Id. 563. Having by his answer raised an issue which involved trial and determination, he became bound by the decision upon the question at issue, and the record of the judgment was admissible in evidence in this case, not only for the purpose of proving the extent of the interest in the property which the plaintiffs acquired at the sale, which was confirmed by the judgment, but also for the purpose of proving that the defendant, Henry, had no interest in the property: Morenhaut v. Higuera, 32 Cal, 294; Hancock v. Lopez, 53 Id. 362.

There is no prejudicial error in the record.

Judgment and order affirmed.

McKINSTRY, J., concurred.

ROSS, J., I concur in the judgment.

No. 8,144.

LOCKE v PETERS.

Department One. Filed April 29, 1884.

A DEMURRER MUST BE DIRECTED TO THE WHOLE OF A PLEADING, or to a particular and separate statement of a cause of action or defense. It cannot be directed to certain lines thereof.

TRESPASS FOR MESNE PROFITS—EJECTMENT—JUDGMENT.—Damages for withholding real property, or for the rents and profits thereof, can not be recovered in an action of ejectment, unless judgment is also given for the recovery of the possession.

Appeal from a judgment of the superior court of San Joaquin county, entered in favor of the plaintiff. The opinion states the facts.

Terry, McKinne & Terry, for the appellant.

Byers & Elliott, for the respondent.

MCKINSTRY, J. If, (as alleged in the amended answer,) all the right, title or interest of plaintiff to the demanded premises was acquired from the Lodi Mill and Warehouse Company, after the execution and registration of the five years' lease by that company to Ellis, the entry of Ellis thereunder, and the occupation of defendant with the consent and approval of Ellis and the company, these facts would have been admissible under the denials of the complaint-averments contained in the amended answer.

The term of the lease was five years from March 30, 1880, and the present ejectment was brought January 3, 1881, and was tried on or prior to the fourteenth day of October, 1881.

If the demurrer of the plaintiff had been addressed to a separate count or defense in the answer, which alleged the facts above mentioned, we would not reverse the judgment, because of the order sustaining the demurrer, since the facts might have been proved under the denials. But the demurrer is to "all of defendant's amended answer, which occurs after line four, page two." The amended answer in the transcript is not numbered as to lines or pages. A demurrer must be directed to the whole of a pleading, or to a particular and separate count, or statement of a cause of action or defense.

The verdict was: "We, the jury in the above entitled cause, find for plaintiff in the sum of five hundred dollars." Even if it should be conceded that the verdict passed upon the issues made by the pleadings, the *judgment* was erroneous and must be reversed. The judgment was: "Wherefore, * * * it is ordered, adjudged and decreed that said plaintiff do have and recover from said defendant the sum of five hundred dollars damages, together with said plaintiff's costs and disbursements incurred in this action, amounting to the sum of ninety dollars and forty-five cents."

This is no adjudication of the plaintiff's right of possession, or with reference to the *ouster*, or as to defendant's alleged withholding of the possession.

The verdict and judgment for five hundred dollars were intended to be either for "rents and profits" or for "damages for withholding." The plaintiff was authorized to unite a claim to recover specific real property with a claim for damages for withholding thereof, and for rents and profits of the same: C. C. P. 427. Whatever may be the difference between the two claims last mentioned, they are to be treated as in nature of an alleged *trespass for mesne profits*, which can be recovered only after or contemporaneously with a judgment for recovery of the possession of the demanded premises. When united with the ejectment, judgment for such damages can be rendered only when there is also a judgment for recovery of the possession.

Judgment reversed and cause remanded for a new trial.

McKEE, J., and ROSS, J., concurred.

No. 9,057.

EVERSDON *v.* MAYHEW.

Department One Filed April 29, 1884.

TOWN SITE OF RED BLUFF—STATUTES AFFECTING—CERTIFICATES OF TITLE—TRUST ESTATE—CONVEYANCE BY TRUSTEE.—On May 1st, 1865, Ann Wasson, then a widow with a child by a former husband, the plaintiff here, entered upon and took possession of certain lots forming part of the town site of Red Bluff. She resided there with her child until her marriage, in 1866, to Wasson; thereafter she, her husband and the plaintiff continued to live and occupy said premises as her property until her death in 1867, when she died intestate, leaving surviving her as her heirs at law, her husband and the plaintiff. Said town site had been entered at the office of the register of the land office of the United States, by the county judge of Tehama county, in trust for the several use and benefit of the occupants thereof, under acts of congress providing for the reservation of town sites upon the public lands of the United States. Thereafter said trustee purchased the lands under the provisions of an act of congress applicable to his trust, and on September 29, 1866, a United States patent was issued to the county judge and his successors in office. On March 6th, 1868, the legislature passed an act authorizing the trustee to distribute the town lots held by him in trust, and to issue certificates of title to the inhabitants of said town in accordance with their respective interests. On July 9th, 1868, Wasson, claiming as heir at law of his wife, obtained from the trustee the certificate of title to the premises in dispute, in his own name, which were afterwards conveyed by mesne conveyances to the defendant. *Held*, that the widow, under the aforesaid acts of congress, as the original and *bona fide* occupant of said lots, became vested with an equitable title to the same, as her separate property, which she would have had a right to perfect, had she lived, by obtaining from the trustee, when he came to execute his trust, under the regulations prescribed by the state, a certificate of legal title; upon her death, before such regulations had been prescribed, her interest vested in her husband and the plaintiff as tenants in common, each entitled to an undivided half of the premises; that the legal title obtained by the husband, and his entry thereunder, inured to the benefit of the plaintiff, and was held by him in trust for her; and that the defendant, who took such land with notice of the equitable rights of the plaintiff, as shown by the county records, could acquire no greater rights therein than his grantor had.

DEFENSE OF BONA FIDE PURCHASER.—The defense of a *bona fide* purchaser is in the nature of a new case founded on a right as to title to real property operating, if made out, to bar and avoid the plaintiff's equity, which otherwise must prevail. To entitle a party to protection as such a purchaser he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment. If he had notice, actual or constructive, at any moment before the payment of the money, he is not a *bona fide* purchaser.

APPEAL from a judgment of the superior court for Tehama county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

Chipman & Garter for the appellant.

Chadbourne and Ellison, for the respondent.

McKEE, J. On the first day of May, 1865, Ann Wasson, then a widow with a child by a former husband, entered upon and took possession, under color of title, of "lots numbers 1, 2, 3, 4 and 5, in block number 47, as laid out and designated on the official plot of the town site of Red Bluff, now on file in the office of the county recorder of the county of Tehama." Upon these premises she had a small dwelling-house in which she and the child, who is the plaintiff in the action in hand, resided until the year 1866, when the widow inter-married with Henry Wasson; and after her marriage she, with her husband and the plaintiff, continued to live there and occupy said premises as her property, until September, 1867, when she died intestate, seized of said premises, and leaving surviving her as her only heirs-at-law her said husband and child.

The lots upon which she thus entered and resided, and on which she died, were portions of two tracts of land which constituted the town site of the town of Red Bluff. These tracts had been entered at the office of the register of the land office of the United States in California, by the county judge of Tehama county, in trust for the several use and benefit of the occupants thereof, according to their respective interests under acts of congress which provided for the reservation of town sites upon public lands of the United States: United States land laws, pp 107, 108, 109. After the entry had been made, the trustee purchased the lands under the provisions of an act of congress applicable to his trust; and on September 20, 1866, the government of the United States issued the patent to Warner Earll, the county judge of said county, and to his successors and assigns for said lands, as the town site of said town, in trust for the several use and benefit of the occupants of said lands according to their respective interests.

Congress provided that the execution of this trust, as to the disposal of the lots in said town, and the proceeds of the sales thereof, were to be conducted under such regulations as would be prescribed by the legislative authority of the state (sec. 294, p. 109, *supra*); and on the 6th of March, 1868, the legislature passed an act which authorized the trustee to distribute the town lots held by him in trust for the citizens of the town of Red Bluff, and to issue certificates of title to the inhabitants of the town in accordance with their respective interest, in the manner prescribed by the act: (Stats. 1867-8, p. 107.)

The acts of congress, under which the foregoing proceedings were had, vested the widow, as the original and *bona fide* occupant of the town lots in dispute, with an equitable title to the same; and as she acquired the property before her marriage with Wasson, it was, by the laws of the state, her separate property. The protection of her title to this property was one of the objects of the congressional legislation upon the subject of town sites upon the public domain:

Alemany v. Petaluma, and Jones v. Petaluma, 38 Cal., pp. 379, 533. Had she lived she would have had the right to perfect her equitable title to the property, by obtaining from the trustee, when he came to execute his trust under the regulations prescribed by the state, a certificate of legal title. She died, however, before the state directed how the trust should be executed, and her estate in the property descended to her heirs: Grover v. Hawley, 5 Cal., 486. As one of these heirs the plaintiff succeeded to an undivided one-half interest in the lots with the surviving husband as the owner of the other half. Wasson and the plaintiff thus became co-heirs and tenants in common of the property.

During the existence of that legal relation, Wasson, the adult tenant in common, on July 6, 1868, obtained from the trustee the certificate of title to the lots in his own name; and, soon after obtaining it, conveyed them to one Bryant, who, in turn, conveyed them by deed to the defendant. But the acquisition by Wasson of the legal title inured to the benefit of himself and his infant co-tenant, whose rights he was bound to respect.

It is urged that the plaintiff did not enter after the death of her mother, and that she was not a beneficiary under the acts of congress, when the legal title was obtained. But at the death of her mother she was an infant about ten years of age and her co-heir entered after the death. His entry, therefore, inured to her benefit; and he took and held the legal title to her undivided half interest in trust for her.

"When," says Chancellor Kent in Home v. Fonda (5 John's Ch. 388), "two devisees are in possession under an imperfect title, derived from the common ancestor, there would seem, naturally and equitably, to arise an obligation between them, resulting from their joint claim and community of interests, that one of them should not affect the claim to the prejudice of the other. It is not consistent with good faith, nor with the duty which the connection of the parties, as claimants of a common subject, created, that one of them should be able without the consent of the other to buy in an outstanding title, and appropriate the whole subject to himself, and thus undermine and oust his companion."

Wasson, therefore, by the acquisition of the legal title, became the absolute owner of his own interest in the property, and the trustee of the legal title to the interest of the plaintiff therein. Being her trustee, he held the title for her benefit; and it was a violation of his trust for him to transfer her title to another. But the transfer was ineffectual to pass any other or greater estate than the trustee had; the person to whom he transferred it, and any one claiming under him, with notice of the trust, stood in the shoes of the trustee as their grantor. That was the position of the defendant, and the legal title to the plaintiff's interest in the lots, which he derived from the trustee, was in the hands of the defendant, subject to the control of the superior equitable right of the plaintiff, unless he was entitled to the protection of a court of equity

against the equitable rights, as a *bona fide* purchaser without notice.

That constitutes the staple of the principal defense, while the defendant makes to the action. In his answer he alleges "that he purchased said premises in good faith and without any notice or knowledge of any right, title or interest of the plaintiff in or to the same."

Upon this pleading the court found, as fact, that the defendant purchased the lots in controversy, in good faith, and paid the sum of two hundred dollars therefor, and immediately after the purchase entered upon and took possession of the same; and, as law, that he was a *bona fide* purchaser of the lots for a valuable consideration, without notice or knowledge of the plaintiff's claim or interest in the same, at the time of making his purchase.

This finding is not sustained by the evidence. Without conflict, the evidence in the record shows, that the defendant when he purchased had knowledge from the records of the title, that the lots had been claimed by the wife of Wasson, under a deed to her, before her marriage with him, from one George Stafford, which was recorded on page 440 in record book E, in the recorder's office of Tehama county, that she had occupied the lots under that deed and died seized of the same; and that her husband after her death, in his application for the legal title, claimed it only as an heir-at-law of his deceased wife. He admits that he examined the record of the title before buying from the husband, and that about or after the time of his purchase he tried to obtain a deed from the plaintiff, but could not, because of her infancy. A purchaser with such knowledge, or which is equivalent to the same thing, such means of knowledge, is not a purchaser without notice.

Besides the answer does not contain the allegations of, nor does the finding establish such a purchase, in good faith, for a valuable consideration, without notice, actual or constructive, as entitled the defendant to be protected against the prior equity of the plaintiff. The answer of a *bona fide* purchaser without notice is, says the supreme court of the United States, in the nature of a new case founded on a right as to title to real property operating, if made out, to bar and avoid the plaintiff's equity, which otherwise must prevail: Boone v. Childs, 10 Peters 210. To entitle a party to protection as such a purchaser he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money, in good faith, and without notice, actual or constructive, *prior to and down to the time of its payment*, for if he had notice, actual or constructive, at any moment of time before the payment of the money, he is not a *bona fide* purchaser: Boone v. Childs, 10 Peters, 210-13; Wallwyn v. Lee, 9 Vesey Jr. 32; Scott v. Umbarger, 41 Cal. 419; Taylor v. Raimey, 4 Hill, 624; Wells v. Morrow, 38 Ala. 128; Pearce v. Foreman, 29 Ark. 568.

Judgment and order reversed, and cause remanded for a new trial.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,999.

SCHLUTER *v.* HARVEY ET AL.

Department One. Filed April 29, 1884.

PRE-EXISTING DEBT—VALUABLE CONSIDERATION—BONA FIDE PURCHASER.—The cancellation of a pre-existing indebtedness may be a sufficient consideration to constitute a vendee a purchaser in good faith and for a valuable consideration.

THE SAME.—PLEADING BONA FIDE PURCHASE.—Insufficiency in pleading the facts showing a *bona fide* purchase for a valuable consideration cannot be taken advantage of in the appellate court, where there was an attempt to plead them, when no objection was raised by demurrer or otherwise in the court below, nor objection made to the evidence tending to prove such facts.

BILL OF INTERPLEADER—CONFLICTING CLAIMS FOR RENT.—A TENANT AGAINST WHOM TWO CONFLICTING CLAIMS for the rent due are made, may institute a bill of interpleader against such claimants, to determine their respective rights to the rent. In such action the court may determine the ultimate rights of the parties on each side as between themselves.

On the tenth day of September, 1878, one J. L. Muth leased to A. C. A. Jens and Claus Schluter, for the term of five years, certain farming lands then owned by him. The lease was for the term of five years, commencing September 18, 1878, and ending September 1, 1883. The lessees, according to the terms of the lease, were to pay to the lessor or his assigns, the yearly rent of one thousand five hundred and fifty dollars, the first payment to be made September 1, 1879, and thereafter one payment each year on the first day of September. To secure the foregoing payments the lessees were to execute a note each year, in advance, with approved security, and deliver the same to the lessor on September 1, of each year. Subsequently the lessee, Jens, assigned his interest in said lease to the plaintiff Schluter, who thereafter occupied the land as sole lessee. On the twenty-fifth day of February, 1882, the defendant Muth executed an assignment on the back of the lease in the words and figures following, to wit:

"This indenture, made the twenty-fifth day of February, 1882, by J. L. Muth of Tehama county, that I give to Henry Baumgarten all my debt of one thousand five hundred and fifty dollars on this lease, made the tenth day of September, 1878, between J. L. Muth and Claus Schluter, A. C. A. Jens and C. F. Brincken for security of one note made this day, of eleven hundred dollars with one and one-fourth interest, also for tax and so forth. J. L. MUTH." On the twenty-third day of March, 1882, Muth, by deed bearing date on that day, sold and conveyed the leased premises to the defendent, Charles Harvey, in consideration of a prior indebtedness. This deed from Muth to Harvey was recorded on the twenty-fourth day of March, 1882. The lease and assignment were recorded March 25, 1882. Schluter, on the first day of September, 1881, following the terms of the lease, executed and delivered to Muth a note for one thousand five hundred and fifty dollars, payable September 1, 1882. This note was given to secure the rent for the year commencing September 1, 1881, and ending September 1, 1882. By the terms of the lease it became the duty of the tenant to execute a note September 1, 1882, payable September 1, 1883, to secure

the rent for the year commencing September 1, 1882, and ending Semptember 1, 1883. When the time had nearly arrived when by the terms of the lease, the note last referred to should be executed, Schluter learned that the defendant, Harvey, claimed it should be executed to him and that the defendant Baumgarten, claimed it should be executed to him. Not wishing to pay the same debt to each of these parties, and being in doubt as to which of the two was entitled to it, he brought this suit against them both to compel them to adjust their conflicting claims to the rent for the ensuing year. All the parties to the suit appeared in open court on the eighteenth day of September, and admitted that the facts stated in the complaint were true, and consented to the entry of the decree. Afterwards, on the eighteenth day of September, Harvey and Baumgartem both appeared in court. Neither raised any objections to the papers filed by the other; each introduced evidence to establish his right to the note, and no objections were interposed by either to any of the evidence offered by the other. After hearing all the testimony the court ordered findings and judgment for defendant Harvey. From this judgment and an order of the court denying Baumgarten's motion for a new trial, Baumgarten brings this appeal.

Chipman & Garter, for the appellant.

J. F. Ellison, for the respondent.

The COURT. 1. It is urged by appellant that the respondent cannot claim to be a purchaser in good faith, and for a valuable consideration, because the cancellation of a pre-existing indebtedness is not a valuable consideration within the meaning of section 1214 of the civil code. But it is the law of the state, that such pre-existing debt is a valuable consideration: Frey v. Clifford, 44 Cal. 335.

2. It is further insisted that the facts showing respondent to be a purchaser for a valuable consideration, were not sufficiently pleaded by him. But there was an attempt to plead them, to which no objection was taken by demurrer or otherwise in the court below, nor was any objection made to the evidence of respondent tending to prove that he was a purchaser *bona fide* and for valuable consideration.

3. There was evidence to sustain a finding that respondent had no actual notice of the grant to appellant.

4. It is claimed by appellant that the law of this state does not authorize the practice pursued, or judgment rendered in this proceeding. In our opinion the action was authorized, and the proceeding accords with section 386 of the code of civil procedure.

Judgment and order affirmed.

No. 10,977.

EX PARTE WHITTY.

Department Two. Filed April 29, 1884.

STAY OF EXECUTION PENDING APPEAL—CERTIFICATE OF PROBABLE CAUSE. Where after a conviction for battery by a justice of the peace, the defendant appeals to the superior court, although no certificate of probable cause is filed, the same effect will be given to a dismissal of the appeal, when the justice, sheriff and defendant treated the appeal as staying execution, as would be given to it had there been a certificate of probable cause.

Application for a writ of habeas corpus. The petitioner was, on February 7th, 1884, convicted in the justice's court, of battery. On the following day he was adjudged to be imprisoned for fifty days. On February 14th the Sheriff, in pursuance of an order of commitment, arrested and imprisoned him. On February 23d the petitioner filed notice of appeal, and was admitted to bail, and released by the Sheriff. No certificate of probable cause was filed. On March 29th the appeal was dismissed, and on April 17th the petitioner was taken into custody under the judgment of February 8th. To obtain his release from such custody he makes this application.

L. J. Maddox, for the petitioner.

The COURT. If giving notice of appeal and filing a bond would have stayed execution of sentence, pending the appeal, it is sufficiently clear that on the dismissal of the appeal the petitioner herein might have been recommitted to prison. This is not disputed. But it is claimed that the appeal did not stay execution because there was no "certificate of probable cause," such as the code requires in order to have the appeal operate as a stay. The appeal, however, was duly taken, and the justice, sheriff and petitioner treated it as a stay of execution during its pendency. We think, under such circumstances, the same effect should be given to the dismissal of the appeal as would be given to it if there had been a certificate of probable cause.

Application denied and petitioner remanded.

No. 9,186

WILLIAMS *v.* BOARD OF SUPERVISORS.

Department One. Filed April 29, 1884.

CERTIORARI TO REVIEW ACTION of SUPERVISORS—RECLAMATION OF SWAMP LAND. An order of a Board of Supervisors creating a district for the reclamation of swamp land, is an act of legislation, in the exercise of the taxing or police power of the State, and is not reviewable upon *certiorari*.

APPEAL from a judgment of the superior court for Sacramento county, in proceedings for *certiorari*.

Grove L. Johnson, for the appellant.

Williams & Gordon, for the respondent.

THE COURT. The order of a board of supervisors creating a district for the reclamation of swamp land, is an act of legislation, in the exercise of the taxing or police power of the State, which is not reviewable upon *certiorari*: Bixler v. County of Sacramento, 59 Cal. 700. The writ of *certiorari* is, as a remedy, only available for the review of an act judicial in its character.

Judgment reversed and cause remanded.

No. 8,559.

IN RE LOWENTHAL.

In Bank. Filed April 29, 1884.

DISBARMENT OF ATTORNEY.—Evidence held insufficient to justify the defendant's removal or suspension from the bar.

APPLICATION for the disbarment of an attorney. The opinion states the facts.

J. L. Crittenden, for the application.

W. W. Cope, for the defendant.

THE COURT. This is a proceeding under section 287 and following sections of the code of civil procedure, to remove or suspend an attorney and counsellor of this court. The accusation was made in due form, and being wholly denied, a reference was made, under section 298, to William Craig, Esq. Mr. Craig has filed his report, accompanied by the evidence taken by him in support of the accusation as well as that produced by the defense.

We have examined the evidence in the case, and do not find it sufficient to justify a removal or suspension of Mr. Lowenthal, and the charges are therefore dismissed.

No. 7,716.

ENOS. v. COOK ET AL.

Department One. Filed April 30, 1884.

EJECTMENT—FORECLOSURE DECREE, WHO BARRED BY.—In an action of ejectment by the owner of a lease-hold, after the plaintiff has proved, *prima facie*, his right to recover the demanded premises, a defendant who claims under a foreclosure decree against the owner in fee, must show affirmatively that the plaintiff, or his assignors, were barred by such decree.

THE SAME—TENANT FOR YEARS—PRIORITY OF OVER SUBSEQUENT MORTGAGEE.—The assignee of an estate for years, claiming under a duly recorded lease, is entitled to priority over a mortgage executed subsequent to the date of the lease, although the assignment of the lease was made after a decree foreclosing such mortgage. If a writ of assistance is asked for under such decree, and if, after the assignee of such estate for years had appeared and opposed such issuance, the court had nevertheless directed the writ to issue, and the assignee had been removed thereunder, such facts would not have constituted an adjudication of his rights which would have estopped his assertion of them in a subsequent action. Courts will not undertake to settle the conflicting legal or equitable rights of persons, not parties to a foreclosure suit, upon an application for a writ of assistance.

APPEAL from a judgment of the superior court for San Luis Obispo county, entered in favor of the defendants. The opinion states the facts.

Wilcoxson and *Graves*, for the appellant.

McD. R. Venable, for the respondents.

MCKINSTRY, J. This is an action of ejectment to recover the possession of certain lands and premises, ten thousand dollars damages for the use and occupation, and damages caused by the loss of the value of the rents, issues and profits, at the rate of two hundred dollars per month from the ninth day of November, A. D. 1880. The court below gave judgment for defendants, from which plaintiff appealed.

The facts of the case, as disclosed by the record, are as follows: On the fourth day of September, 1876, C. H. Johnson was the owner of the premises described in the complaint, and on that day leased them to one Silva for five years from and after the first day of October, 1876, which lease was on the same day recorded. Silva entered under the lease, and on the thirteenth day of December, 1879, assigned to plaintiff and one Menas. Plaintiff afterwards, and prior to the ninth day of November, 1880, became sole owner of the lease.

On the fourth day of May, 1878, C. H. Johnson mortgaged the demanded premises to the respondent San Luis Obispo Bank, which mortgage was the same day duly recorded. The bank brought suit to foreclose the mortgage, and on the nineteenth day of May, 1879, a decree foreclosing said mortgage and ordering the sale of the mortgaged premises was entered. To this suit plaintiff was not made a party. Upon this decree an order of sale was issued February 20, 1880, and the premises were sold at sheriff's sale, and bid in by the bank, and on the twenty-seventh day of September, 1880, the bank received the sheriff's deed for the same, which was duly executed and recorded.

On the fifth day of October, 1880, an affidavit for a writ of assistance made by the president of the respondent bank, and notice of motion for the writ, returnable October 12, 1880, were filed in the lower court, and copies of the notice and affidavit were served the same day by the sheriff on C. H. Johnson, Merritt Walker and plaintiff.

On November 6, 1880, the said Johnson, Walker and plaintiff failing to appear as required by said notice, the court ordered the writ of assistance to issue. The writ was issued and served, and the respondent bank put in possession of the premises the ninth day of November, 1880.

At the trial the plaintiff proved the lease from Johnson to Silva, the entry of the latter thereunder, the assignments of the lease, the continued occupation by Silva and his assigns—including plaintiff—and the ouster and withholding by defendant. After proof by defendants of the mortgage foreclosure, and the proceedings on

application for writ of assistance, the court below struck out and excluded from the consideration of the jury all of plaintiff's evidence; and thereupon the court, on motion of defendant, discharged the jury and dismissed the action. To these orders and rulings the plaintiff duly accepted.

It is urged by respondent that the owner of the lease-hold and assignor of plaintiff (the latter having taken his assignment after the foreclosure decree) may have been a party to the foreclosure suit and barred by the decree therein. As, however, the plaintiff had proved, *prima facie*, his right to recover the premises demanded in this action, it was for defendant herein to establish affirmatively that plaintiff or his assignor was barred by the foreclosure decree.

It may be conceded (as claimed by respondent) that plaintiff in a foreclosure decree is entitled to a writ of assistance against the mortgagor and those entering under him subsequent to the decree. But plaintiff here did not enter under the mortgagor.

It is contended by respondent that, as plaintiff became interested in the premises subsequently to the rendition of judgment in the foreclosure suit, it was incumbent on him to resist the motion for writ of assistance and his failure to appear and oppose the issuance of the writ, stopped him from setting up at the trial of this action any claim to the land which he might have set up to defeat the motion for the writ.

The right to the exclusive possession for the term, which plaintiff derived from Silva, *antedated* the mortgage to the defendant, the bank. The mortgagee took with notice of the lease, which had been registered. Even if plaintiff had appeared and opposed the issuance of the writ of assistance, and had then and there shown the lease, assignments and possession under it, if the court nevertheless had directed the writ to issue, and the present plaintiff had been amoved under it, these facts would not have constituted an adjudication of his rights which would have estopped his assertion of them in a subsequent action. He could not thus be deprived of his right to have his adverse title passed upon by a court and jury. The courts will not undertake to settle the conflicting legal or equitable rights of persons, not parties to a foreclosure suit, upon an application for a writ of assistance; to adjudicate such rights upon affidavits or on a motion: Skinner v. Beatley, 16 Cal. 157; Burton v. Lies, 21 Id. 88; Frisbie v. Forgarthy, 34 Id. 11; Daniels v. Henderson, 49 Id. 242; Henderson v. McTucker, 45 Id. 647.

Judgment reversed and cause remanded for new trial.

McKEE, J., and ROSS, J., concurred.

No. 9,402.

GOLDEN GATE CONSOLIDATED HY. M. CO. *v.* SUPERIOR COURT OF YUBA COUNTY.

Department One. Filed April 30, 1884.

WRIT OF REVIEW--AN EX PARTE ORDER FOR AN INJUNCTION can not be annulled on a proceeding for a writ of review, because an appeal lies from the order granting the injunction.

INJUNCTION SUSPENDING WORKING OF HYDRAULIC MINES—AN EX PARTE injunction restraining a hydraulic mining corporation from conducting its business in a manner injurious to the plaintiff is not void, although granted without notice to the defendant. Such injunction does not suspend the general and ordinary business of the corporation.

SERVICE OF INJUNCTION—RETURN OF.—An affidavit of the service of an injunction, which states that the same was personally served upon the superintendent and managing agent of the defendant, is *prima facie* evidence of such fact, although the affidavit subsequently states that the affiant is informed and believes that the person served was such superintendent and agent.

THE SAME—REVIEW OF EVIDENCE OF SERVICE OF INJUNCTION ON CERTIORARI—Conceding that the supreme court will, on an application for a writ of certiorari, look into the affidavits used on a motion to quash the service of an injunction, when the jurisdiction of the court to which the writ issues depends upon such evidence, still when such evidence is conflicting, it will be held that the lower court had jurisdiction.

NOTICE OF INJUNCTION—WHEN NOT SERVED.—A defendant against whom an injunction has issued, who has actual notice thereof, will be bound thereby, although the same is not served.

AN INJUNCTION NEED NOT BE SERVED BY A SHERIFF; it may be served by any person authorized to serve a summons.

CORPORATIONS, OTHER THAN MUNICIPAL, MAY BE PUNISHED FOR CONTEMPT, for violation of an injunction.

CONTEMPT—AFFIDAVITS ON PROCEEDINGS FOR.—The jurisdiction of a court to adjudge a contempt, committed out of its presence, does not depend upon the form of the affidavit which sets the proceeding in motion, although the facts constituting the contempt are stated therein on information and belief. The finding that the alleged contempt was committed, after a hearing on an order to show cause issued on such affidavits, will not be reviewed on *certiorari*.

ORDER TO SHOW CAUSE ON CONTEMPT PROCEEDINGS—SERVICE OF, ON ATTORNEY, WHEN SUFFICIENT.—An order to show cause why a corparation should not be punished for contempt, should ordinarily be served upon the president, or other head of the corporation, secretary, cashier or managing agent thereof. But where it appears that diligent efforts have been made to serve an officer or managing agent and that they had attempted to resign their offices and had concealed themselves to avoid service of the order, the court may order service to be made upon one or more of its attorneys. Service upon an attorney who had repeatedly appeared for the corporation is sufficient, although he did not appear as such attorney on the record.

PETITION for a writ of review to the superior court of Yuba county. The opinion states the facts.

Frank H. McNally, for the petitioner.

Byrne and *Davis*, for the respondent.

MCKINSTRY, J. The return to the writ of review shows that, in the action "County of Yuba v. Golden Gate Consolidated Hydraulic Mining Company," an injunction was issued, *ex parte*, commanding the defendant, its officers, agents, servants, etc., until the further order of the court, "to desist and refrain from depositing or suffering to flow into the channel or bed of the Yuba river, or into the channel or bed of Sucker Flat ravine, or into the tributary streams, gulches or ravines which lead into said river or ravine, any of the tailings from defendant's hydraulic mines, or the earth, sand, clay, sediment, stones or other material discharged from said mines, commonly called mining debris." The defendant in that action was by the superior court adjudged guilty of three several contempts in

violating the injunction order. We are asked to annul the contempt judgments and the orders which preceded them.

It is claimed by petitioner that the injunction is *void*, because no notice was given petitioner of the application for it. Section 531 of the code of civil procedure provides that an injunction "to suspend the general and ordinary business of a corporation" cannot be granted "without due notice of the application therefor to the proper officers or managing agent of the corporation."

It is obvious that petitioner cannot have the order for the injunction annulled, because he had an *appeal* from the order granting the injunction: C. C. P. 963, 1068.

The point of petitioner is, that, inasmuch as the injunction was *void*, the petitioner, its servants, etc., were not bound to obey it, and the superior court had no jurisdiction to punish as for contempt, any disobedience of it. But the injunction did not suspend the general and ordinary business of the corporation, "in buying and selling mining claims, or in working them," but only suspended its conduct of mining operations, in a particular manner alleged to injure the plaintiff in the action in which the injunction was issued.

It is further said by petitioner that the injunction was never served on it—the defendant in the action, County of Yuba v. Golden Gate Company; because the person on whom it was served was not any officer or agent of the corporation, when the service was made.

The affidavit of service states that the server personally served the injuction on "W. J. Madden, superintendent and managing agent of said defendant." The subsequent statement that he was "informed and believes," that Madden was superintendent and managing agent does not detract from the previous statement. He could know the fact only from information derived from some source. The return was *prima facie* evidence of the fact: Rowe v. Table Mountain W. Co. 10 Cal. 441.

It is also urged that the court issuing the writ of certiorari will review the *evidence*, when the jurisdiction of the court to which the writ issues depends upon such evidence; that we should look into the avidavits used on a motion to quash the service. If this be conceded, still, where the evidence is conflicting, and there is evidence tending to prove the fact on which jurisdiction depends, this court must hold that the court which decided the fact had jurisdiction. Such is the case here. Besides, there is evidence that the petitioner, its officers and agents had *actual notice* of the injunction. If it and they had such actual notice, they were bound by the injunction, although it was not served at all: High on Injunctions, 2d Ed. secs. 14, 21, 22, 23, 24, and notes; Ex-parte Cottrell, 59 Cal. 421.

It is further claimed that an injunction can be served only by the *Sheriff*, and counsel for petitioner cites subdivision *eight* of section 4176 of the political code: "The Sheriff must serve all process and notices in the manner prescribed by law." The section is found in the chapter defining the duties of sheriff, and does not

give to or impose upon him exclusively the duty of serving all process and notices, but requires of him to serve all process and notices directed to him, or placed in his hands for service, which the law commands him to serve when addressed or handed to him. The code of civil procedure does not provide how or by whom an injunction shall be served, but the important matter is that the party enjoined shall have notice, and the statute being silent it is at the most sufficient if service is made in conformity with the mode prescribed with reference to service of summons. And this seems to be intimated in Edmondson v. Mason: 16 Cal. 388.

The petitioner argues that a corporation cannot commit a contempt. It has been held that a *municipal* corporation cannot be attached for violation of an injunction, but that its officers who disobey the writ may be: London v. Lynn, Black. 206; Davis v. Mayor, etc., 1 Duer, 541; Bass v. City of Shakopee, 27 Minn. 250. But other corporations may be punished for contempts: The People v. Albany, etc., R., 12 Abbott Pr. 171, 20 How. 358; United States v. Memphis, etc., R., 6 Fed. Rep. 237; The Mayor, etc., N. Y. v. Staten Is. Ferry Co., 64 N. Y. 624.

Petitioner contends that the affidavits on which contempt proceedings were initiated were insufficient to give the court jurisdiction, because the facts constituting the alleged contempt were not stated therein positively, nor were they described. The facts are set out showing a clear violation of the injunction by the defendant, petitioner here. It is true they are stated on information and belief. But the jurisdiction of the court to adjudge a contempt, committed out of its presence, does not depend upon the form of the affidavit which sets the proceedings in motion. Here an order to show cause was made, and, if it was served, the defendant had an opportunity to appear and answer any contempt alleged against it. The omissions in the affidavit, upon which the order was made, may have been irregularities, but the commitment was not based upon such affidavits, but upon the oral testimony of witnesses, and documentary evidence given and introduced on the return day of the order to show cause. In each case the superior court found that the defendant on a certain day, in violation of said injunction, and in contempt of the order of the court, did operate its mine, etc., and deposit and flow its debris, etc. It is not our province to inquire whether the court below was justified in finding the existence of the facts which constituted the contempt: *Ex parte* Cottrell, 59 Cal. 420; *ex parte* Perkins, 18 *id.* 60.

The several orders to show cause why the defendant should not be punished for contempt in disobeying the injunction, were served upon attorneys for defendant. Section 1015 of the code of civil procedure provides that, when a party has an attorney in an action, the service of papers, when required, must be upon the attorney, except * * * of papers to bring him in contempt. And section 1016 reads: "The foregoing provisions of this chapter do not apply to the service of summons or other process, or of any paper to bring a party into contempt."

Section 1212 provides, that, when a contempt is not committed in the immediate presence of the court, a warrant of commitment may be granted "upon an order to show cause."

There is no express provision in the codes as to the mode of service of the order to show cause upon a *corporation* in contempt proceedings. It may be conceded, in the view we take, that the order to show cause is "a paper to bring a party into contempt," within the meaning of sections 1015 and 1016; and that, ordinarily, the service of such paper, like that of summons, must be upon "the president or other head of the corporation, secretary, cashier or managing agent thereof."

But, in the case at bar, it was made to appear to the court, by satisfactory evidence, that diligent efforts had been made to serve an officer or managing agent; that the officers of the corporation had attempted to resign their offices, and that they had *concealed* themselves to avoid service of the order, whereupon the court ordered that service be made upon one or more of the attorneys of defendant.

The question to be considered is: When a party charged with contempt, in disobeying a legal order, willfully conceals himself to avoid service of an order to show cause why he should not be adjudged guilty of a contempt, is the court powerless to proceed, or to prevent the continued disregard of its lawful order?

It is obvious that the provisions of the code referred to do not contemplate such concealment. Certainly it is not to be tolerated that a party may defy the court, and continue to violate a restraining order, until personal service can be had of "the paper to bring him into contempt." Every court has inherent jurisdiction to punish a contempt, and the 1209th section of the code of civil procedure, in its enumeration of the acts which are contempts includes "disobedience of any lawful order," etc. And section 187 of the same code, which is but declaratory of the common law, reads: "When jurisdiction is by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and, in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code, or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

The defendant in the action had intrusted its attorneys with the protection of its interests and the defense of its rights. We can see no abuse of authority on the part of the court in directing that the order to show cause should be served on an attorney, since it was made to appear that the defendant, by reason of its own acts, could not be served personally. The process was "suitable," and the mode adopted by the court "conformable to the spirit of the code."

The court found the defendant guilty of three separate contempts, in disobeying the restraining order on three several days. This it

was authorized to do. Each act
separate contempt.

One of the orders to show cause
Esq., who had not been formally
record, but who, as appears fr
appeared in the proceedings as on
and 285 of the code of civil proce
on any question here presented. T
had acted as attorney, was neither
the "spirit of the code."

Judgments and orders affirmed.

ROSS, J., concurred.

MCKEE, J. I concur in the judgm

No. 7,850

JOHNSON ET AL. v

Department One. Filed

FINDINGS OF JURY IN EQUITABLE ACTION—SETTIN
on issues submitted to them in an equitable action
aside such verdict and find the facts itself.

AMENDED COMPLAINT—IMPEACHMENT OF WITNESS
plaint the plaintiff makes its statements his own. A
the original ceases to perform any office as a pleadi
to disprove those of the amended complaint. But wl
his own behalf, the original complaint is admissible i
ing him, when the statements contained therein are
witness.

IMPLIED WARRANTY—SALE BY WRITTEN CONTRACT-
sonal property in his possession warrants his title to tl
sale be by written bill or sale or oral, the implied warr
The law does not generally imply warranties as to qua
caveat emptor, and the purchaser has no remedy except
If the contract of sale be reduced to writing, nothing w
which the law implies, forms part of the contract. Wh
or expresses the warranty that is given by the vendor,
the existence of a warranty in the former case, or to ex

APPEAL from a judgment of the superi
ty, entered in favor of the defendant, and
plaintiffs a new trial.

This was an action to recover damages
in a sale by the defendant to the plainti
The defendant answered denying the
thereof, and filed a cross-complaint seel
mortgage given by the plaintiffs, at the t
their promissory notes given for the purch
were submitted to the jury, who found for
afterwards set such findings aside and foun
further facts appear in the opinion.

Vrooman & Davis and *C. A. Tuttle*, for tl
Edward Lynch and *W. R. Daingerfield*, fo

The COURT. 1. Appellant claims the court below had no power to set aside the verdict of the jury, and to find the facts.

The substituted cross-complaint contains a statement of facts constituting a cause of action in equity. It was a complaint to foreclose a mortgage of personal property given to secure the payment of a promissory note therein set forth. The court was justified in treating the findings of the jury as advisory only.

2. By the verification of the original complaint the plaintiff made its statements his own. As an amended complaint had been substituted for the original, the latter had ceased to perform any office as a *pleading*, and its averments could not be used to disprove those of the amended complaint. If the adverse party were at liberty to use the first pleadings as an admission to overthrow the amended pleading, the party who amends would reap no benefit from his amendment: Meacham v. McKay, 37 Cal. 165. So in Ponee v. McElroy, it was said: "The court below erred in permitting the original complaint to be read in evidence against the plaintiff." But in the case now before us the plaintiff was called as a *witness* on his own behalf, and on cross-examination his attention was called to portions of the original complaint claimed to be inconsistent with his statements as a witness. There is no suggestion that he was not given full opportunity to explain the inconsistencies. The portions of the original complaint were not offered as evidence of any fact other than the fact that the plaintiff made the statements contained in them, and such statements, so far as they were contradictory of or inconsistent with his statements as a witness, were as much admissible for the purpose of impeaching him, as if they were contained in a letter written by him to a third person, or in an affidavit filed in a distinct proceeding. (C. C. P., 2,052.)

3. The plaintiff's witnesses were allowed to testify fully as to the representations and alleged warranty made by defendant at the time of the sale. During the examination of a witness on behalf of the *defendant*, with reference to the alleged representations claimed by plaintiffs to be false and to constitute a warranty, the court remarked: "I don't think there is any warranty in this case. The defense here, if any, to the note, is on the ground of fraud; I hold that in this case the plaintiffs cannot prove a warranty made at the time of the sale by parol agreement made between the parties at that time because of the fact that there was a bill of sale made in writing between them which is silent as to any provision of warranty." The appellant insists that this was error.

The vendor of personal property in his possession warrants his *title* to the same by implication. And whether such sale be by written bill of sale, or oral, the implied warranty of title may be rebutted by parol, that is to say, the vendor may overcome the legal presumption by proof that he did not warrant the title: Miller v. Van Tassel, 24 Cal. 458. In such case the vendor does not add to the terms expressed in the writing, but he only rebuts a legal presumption, not itself expressed in writing, but arising from that which

is expressed. But with reference to warranties as to quality, the general rule is that the law does not imply such a warranty. The maxim is *caveat emptor*, and the purchaser has no remedy except in case of express warranty or fraud. Of course fraudulent representations as to the value of a business may be proved, although such representations are not embodied in the written contract of sale, because such evidence of fraud goes to show that the contract never had any operation. And in the case now here the court below allowed the fullest latitude to appellant in the examination of witnesses as to alleged fraudulent representations.

If the contract between the vendor and vendee be reduced to writing, nothing which is not found in the writing (except that which is presumed by law from that which is written) can be considered as a part of the contract: Kain v. Old, 2 B. & C. 627. When the written sale contains no warranty, or expresses the warranty that is given by the vendor, parol evidence is inadmissible to prove the existence of the warranty in the former case, or to extend it in the latter: Benj. on Sales, 621. The apparent exceptions to the rule are where written papers in the nature of informal *receipts* have been held not to embody, and not to have been intended or designed to set out the terms and conditions of the contract of bargain and sale; as when such a paper merely designates the property, and contains a receipt for the price: Benj. on Sales, 622, note p. Bills of parcels introduce an exception to the general rule. In Allen v. Paik (4 M. & Welsby, 140), there was a memorandum of sale, "Bought of G. Paik, a horse for the sum £7, 2s 6d, (signed) G. Paik." Lord Abinger said the paper appeared to have been intended merely as an informal receipt, and not as containing the terms of the contract. And in Filkins v. Whyland (24 Barb. 379), the memorandum was: "C. B. Filkins, Bt. of C. Whyland an horse, $150. Received payment, C. Whyland." On the other hand, a paper purporting to be a receipt, but containing in truth a complete contract between the parties, cannot be explained by parol: 1 Cow. & Hill, notes, 216, 2d Ed. 1439; Niles v. Culver, 8 Barb. 205; Goodyear v. Ogden, 4 Hill, 104. It is obvious that the question is to be determined by the response to the inquiry: "Is this writing more than a receipt? Does it contain the contract?" In the case at bar, four paper writings were executed contemporaneously: First, a bill of sale by defendant, describing property and acknowledging the receipt of the purchase price, six thousand dollars; second, a promissory note of plaintiffs for five thousand five hundred dollars; third, a mortgage of the property by plaintiffs to secure the five thousand five hundred dollars note; fourth, a promissory note by plaintiffs for five hundred dollars, the balance of the purchase price. It is manifest that these writings contain the terms and conditions of a complete contract, and must be presumed to contain all the terms of the agreement between the parties.

Judgment and order affirmed.

No. 9,032.

HOWELL v. FOSTER, Sheriff. etc.

Department One. Filed April 30, 1884.

STRIKING OUT PORTIONS OF COMPLAINT AND ANSWER.—Plaintiff brought this action to recover possession of certain grain and hogs, on the ground, as alleged in his verified complaint, that the same were his property. The defendant, as sheriff, denied the ownership by the plaintiff, and justified his possession under certain writs of attachment. He alleged that the said property had been taken from him by the plaintiff, after his levy, under a writ of replevin, and asked a return thereof to him, to be held subject to such attachment. On the trial the court, against defendant's objection, on the oral statement of plaintiff's counsel, that the defendant had not levied upon the hogs, permitted the plaintiff to strike out from the complaint all reference to the hogs, and struck out all allegations in regard to the same in defendant's answer. *Held*, that such action of the court was erroneous; for if the averments of the answer were true, the effect of the amendment would be to take the hogs from the defendant's possession and transfer them to the plaintiff without affording the former an opportunity to try the question of his right to their return.

GRAIN RAISED BY A TENANT UNDER A WRITTEN AGREEMENT WITH HIS LANDLORD that the same should be delivered to the latter and remain his property, and in no way subject to the disposal of the former, until certain advances made to him had been repaid, cannot, after such delivery, be attached by a creditor of the tenant, until such advances have been paid.

APPEAL from a judgment of the superior court of Tehama county entered in favor of the plaintiff, and from an order denying the defendant a new trial.

J. F. Ellison, for the appellant.
Chipman & Garter, for the respondent.

ROSS, J. The plaintiff brought this action to recover the possession of 4,455 sacks of wheat, 764 sacks of barley, and 230 head of hogs. In his complaint, which was verified, he alleged that he was the owner of the grain and hogs and that defendant had, without his consent, taken the said property into his possession, and continued to withhold it from the plaintiff. Defendant who, at the times mentioned in the record, was sheriff of Tehama county, answering the complaint—the answer being also verified—denied the ownership by the plaintiff of the property in question, and alleged that the same was owned by the plaintiff and one Mayfield as tenants in common, and that in his official capacity he (defendant) levied upon and took all of the property into his possession, under and by virtue of two certain writs of attachment duly issued out of the superior court of Tehama county in certain actions against Mayfield. Defendant also alleged in his answer that after his levy, the plaintiff, by virtue of a writ of replevin, took all of the property from his (defendant's) possession, and asked a return thereof to him, to be held subject to the aforesaid writs of attachment. When the case came on for trial, the court below, on motion of the plaintiff and against the objection and exception of the defendant, allowed the plaintiff to amend his complaint by striking therefrom all of the allegations in relation to the two hundred and thirty head of hogs, and also struck out of the defendant's answer all reference thereto. This was done upon the verbal statement of plaintiff's counsel that the defendant had not in fact levied the writs of attachment upon the hogs. But not only did the verified complaint of the plaintiff show that defendant had taken the hogs, but defendant, in his verified answer, alleged that

he had levied upon them, and further alleged that subsequently to his levy the plaintiff, by virtue of a writ of replevin, had taken the hogs from his (defendant's) possesson. Under such circumstances the court below erred in allowing the amendment to the complaint and in striking out the portions of the answer referred to; for, if the averments of the answer were true, the effect of the action of the court was to take the hogs from the possession of the defendant and transfer them to the plaintiff without affording the defendant an opportunity to try the question of his right to their return, which he affirmatively alleged. For this error we must reverse the judgment and remand the cause for a new trial; and as there must be a new trial it is proper that we should pass upon the other question in the case.

The action of the court below in the respect already indicated left the case to be tried only as to the wheat and barley, and it was as to that only that the case was tried. Upon this branch of the case the question is, Did Mayfield have an attachable interest in the grain? It was raised by him on land belonging to the plaintiff, under a written instrument by which the plaintiff leased and demised to Mayfield the land for a certain term, with the covenant among others, on the part of Mayfield, that he would till and cultivate the land in a good farmer-like manner, and, at the proper time, would sow the land to wheat, oats or barley, or proportions of each, and, at the proper time, would harvest, thresh, clean and sack the grain, and thereupon deliver all of it to plaintiff, to be held by him as security for all advances made by him to Mayfield, together with interest thereon, at the rate of one and one-half per cent. per month; "and," proceeds the contract, "such demands being satisfied, the said party of the first part (plaintiff) agrees that upon said grain being sacked and delivered as aforesaid he will deliver and transfer to the said party of the second part (Mayfield) his three-fourths of said grain, quality and quantity considered."

The instrument contained this further clause: "And it is mutually covenanted and agreed that until such delivery and transfer by the said party of the first part (plaintiff) all of said grain shall be the property of the said party of the first part, and the said party of the second part (Mayfield) shall have no right to dispose of any portion thereof."

There was also a provision to the effect that the grain should be delivered after it was sacked, at the nearest depot or warehouse, and that the plaintiff should pay one-fourth of the cost of hauling it and one-fourth of the cost of the sacks used. There is no doubt that where one man farms land of another under an agreement by which he is to give the owner a part of the crop raised for its use, he and the owner, in the absence of a stipulation providing otherwise, become tenants in common of the crops raised. But it is just as clear that the agreement between the parties may be so framed as to secure to the owner of the land the ownership of the product until the performance of a certain stated condition: Wentworth v.

Miller, 53 Cal. 9: Andrew v. Newcomb, 32 N. Y. 419; Lewis v. Lyman, 22 Pick. 437; Ponder v. Rhea, 32 Ark., 435; Smith v. Atkins, 18 Vt. 461. In the present case the parties expressly agreed that all of the grain raised on the land by Mayfield should be delivered to the plaintiff and remain his property, and in no way subject to the disposal of Mayfield until all of such advances as the plaintiff may have made him had been satisfied, and he had thereupon received from the plaintiff his share of the grain, which plaintiff bound himself to to deliver. Until all this happened all of the grain, by the express contract of the parties, was to be and remain the property of the plaintiff and in no way subject to the disposal of Mayfield. That it was competent for the parties so to provide has already been shown, and having so provided, it results that Mayfield had no attachable interest in the grain at the time of the levy of the writs in question. "It is a fundamental principle," says Drake on Attachment, sec. 245, "that an attaching creditor can acquire no greater right in attached property than the defendant had at the time of the attachment. If, therefore, the property be in such situation that the defendant has lost his power over it, or has not yet acquired such interest in or power over it as to permit him to dispose of it adversely to others, it cannot be attached for his debt," See, also, authorities cited in support of the text, and Tuohy v. Wingfield, 52 Cal. 319.

Our conclusion is that the ruling of the court below was right with respect to the grain, but erroneous in regard to the hogs involved in the controversy.

Judgment and order reversed, and cause remanded for a new trial.

MCKINSTRY. J., and MCKEE, J., concurred.

No. 10,934.

PEOPLE v. MUNN.

In Bank. Filed April 30, 1884.

KILLING AS THE RESULT OF A SIMPLE ASSAULT—MANSLAUGHTER.—The defendant, after an exchange of words with the deceased, struck him several blows on the head or face with his fist. The blows did not seem at the time, or immediately afterwards, to produce any serious results. How severe the blows were did not appear, but they must have been dealt with considerable force, as the deceased was found dead on the following day from their effect. It did not appear that the defendant had any intention to kill the deceased. *Held*, that such killing amounted to merely manslaughter and not murder.

THE SAME—DISTINCTION BETWEEN MURDER AND MANSLAUGHTER—MALICE.—In cases of homicide committed by violence, it is important to consider the character of the weapon with which the homicide was committed. If the means employed be not dangerous to life, or if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder. Unless such malice exists the homicide amounts simply to manslaughter.

THE SAME—INSTRUCTIONS.—An instruction in this case, to the effect that "if a man knowingly and willfully does an act unlawful in itself, and it produces harm, the law conclusively infers that such harm was intended; the law presumes that the natural, necessary and even possible consequences were intended by the author of the act; if of sound mind, the natural and proximate consequences; and if the act intended was unlawful, even the

possible consequences," is erroneous, as ignoring all distinction between the intent to commit an act ammounting only to a misdemeanor, and one that would, if committed, be a felony.

Appeal from a judgment of the superior court for Stanislaus county, entered upon a verdict convicting the defendant of murder. The opinion states the facts.

Wright & Hazen, for the appellant.

Attorney-General, for the respondent.

MORRISON, C. J. The defendant was convicted of the crime of murder of the second degree, and was sentenced to imprisonment for life in the state prison. The killing occurred in the town of Turlock, in the county of Stanislaus, on the 12th day of August, 1883, under circumstances substantially as follows: The defendant, Albert Case, the deceased, and several others, were in a saloon kept by one Ross, at the hour of 9 or 10 o'clock at night, when an exchange of words occurred between the defendant and the deceased. What the exact words were does not clearly appear from the evidence. Suffice it to say they were words of insult from the defendant and of remonstrance on the part of the deceased. There was, however, no angry discussion, and persons present thought the defendant was jesting rather than in earnest. Case was sitting near the door and defendant standing at the bar of the saloon. The latter walked over to where the former was sitting, and after the exchange of some words struck the former either two or three blows with his fist. The blows fell on the face or head of the deceased, and did not at the time, or immediately afterward, seem to produce any serious effect. How severe the blows were does not clearly appear, but they must have been dealt with a good deal of force. The deceased was a lad of sixteen or seventeen, well developed and largely grown for his age, and was nearly or quite as large as the defendant. The morning after the infliction of the injury the deceased, Case, was found lying on the ground dead, near the room in which he slept.

The *post mortem* examination showed that there was a fracture of the skull just above the right ear, and a clot of blood on the inside of the skull. This came from the rupture of an artery, and was pronounced by the physician making the autopsy to be the cause of death.

The principal question in the case which we deem it necessary to consider is: Did the facts, admitting them in their full force and effect, constitute murder?

This degree of homicide is defined by section 187, penal code, to be the unlawful killing of a human being with malice aforethought, whereas manslaughter is the unlawful killing of a human being without malice: Sec. 192, Id.

"It is of two kinds: First, voluntary, upon a sudden quarrel or heat of passion. Second, involuntary, in the commission of an *unlawful act not amounting to felony;* or in the commission of a law

ful act which might produce death in an unlawful manner, or without due caution or circumspection."

It may be conceded that an assault with the fist, or without the use of a deadly weapon, may be made in such a manner and under such circumstances as to make the killing murder, but the law draws a broad distinction in cases generally between an assault committed with a deadly weapon and a simple assault and battery. The former amounts to a felony, whereas the other is merely a misdemeanor. Section 240 of the penal code provides that "an assault is an unlawful attempt, coupled with a present ability to commit a violent injury on the person of another. A battery is any willful and unlawful use of force or violence on the person of another": Sec. 242. A battery is punishable by fine or imprisonment in the county jail, or both: Sec. 243.

An assault with a deadly weapon, or by any means or force likely to produce great bodily injury, is declared to be a felony, and is punishable by imprisonment in the state prison: Sec. 245.

In the case of The People v. Murat (45 Cal. 281) it was held that an assault made without the use of a deadly weapon with intent to do mere bodily harm, and not to do murder, is a misdemeanor, nothing more.

In the trial of cases of homicide committed by violence it is almost always important to consider the character of the weapon with which the homicide was committed, and all through the cases great emphasis is laid on the fact that a weapon likely to produce death was used by the accused. If the means employed be not dangerous to life, or, in other words, if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder. The distinguishing characteristic respecting the two crimes of murder and manslaughter is malice. Without the presence of this element of malice the crime does not reach the higher degree of murder, but amounts simply to manslaughter.

We will consider a few of the cases in which the distinction is clearly drawn.

If a party participate in a homicide, intending only to commit an assault and battery, he is guilty of manslaughter only: Brown v. The State, 28 Georgia, 209.

Beating and striking a wife violently with the open hand, the blows being illegal, the killing of the wife in such manner is manslaughter: Commonwealth v. McAffee, 108 Mass. 261.

If A and B agree to assault C with their fists, and C receives chance blows from either, producing death, both are guilty of manslaughter: Reg. v. Caton, 12 Cox C. C. 624.

When death ensues in pursuit of an unlawful design, without any intention to kill, it will be murder or manslaughter as the intended offense is felony or only a misdemeanor: Smith v. State, 33 Maine, 55; Foster, 268.

The case of Wellar v. The State, 22 Mich. 16, is a very instructive one on the point we are now considering, and it was there held that "in general when the assault is not committed with a deadly weapon the intent must be clearly felonious to make the killing constitute murder, * * * and in such a case the deadly intent ought to be left in no doubt."

The willful use of a deadly weapon without excuse or provocation, in such a manner as to imperil life, is almost universally recognized as showing a felonious intent: 2 Bishop's Criminal Law, secs. 680, 681. But when the weapon or implement used is not likely to kill or maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose: See cases cited in 30 Michigan, p. 16.

It does not appear from the evidence in this case that there was any intention on the part of the defendant to kill the deceased, and the physician who made the *post mortem* states that an ordinary blow would not have produced the fracture which resulted in the death of Case. It appears, too, that the blow happened by chance to fall upon that portion of the skull which is the thinest and most easily fractured. There certainly was no design or intent on the part of the defendant that it should. If the blow had fallen a little higher or a little lower on the skull the result, in all human probability, would not have been fatal. If death had not ensued the defendant would have been guilty of a simple assault and battery under the penal code, as the assault was not with a dangerous weapon or instrument, or by any means or force likely to produce great bodily injury.

If the party had not died from the injury, the defendant would have been guilty of a misdemeanor only, and not a felony.

The killing of Alfred Case not having been intended, but resulting from an unlawful act, not amounting to a felony, was, therefore, manslaughter and not murder.

We will now consider one of the instructions given by the court to the jury. It was as follows:

"Intent is generally inferred from the commission of the act. If a man knowingly and willfully does an act unlawful in itself, and it produces harm, the law conclusively infers that such harm was intended. The law presumes that the natural, necessary and even possible consequences were intended by the author of the act. If of sound mind the natural and proximate consequences. And if the act intended was unlawful even the *possible* consequences. So if the act produces harm not intended it holds him responsible for all the consequences."

This instruction ignores all distinction between the intent to commit an act amounting only to a misdemeanor, and one that would, if committed, be a felony. We have endeavored to point out the distinction. In our opinion, the instruction was too broad, and was well calculated to mislead the jury under the circumstances of this case. The language of Chief Justice Shaw in the case of Common-

wealth v. Webster, 5 Cushing 305, is as follows: "This rule is founded on the plain and obvious principle, that a person must be presumed to intend to do that which he voluntarily and willfully does in fact do, and that he must intend all the *natural, probable und usual* consequences of his own act."

To hold the defendant liable for all *possible* consequences of his act and to the full extent of the rule laid down by the court, would be dangerous in the extreme.

For the reasons herein set forth, the judgment and order are reversed and the cause remanded for a new trial.

SHARPSTEIN, J., and THORNTON, J., concurred.

ROSS, J.: I concur upon the ground last stated in the opinion.

MCKINSTRY, J., MYRICK, J.: We concur in the judgment and in the opinion that the instruction as to responsibility for all *possible* consequences was erroneous.

No. 9241.

CONNOR v. STANLEY, ADMINISTRATOR, ETC.

Department One. Filed April 30, 1884.

ANTE-NUPTIAL SETTLEMENT, BREACH OF.—Prior to the death of defendant's intestate he and the plaintiff, an unmarried woman, entered into an agreement whereby they mutually promised to inter-marry within a reasonable time. In consideration thereof the agreement provided that "the party of the first part (the defendant's intestate) grants and gives to the party of the second part" certain bonds then in his possession, "all of which he promises to deliver to her on or before the day of their marriage, to be and become her own absolute property." *Held*, that such agreement was an ante-nuptial settlement, the consequences of which could not be avoided by the defendant's intestate refusing to consummate the marriage. That upon his refusal, after a reasonable time, to marry, the plaintiff, having at all times remained ready and willing to consummate the contract, was entitled to the bonds. That it was not for her to have sought him, but it was his duty to have sought her in marriage.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the defendant. The opinion states the facts.

George Cadwalader, for the appellant.
Freeman & Bates, for the respondent.

ROSS, J. On the twenty-first day of June, 1882, plaintiff and the defendant's intestate, William Jarvis, executed the following instrument in writing:

"This indenture, made and entered into this twenty-first day of June, 1882, by and between William Jarvis, of the county of Sacramento, state of California, party of the first part, and Mrs. J. L. Conner, of the city and county of San Francisco, state of California, party of the second part:

"Witnesseth, that whereas, the party of the first part and the party of the second part have agreed, and do hereby mutually agree to marry each other, and that in consideration thereof, and of the mutual affection existing between them, the party of the first part grants and gives to the said party of the second part ten thousand

(10,000) dollars' worth of the bonds of the Natoma Water and Mining Company, a corporation duly organized under the laws of the state of California, being twenty bonds of five hundred (500) dollars each, made payable to bearer, now in the possession of the party of the first part, all of which he promises to deliver to her, the party of the second part, on or before the day of their said marriage, to be and become her own absolute property, in her own name, as her separate estate.

"It is further agreed that one-half of the interest on said bonds, as the same becomes due and payable, from time to time, shall be paid to the party of the first part, and the other half thereof shall be paid to the party of the second part.

"And the party of the second part hereby agrees to keep and perform her agreement herein in good faith; and they hereby mutually agree to marry each other within a reasonable time hereafter.

"In witness whereof, the parties have hereunto set their hands and seals the year and day first above written.

"WM. JARVIS, [SEAL]
"MRS. J. L. CONNER. [SEAL]

"Signed in the presence of P. B. Nagle."

As the case is presented, it appears that at the time of the execution of the contract, both of the contracting parties were unmarried; that the plaintiff, in accordance with the obligations imposed on her thereby, remained unmarried, and was, from the time of the making of the contract to the time of the death of Jarvis, which occurred on the eighth of September, 1882, always ready and willing to marry him, of which he was constantly advised; but that he, in disregard of the obligation imposed upon him by the contract, refused to marry the plaintiff, and continued such refusal to the time of his death. After the death of Jarvis, an administrator of his estate was appointed, to whom the plaintiff presented a verified claim based on the contract, which claim was rejected by the administrator. The action is to recover of the administrator the value of the bonds and one-half of the accrued interest thereon. The interpretation of the contract adopted by the court below was, that on the part of Jarvis there was a mere promise to deliver the bonds upon the marriage of the parties within a reasonable time. "The happening of a future event, viz: the marriage was," said the Court, "a condition precedent to the vesting of the bonds in plaintiff." We cannot so construe the contract. The language is: "The party of the first part grants and gives to the party of the second part" certain described bonds then in the possession of the party of the first part, "all of which he promises to deliver to her, the party of the second part, on or before the day of their said marriage, to be and become her own absolute property, in her own name as her separate estate." The bonds which he granted and gave he promised to deliver to the plaintiff on or *before* the day of their marriage; and the consideration for this was, the affection existing between the parties and their mutual agreement to marry. It was

nothing more nor less than an ante-nuptial settlement, the consequences of which could not be avoided by Jarvis' refusal to consummate his agreement to marry the plaintiff—she being at all times ready and willing to marry him, and no reason for his refusal appearing. It was not for her to seek him, but it was his duty to have sought her in marriage within a reasonable time after the engagement. "The modesty of the sex is considered by the common law," said Lord Coke.

Jarvis having without excuse refused to consummate his engagement, and the plaintiff having in all things complied with the obligations imposed on her by the contract, she is legally and justly entitled to receive the consideration for which she plighted her troth. That the promise and conduct of the plaintiff constituted adequate and valuable consideration for the settlement does not admit of doubt. The circumstance that the marriage was not in fact consummated is immaterial. It was not consummated because of the fault of Jarvis, and it is a maxim of the law that no man shall take advantage of his own wrong. Besides, with respect to the sufficiency and value of the consideration, there does not appear to be any real and substantial distinction between a marriage formally solemnized and a binding and obligatory agreement, fairly made, to form such connection and enter into that relation. "All the consequences of a legal obligation," as said by the court in Smith v. Allen, 5 Allen's reports, p. 458, "accompany such an agreement. The law enforces its performance by affording an effectual remedy against the party who shall without legal excuse fail to fulfill it. But a contract of this kind is not to be regarded as a valuable consideration merely because damages commensurate with the injury may be recovered of the party who inexcusably refuses to fulfill it. It is peculiar in its character, and has other effects and consequences attending it. It essentially changes the rights, duties and privileges of the parties. They cannot, while it exists, without a violation of good faith, as well as of the material obligations to which it subjects them, negotiate a contract for such an alliance with any other person. A woman who has voluntarily made such an agreement cannot without indelicacy, and so not without exposing herself to unfavorable observation, and to some loss of public favor and respect, seek elsewhere, except for good and substantial reasons, by withdrawing from the engagement by which she has bound herself for preferment in marriage; and thus her promise and agreement to marry a particular person essentially change her condition in life. They materially affect not only her opportunities but her right to attempt in that way to improve them. A legal contract and promise, made in good faith to marry another must, therefore, like an actual marriage, be deemed to be a valuable consideration for the conveyance of an estate.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer to the amended complaint, with leave to the defendant to answer.

McKINSTRY, J., and McKEE, J., concurred.

No. 7453.

SANTA CRUZ RAILROAD CO. *v.* SPRECKLES.

In Bank. Filed April 30, 1884.

ASSESSMENT ON FULLY PAID UP STOCK.—Corporations organized and existing under the laws of this state have authority to levy and collect assessments upon stock for which the subscription price has been fully paid.

ADVANCE BY DIRECTOR—LIABILITY OF CORPORATION FOR.—A corporation is liable for moneys advanced to it by a director which it receives and uses at a time when it was out of money and in debt and unable to obtain money from any other source.

APPEAL from a judgment of the superior court for Santa Cruz county, entered in favor of the defendant. The opinion states the facts.

C. B. Younger, for the appellant.

Jarboe & Harrison, and *Craig*, for the respondent.

ROSS, J. The important question in this case is, to what extent corporations organized and existing under the laws of this state, may levy and collect assessments.

On the part of the respondent it is contended that no assessment can be levied upon any stock for which the subscription price has been fully paid.

The matter of assessments is regulated by our statute, and the question is therefore to be determined by its provisions. Section 331 of the civil code provides: "The directors of any corporation formed or existing under the laws of the state, after one-fourth of its capital stock has been subscribed, may, for the purpose of paying expenses, conducting business, or paying debts, levy and collect assessments upon the subscribed capital stock thereof, in the manner and form, and to the extent provided herein."

From this section these things at least are clear: 1. That no assessment for any purpose can be levied until at least one-fourth of the capital stock of the corporation has been subscribed; 2. That assessments may be levied in the manner and form and to the extent provided by the statute, for the purpose of paying the expenses, conducting the business or paying the debts of the corporation; and, 3, that the assessment authorized to be levied, shall be levied only upon the subscribed capital stock.

The authority thus conferred on the directors of any corporation formed or existing under the laws of this state to levy and collect assessments for the purposes stated is thus limited by the next section:

"Section 332: No one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation, except in the cases in this section otherwise provided for, as follows:

"1. If the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the full amount unpaid upon the capital stock; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount.

"2. The directors of railroad corporations may assess the capital stock in installments of not more than ten per cent. per month, unless in the articles of incorporation it is otherwise provided.

"3. The directors of fire or marine insurance corporations may assess such a percentage of the capital stock as they deem proper."

It is further limited by section 333, which reads:

"Section 333: No assessment must be levied while any portion of a previous one remains unpaid, unless:

"1. The power of the corporation has been exercised in accordance with the provisions of this article for the purpose of collecting such previous assessment;

"2. The collection of the previous assessment has been enjoined, or,

"3. The assessment falls within the provisions of either the first, second or third subdivision of section 332."

We perceive, therefore, but two limitations to the power conferred by section 331—the first being that no one assessment must exceed ten per cent. of the amount of the capital stock named in the articles of incorporation; and the second, that no assessment must be levied while any portion of a previous one remains unpaid. But to each of these limitations certain exceptions are made. One of the exceptions to the first limitation is, that if the whole capital of a corporation has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, one assessment may be for the full amount unpaid upon the capital stock even though it exceed ten per cent. of the amount of the capital stock named in the articles of incorporation; or if a less amount is sufficient, then it may be for such a percentage as will raise that amount. And one of the exceptions to the second limitation, which prohibits the levy of any assessment while any portion of a previous one remains unpaid is, when the previous assessment "falls within the provisions of either the first, second or third subdivision of section 332." In other words, when the previous assessment falls within the provisions of either the first, second or third subdivision of section 332, another assessment may be levied while the previous one remains unpaid.

Now, the first subdivision of section 332 in terms declares that if the whole capital has not been paid up, and the corporation is unable to meet its liabilities or to satisfy the claims of its creditors, the assessment may be for the *full amount unpaid upon the capital stock*. Of course when such an assessment is collected, the stock upon which it is levied becomes fully paid for; yet, according to section 333, another assessment may nevertheless be levied. And the reason for the rule thus prescribed by the legislature seems plain; for one of the purposes for which the directors of a corporation are, by section 331, authorized to levy an assessment is the conducting of the business of the corporation. And when the full amount unpaid upon the subscribed capital stock is required to meet the liabilities of the corporation, if the business is to be fur-

ther conducted, it would seem very reasonable to authorize another assessment. So, too, does it seem reasonable that other assessments should be authorized when, for instance, the assessment which, by the first subdivision of section 332 is authorized to be levied for the full amount unpaid upon the capital stock subscribed, is insufficient to satisfy the claims of the creditors of the corporation. But whether reasonable or unreasonable, the law is so written, as we understand it.

Nor is it easy to believe that, had the legislature intended, by the provisions of the code in question, to authorize assessments only to the extent of the par value of the stock subscribed for—in other words, to provide only for the calling in of the sums subscribed—it would not have expressed that intention in appropriate language. It would have been an easy matter to have done so, and, as we shall presently see, when the codes were adopted there was standing upon the statute books an old act providing for that very thing. "There are two classes of assessments," says Potter on Coroporations, vol. 1, 323, "made by corporations or by the directors thereof, one of which is more properly distinguished as 'calls,' made upon the subscriptions for shares within the amount of the unpaid sums upon the number of shares subscribed; the other, an assessment made upon the corporators, not merely as a part of their subscriptions, but to raise a sum of money beyond the amount of subscription for the use of the corporation, to sustain its existence, to carry into use its corporate powers and to enable it to exercise its corporate duties." The power to call in the par value of the stock actually subscribed and agreed to be taken was a power incident to the corporation at common law, and the subscriber was liable to an action therefor. But, by the common law, the stock of the subscriber could not be forfeited or sold for the amount of the assessment levied for the unpaid portion of the subscription price. To authorize a sale of the stock even for that purpose statutory authority was necessary. Accordingly the legislature of this state, by the act approved April 14, 1853 (Hittell Art. 932, *et. seq.*), empowered the trustees "to call in and demand from the stockholders the sums by them subscribed, at such times and in such payments of installments as they may deem proper": Sec. 10. Notice of each assessment was required to be given in a prescribed way, and provision was then made for the sale of the stock of such of the stockholders as should make default in the payment of the assessments upon the shares held by them.

But in the year 1864 the legislature went further and by act, approved April 4, 1864, (Stats. 1863–4, 402), provided that "the trustees of any corporation formed under the general laws of this state shall have power to levy and collect, for the purpose of paying the proper and legal expenses of such corporation, assessments upon the the capital stock thereof, in the manner and form and to the extent hereinafter provided, and not otherwise." The next section contained the *limitations* and reads: "No assessments shall ex-

ceed five per cent. of the capital stock of the corporation, and none shall be levied while any portion of any previous assessment shall remain unpaid or uncollected, except in cases where all the powers of the corporation shall have been exercised in accordance with the terms of this act for the purpose of collecting such previous assessment, and except, also, the collection or a previous assessment against one or more stockholder restrained by injunction or otherwise, in which case further assessment may be levied and collected according to this act." Subsequent sections of the act provided for notice and for a sale of the stock in default of payment of the assessment.

This act was superseded by that of March 26, 1866, (stats. 1865–6, 458), but in the particulars in which we are considering the act of 1864, was similar to it.

The act of 1864 was under consideration by the supreme court of this state in the case of Sullivan v. Triunfo Mining Company, 39 Cal. 465, and it was there held that it was, as it purported to be, applicable to all corporations "formed under the general laws of this state" In that case the court did not pass upon the question whether the provisions of the act were applicable to assessments for subscriptions to the capital stock, but it treated the assessment then in question as having been levied upon fully paid up stock, *and it sustained the assessment.* The court said: "We express no opinion as to whether the provisions of the act are applicable to calls or assessments for subscription to the capital stock. The question does not arise in this case, for we infer from the complaint that the stock was issued in the usual mode in mining corporations; that is, the stock was issued to the owners of the mine in proportion to their several interests therein."

We have no doubt of the correctness of the construction thus put in the year 1870 upon the act of April 4, 1864; but whether right or wrong, it is too late now, after the lapse of thirteen years, for the court to change it.

We know, then, that the legislature did first provide only for the calling in by assessment of the full amount of the subscribed stock, and for the sale of the stock, after notice, in default of the payment of the subscription price. We know, also, that the legislature next went further and provided for assessments for certain purposes and within certain limits, upon stock which had been fully paid for; and that thus the law stood when the codes were adopted. If, in enacting the codes, the legislature had intended to return to the rule prevailing in this state prior to the passage of the act of April 4, 1864, and to provide for assessments only for the amount unpaid upon the capital stock, would it not have employed some such language as it had previously employed when it had that purpose in view and have empowered the trustees, as it did by the act of April 14, 1853, "to call in and demand from the stockholders the sums by them subscribed?" Some such language as that would so easily and so naturally have expressed that intent, that any substantial departure

from it naturally suggests the inquiry whether it did not intend something by the change.

And when we find, as we do, by comparing the respective provisions, that the legislature in enacting the codes adopted substantially and almost literally the very language employed in the acts of 1864 and 1866—language which this court more than thirteen years ago decided authorized assessments upon stock that had been fully paid for—and also made specific provision in regard to the assessment of the sums actually subscribed, the conclusion is to our minds irresistible that in enacting the sections of the code in question it not only did, but clearly intended to authorize, for the purposes and subject to the limitations prescribed, assessments upon stock fully paid for as well as assessments for the amount unpaid thereon. Indeed, the sections of the code as first enacted were but a compilation, with certain modifications and alterations, of the pre-existing statutes on the subject. This is further shown by the provisions of section 332, in relation to railroad and fire and insurance corporations, which were taken from the pre-existing statutes in relation to the same subjects. The change made in the code by the amendment of July 1, 1874, does not alter the case. It has already been referred to. Since the amendment no assessment can be levied for any purpose until after one-fourth of the capital stock has been subscribed, and now it is only upon the subscribed capital stock that any assessment at all can be levied. In other respects the limitations and provisions remain as before.

It is hardly necessary to add that with the policy of the law in question we have nothing to do.

With respect to the indebtedness of the corporation at the time of the levy of the assessment in question, it is sufficient to say that even if it be conceded that, under the circumstances set forth in the agreed statement of facts, a portion of the indebtedness to Hihn is invalid, we think there can be no question as to the validity of the item of cash advanced by him to the corporation; and this, added to the other indebtedness of the corporation, is more than the aggregate of the assessment. The money was advanced to and received by the corporation at a time when it was out of money and in debt, and when it was unable to obtain money from any other source than from Hihn. Where a director under such circumstances advances the corporation the needed money, which it receives and uses, there surely would be no justice, and, we think, no law, in holding that the corporation could not repay the amount. The authorities cited by respondent do not sustain him, and there are abundant authorities to the contrary. We cite Seeley v. The San Jose Independent Mill and Mining Co., 59 Cal. 22, and the Twin Lick Oil Co. v. Marbury, 1 Otto, 587.

As the facts were agreed to by the respective parties, it is useless to order a new trial.

Judgment reversed and case remanded, with directions to the court below to enter judgment for the plaintiff on the findings.

SHARPSTEIN, J., concurred.

MORRISON, C. J. I concur in the judgment.

MCKINSTRY, J. I concur in the judgment, and in what is said by Mr. Justice Ross with respect to the indebtedness of the corporation when the assessment was levied.

With respect to the power of the corporation to levy the assessment, even construing section 332 of the civil code as containing limitations upon the power conferred by section 331, yet the assessment in question was legal, inasmuch as it and the previous assessments did not amount in the aggregate to "the amount of the capital stock named in the articles of incorporation."

The subscribed capital stock may be assessed "to the extent" provided in the sections of the code: C. C. 331.

By section 332 it is provided, that no one assessment must exceed ten per cent. *of the amount of the capital stock named in the articles of incorporation*, with certain exceptions. It seems very plain that the amount of "capital stock" named in the exceptions, is the amount of capital stock mentioned in the first part of the section—the amount of capital stock "named in the articles of incorporation."

The argument of respondent would lead us to the conclusion that section 332 does not mean what it distinctly declares, and that assessments are ordinarily to be graduated by reference, not to the amount of capital stock in the articles of incorporation, but by reference to the amount *subscribed*.

Section 332 certainly limits the amount of any *one* assessment. But if it be treated as limiting the whole amount which may be collected by assessment, still the amount of assessment may be equal to the amount of the capital stock named in the articles. If a corporation shall choose to proceed to business after less than all of its stock is subcribed for, it may do so, but, in such case, those who have subscribed are subject to assessments to the same amount as if all the stock were subscribed for. There are many reasons why the legislature may have imposed such burden upon the subscribed stock.

MYRICK, J., and THORNTON, J., dissented.

No. 1

PEOPLE

Department One. F

TIME FOR SENTENCE—NO EXCEPTION IS AL
fixing the time for sentence, after a defendan
exception being allowed, an order fixing the tin
convicting the defendant was rendered on the 2
the supreme court.

APPEAL from a judgment of the
county of San Francisco, entered
defendant of forgery. The opinio

Clara S. Foltz, for the appellant.

Attorney-General, for the respond

Ross, J. A verdict finding the
forgery was returned and entered in
county of San Francisco on the tw
The court thereupon appointed Oc
pronouncing the sentence of the law
day of October sentenced the defend
prison at San Quentin for the term o
counsel for appellant that the sente
law in that two days had not elapse
verdict and the pronouncing of sent

Section 1191 of the penal code r
of guilty, or after a verdict against
a former conviction or acquittal, if th
new trial granted, the court must a
judgment, which, in cases of felony,
the verdict, if the court intend to re
not, then at as remote a time as can

The intention of the "Court" is l
there is no mode by which we can sa
in session "so long." It is, perhaps,
tion is allowed by statute to the ord
Penal Code, Sections 1172-3. No s
the order is not reviewable here. I
that there was no objection on the
shortness of time when, on the twent
below appointed the twenty-seventh f
was there any such objection made w
defendant was called for sentence. H
to the court that the time appointed w
the rendition of the verdict, and the
session so long, the time for pronounci
have been fixed at least two days after

Our conclusion is that the judgme
valid judgment, and that the defendant

it. It results that the proceedings subsequently taken in the superior court looking to a re-sentence of the defendant were void.

Judgment of October 27, 1883, affirmed, and judgment of November 13, 1883, reversed.

McKEE, J., and McKINSTRY, J., concurred.

No. 8275.

ROYOU v. GUILLEE ET AL.

Department Two. Filed April 30, 1884.

EJECTMENT—FINDINGS—EVIDENCE.—A finding for the plaintiff in an action of ejectment is supported by the evidence, when the defendant offers no evidence and the plaintiff gives in evidence a judgment-roll showing a judgment in his favor, and against the defendant, an execution duly issued thereon, a sale of the demanded premises to him; also a writ of attachment and a sheriff's return showing a levy thereunder, which had never been released, and evidence that subsequent to the levy of the attachment, and prior to the judgment, defendant was in possession of the premises.

Appeal from a judgment of the superior court for Alameda county, entered in favor of the plaintiff, and from an order denying the defendants a new trial.

William M. Pierson, for the appellants.

R. M. Swain, for the respondent.

THE COURT. In this action, ejectment, the complaint is in the usual form, and the answer denies that the plaintiff was seized in in fee or in any other estate, or entitled to the possession of the premises, or that the defendants wrongfully withhold the possession from him or that he was damaged in any sum whatever thereby.

On the trial the plaintiff introduced in evidence the judgment-roll showing a judgment in favor of plaintiff and against defendants, Nicholas and Louise Aimee Guillee, an execution duly issued thereon, a sale of the demanded premises to plaintiff, also a writ of attachment and the sheriff's return showing a levy thereunder on March 19, 1877, which was never released. It was then shown that subsequent to the levy of the attachment, and prior to the judgment in the first suit, defendants were in possession of the demanded premises. Defendants offered no evidence.

The findings which were in favor of plaintiff are attacked on the ground of insufficiency of the evidence to support them.

We think they are amply supported by the evidence, and as this is the only ground relied on for a reversal of the judgment it must be affirmed.

Judgment and order affirmed.

No. 9,246.

CRUZ v. COUNTY OF LOS ANGELES.

In Bank. Filed April 30, 1884.

COUNTY GOVERNMENT ACT OF MARCH, 1883.—Validity of affirmed on authority of Longan v. Solano County, 2 West Coast Rep. 493.

Appeal from a judgment of the superior court for the county of Los Angeles, entered in favor of the defendant. The questions presented in this case were similar to those passed upon in Longan v. Solano county, 2 West Coast Rep. 493.

S. M. White, for the appellant.

Smith, Brown & Hutton, for respondent.

THE COURT. THORNTON J., dissenting. On the authority of Longan v. Solano County, 2 West Coast Rep., 493, the judgment is affirmed.

No. 10,974.

EX PARTE MOAN.

Department One. Filed May 2, 1884.

COMMITMENT AND EXAMINATION BY JUSTICE OF PEACE.—Where a complaint is filed before a justice of the peace, charging a defendant with a felony, and he is thereupon arrested and taken before the magistrate issuing the warrant, by whom an order of commitment for examination is made, such defendant may be examined and committed by another justice of the peace of the same township, although no warrant for the defendant's arrest is issued by such latter magistrate, and it does not appear why the defendant was taken before a magistrate other than the one issuing the warrant.

THE SAME—ORDER FOR COMMITMENT—HABEAS CORPUS.—A defendant's commitment, under section 872 of the penal code, is sufficient, when the justice by whom he was examined makes the following order: "It appearing to me that the offense of manslaughter has been committed, and that there is sufficient cause to believe the within named defendant guilty thereof, I order that he be held to answer to the same, and that he be admitted to bail in the sum of two thousand five hundred dollars." If such commitment were not sufficient, the defendant would not be entitled to his discharge on habeas corpus, after his trial and conviction, when he failed to move to have the information set aside under which he was tried.

FILING INFORMATION AFTER DISMISSAL OF CHARGE BY GRAND JURY.—The district-attorney has authority to file an information against a defendant, within thirty days after his commitment, notwithstanding the grand jury had previously examined the case and dismissed the bill.

APPLICATION for a writ of habeas corpus. The opinion states the facts.

Gibson & Whitmore, for the petitioner.

S. P. Hall, contra.

MORRISON, C. J. This is an application for discharge on *habeas corpus* founded on the following state of facts:

On the 25th day of September, 1883, a complaint was filed before one Emil Nusbaumer, a justice of the peace of Oakland township, charging the petitioner with the crime of murder, and thereupon he was arrested upon the following day, and taken before the magistrate issuing the warrant, by whom an order of commitment for examination was made.

On the 1st day of October, 1883, the petitioner was taken before another justice of the peace of the same township by whom he was examined and committed, but no warrant for his arrest was issued by the latter magistrate.

1. It is claimed on behalf of the petitioner, that the magistrate who issued the warrant, and *he alone* had power to examine the case; that the second magistrate had no jurisdiction over the case, and that all proceedings had before him were therefore void. The reason why the petitioner was taken before a magistrate other than the one issuing the warrant, does not appear, and therefore is simply a matter of conjecture. The following is the provision of the penal code bearing upon this subject:

"If the offense charged is a felony, the officer making the arrest must take the defendant before the magistrate who issued the warrant, or some other magistrate of the same county as provided in section eight hundred and twenty-four. (See sec. 821, penal code.)

Section 824 of the same code is as follows:

"If on the admission of the defendant to bail, the bail is not forthwith given, the officer must take the defendant before the magistrate who issued the warrant, or, in case of his absence or inability to act, before the nearest or most accessible magistrate in the same county, and must at the same time deliver to the magistrate the warrant with his return thereon indorsed and subscribed by him."

All this was done, and the magistrate before whom the petitioner was taken was, as has already been stated, of the same township and county.

By section 826 of the same code it is provided that, "if the defendant is brought before a magistrate other than the one who issued the warrant, the depositions on which the warrant was granted must be sent to that magistrate, or, if they cannot be procured, the prosecutor and his witnesses must be summoned to give their testimony anew." It is claimed here that to give the magistrate, before whom the petitioner was examined and held to answer, jurisdiction, it was necessary for a complaint to be made and to have another warrant issued. We do not think so. The second magistrate had jurisdiction in this case without a second warrant of arrest. The defendant was already before him, and he had full power under the provisions of the code to proceed with, examine the case and hold the party to answer. We are, therefore, of the opinion that the petitioner should not be discharged on this ground.

2. In the next place it is contended that there was no commitment in this case. We find the following order:

"It appearing to me that the offense of manslaughter has been committed, and that there is sufficient cause to believe the within named Edward Moan guilty thereof, I order that he be held to answer to the same, and that he be admitted to bail in the sum of twenty-five hundred dollars. A. M. CHURCH,

"Dated October 1, 1883. Justice of the Peace."

The general conclusions reached by the discussions of the last two or three numbers, if correct, seem to furnish the answers to the foregoing inquiries. Unless I am radically and wholly wrong in the interpretation heretofore given to the title of the code concerning water rights, and in the force and effect attributed to the decisions of the California supreme court heretofore quoted, it seems to me that these questions are susceptible of clear, explicit and definite answers. In the first place, it should be carefully remembered, that the riparian rights of all riparian proprietors on the same stream are equal, irrespective of the times at which they acquired their titles, subject only to the natural advantage belonging to a proprietor situated higher up the stream over one situated lower down.

If, therefore, any person should at any time become owner of a tract of the land bordering on the stream in that portion which now runs through the public lands, he would at once be a riparian proprietor, clothed with all the riparian rights which belong to the present proprietors through whose private property the stream runs. If all or any part of the existing public lands through which the stream now runs in the first twenty miles of its course, should come into the hands of private owners, these owners would have the same riparian rights which belong to the existing riparian proprietors through whose lands the stream runs in the lower portion of its course, with the advantages which their higher location would give them of using the water for the *natural* uses of watering stock, drinking, and other domestic purposes. Although this particular doctrine is not directly involved in the communication of our correspondent, it forms an appropriate introduction to the answers which should be given to his inquiries. (1) Supposing that no appropriation at all had been made of the waters of the stream on that part which still runs through the public lands—that is, the first twenty miles—before the private riparian owners on the lower portion of the stream obtained their titles, what are their rights as against a person *now* making such an appropriation? If such an appropriation should be made for any purpose, by a person who does not own or possess any land on the bank of the stream within the first twenty miles of its course, for the benefit of a tract which he owns or possesses away from the stream, then under the California decisions hereinbefore cited, his appropriation would be clearly unlawful as against the private riparian proprietors below him, and any one of those private riparian proprietors could certainly maintain an action against him, even though no actual damages had been sustained by means of his said appropriation—that is, even though there was sufficient water left flowing in the channel of the stream to supply the existing needs of those private riparian proprietors. This exact point seems to have been determined by one of the recent decisions already cited. The case of an appropriator who has

actually located and taken possession of a tract of the public land bordering on the stream, although he had not yet obtained the legal title by a patent from the government, will be considered subsequently. (2.) Supposing that an appropriation had been made on that part of the stream which runs through the public land,—the first twenty miles,—prior to the time when the private riparian proprietor below obtained their title, what are their rights as against such appropriator? It seems to be well settled that the period of time during which such prior appropriation continued *before* these private riparian owners acquired their titles from the government,—while their lands still remained in the ownership of the United States,—could not be taken as constituting an adverse user against them. The appropriator could, therefore, obtain a right to the water by prescription, only where his adverse user against these private riparian proprietors had continued for the statutory period *after* their own titles had been acquired from the United States. Laying out of view the question as to a right by prescription, if the prior appropriation of the public stream was made in pursuance of the laws and customs of the state, and the purpose and use of the appropriation were such as the statute of congress expressly mentions and protects, then the titles of the subsequent private riparian proprietors are, by the express provisions of the congressional legislation, subordinate and subject to the rights of the prior appropriator and the patents from the United States issued to them must except and reserve those rights.[1] If, on the other hand, the purpose and use of such prior appropriation were *not* of the kind which the statute of congress mentions and protects, then under the decision of the supreme court of Nevada in Van Sickle v. Haines,—if that decision is good law,—all the rights of this prior appropriator on the public stream, as against the subsequent private riparian proprietors, would be cut off and destroyed by the patents from the United States conveying to them the legal titles. We say, if the decision in Van Sickle v. Haines is good law, because that decision upon this particular point may, perhaps, be virtually overruled by the course of reasoning adopted by the supreme court of the United States in one or two later cases[2] (3). Suppose a person should locate and take actual possession of a tract of the public land *situated on the banks* of this stream at any point within the first twenty miles of its course, and should use the water of the stream for the benefit of such tract although he has not yet obtained the legal title thereto by a patent from the United States, what would be his rights? Since a person who locates and takes possession of a tract of the public land, in pursuance of the statutes of congress, is regarded and treated

[1] See Woodruff v. North Bloomfield etc. Co. 1 West Coast Rep. 202 per Sawyer, J.

[2] See especially the opinions in Atchison v. Peterson, 20 Wall. 507, and Basry v. Gallagher, 20 Id. 671.

in all respects as the lawful and legal owner thereof, against all parties except the United States, we are of opinion that, as against the private riparian proprietors holding the legal titles to tracts of land on other portions of the stream, under patents from the government, this locator would be in all respects a riparian owner with all the riparian rights of any riparian proprietor. His position as a subsequent locator of a tract of the public land bordering on the stream, would not, in our opinion, give him any right to appropriate the waters of the stream exclusively, or to such an extent or in such a manner as to interfere with the *equal* riparian rights of the other riparian proprietors below him. He would, at most, be a "riparian proprietor" although he had not yet obtained a legal title to his land from the United States; his rights to use the water would be the same as those held by all the other riparian owners on the stream. whose title had been perfected, with the possible advantage resulting from his higher position on the stream. *J. N. P.*

[TO BE CONTINUED.]

DOES AN AGREEMENT TO PAY REASONABLE ATTORNEY'S FEES DESTROY THE NEGOTIABILITY OF A PROMISSORY NOTE IN WHICH IT APPEARS ?

On this interesting question, there appears to be an irreconcilable conflict among the courts. In Minnesota,[1] Pennsylvania,[2] Missouri,[3] North Carolina,[4] and Maryland,[5] the courts hold that the insertion of the attorney-fee clause annihilates the negotiability of the instrument; but the contrary doctrine is maintained by the courts of Illinois,[6] Iowa,[7] Indiana,[8] Kansas,[9] Louisiana,[10] Kentucky,[11] Arkansas,[12] and, probably, Texas.[13] The same divergence of view is exhibited in the rulings of the circuit courts; for, while the circuit court for the third circuit adopts the Pennsylvania rule,[14] the circuit courts for the eighth and ninth circuits adhere to the contrary doctrine,[15]

It is not an easy matter to arbitrate between these inharmonious views; but still, with all due respect, it is submitted that the weight of authority, as well as of logic, must be regarded as preponderating in favor of that more advanced view which upholds the negotiability of the paper. That peculiar quality of notes, which is denominated negotiability, and which indicates the capacity of the note to pass from hand to hand like coin, giving to any unobjectionable transferee a valid claim upon it against the maker,—that peculiar quality of negotiability, I say, disappears at the instant that the note matures. But it is only at that instant that the attorney-fee clause acquires any dynamic force, and, therefore, the clause could not affect, much less destroy, a quality which had perished before the clause acquired vitality. The negotiability does not cease because the clause becomes operative, but the clause becomes operative because the negotiability ceases; and although the extinction of negotiability may not strictly be the efficient *cause* of the operation of the collateral stipulation, yet it is certainly the *occasion* upon which alone the stipulation ceases to be dormant; and, moreover, it seems paradoxical to hold that instruments evidently framed as bills and notes, are not negotiable during their currency, because, when they cease to be cur-

[1] Jones v. Radatz, 27 Minn. 240.
[2] Woods v. North, 84 Pa. St. 407.
[3] First National Bank v. Jacobs, 73 Mo. 35.
[4] First National Bank v. Bynum, 84 N. C. 24.
[5] Maryland Mfg. Co. v. Newman, 17 Reporter, 113.
[6] Nickerson v. Sheldon, 33 Ill. 372.
[7] Sperry v. Horr, 32 Iowa, 184.
Stoneman v. Pyle, 35 Ind. 103.
Seaton v. Scoville, 18 Kan. 433.
[10] Dietrich v. Bayhi, 23 La. Ann. 767.
[11] Gaar v. Louisville Banking Co, 11 Bush (Ky.), 180.
[12] Overton v. Matthews, 35 Ark. 146.
[13] Minor v. Paris Exchange Bank, 53 Tex. 559; but see Goldman v. Blum, Texas Sup. Ct. 29 Alb. L. J. 19.
[14] Farquhar v. Fidelity Ins. Co. 18 Alb. L. J. 330.
[15] Howenstein v. Barns, 5 Dill. 482; Machine Co. v. Moreno, 6 Sawy. 35; Bank v. Ellis, Id. 96.

rent, they contain a stipulation to defray expenses of collection.[16] In Overton v. Tyler,[17] Chief Justice Gibson, speaking metaphorically, said that "a negotiable bill or note is a courier without luggage;" and in Woods v. North,[18] Sharswood, J., said that the attorney-fee clause "may be well characterized, like an agreement to confess a judgment was by Chief Justice Gibson, as 'luggage,' which negotiable paper, riding as it does on the wings of the wind, is not a courier able to carry." But, I respectfully submit that no courier, who has any regard for regularity or facility of movement, should travel without his appropriate ballast. The attorney-fee clause is not luggage,—it is ballast, and it acts as ballast to the note because, in the language of Mr. Justice Read, in Zimmerman v. Anderson,[19] "instead of clogging its negotiability, it adds to it and gives additional value to the note." Upon that phase of the question, which is concerned about the usurious aspect of the contract, the courts exhibit somewhat less discord; but, of course, these decisions cannot be cited in support of the proposition that the attorney-fee clause annuls the negotiability of the note, because, since the courts very generally hold these stipulations void,[20] they are thereby struck out of the note, and rendered powerless to influence the question of negotiability. In my judgment, then, the better rule may be formulated thus: A stipulation by the maker of a negotiable instrument for the payment to the holder thereof of an attorney's fee in case the same is not paid without action is a valid promise, and passes with the instrument to each and every holder thereof; and each subsequent party to such instrument becomes thereby responsible in like manner for such fee to each and every subsequent holder thereof.[21]

But is this the rule in California? I certainly think not. The definition of a negotiable instrument is to be found in section 3087 of the civil code, which reads as follows: "A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, *in conformity to the provisions of this article.*" The provisions of art. I of chap. 1 of Title XV, are, therefore, supreme on the question of negotiability; and to them, as the appointed criterion, must we turn when engaged in determining the negotiable or non-negotiable character of a promise or request. It will be observed that the section just referred to, requires that the promise or request be "for the payment of a *certain* sum;" and if this language mean anything at all, it must mean that the sum is required to be certain upon the face of the paper,—the

[16] 1 Daniels on Neg. Inst. 3rd ed. sec. 62 a, p. 72.
[17] 3 Barr. 346.
[18] 84 Pa. St. 410.
[19] 64 Pa. St. 421.
[20] That is, of course, void under state usury laws. See, State v. Taylor, 10 Ohio, 378; Toole v. Stevens, 4 Leigh. 581; Bullock v. Taylor, 39 Mich. 137; Meyer v. Hart, 40 Id. 517; Dow v. Updike, 11 Neb. 95; Witherspoon v. Musselman, 14 Bush (Ky.), 214.
[21] Bank v. Ellis, 6 Sawy. 96.

amount to be paid must be fixed by the instrument itself. If the sum be not certain upon the face of the paper, and if it become necessary, at any time prior to the discharge of the obligation, to resort to extrinsic evidence for the purpose of making certain the amount due on the note, it would seem that the note, not being for the payment of a certain sum, is not negotiable. As was well said by McKennan, circuit judge, in Farquhar v. Fidelity Ins. Co.[22]: "Although there may be reason for the difference of judicial decision which exists, as to the effect upon the commercial character of a note of a provision for the additional payment of a fixed per centage for collection, *which is expressed upon its face*, yet there is no conflict of opinion as to the effect of such provision where the amount of the addition is determinable only by extrinsic evidence. An indefinite obligation is obviously unadapted to the exigencies of commercial paper, which derives its peculiar qualities from the intended freedom and facility of its circulation and the consequent necessity that it should carry upon its face unambiguous evidence of the maker's liability, and should denote, with precision, how much the maker is bound to pay and the holder is entitled to receive."

But waiving this question of certainty, let us glance at the provisions of section 3093. This section holds the following language: "A negotiable instrument must not contain any other contract than such as is specified in this article." Now, the plain import of this language is that if the instrument *does* contain some contract not specified in the article referred to, the instrument is not within the provision of the article, and is not negotiable. What, then, are those contracts which may be embraced in negotiable instruments? A close analysis of the code will show, I think, that but two classes of contracts are permissible, and that under neither of these classes can the collateral contract for attorney's fees be ranged. The instrument may invest the payee with an option between the payment of the sum named in the paper, and the performance of another act; but as to the latter, the instrument is not negotiable (civil code, sec. 3090). Curiously constructed as this section is, no warrant can be found under its terms for the insertion in a note, of the collateral contract to pay an attorney's fee. And the same remark may be made concerning section 3092, which provides that "a negotiable instrument may contain a pledge of collateral security, with authority to dispose thereof." This section clearly does not authorize the attorney-fee contract. Nor can it be urged that the attorney-fee clause is admissible under section 3088, which provides that the instrument may be conditional, if the condition be one certain of fulfillment. This section simply means that an obligation dependent upon an uncertain contingency is not negotiable, and it therefore applies to a class of

[22] 18 Alb. L. J. 330.

obligations materially different from that under consideration. It may be said, generally, that the collateral contract for attorney's fees is not a contract specified as permissible by the provisions of the statute, and therefore that it is a contract which under the law of this state, strikes dead the negotiability of any note in which it may be inserted.

The only decision of our supreme court, which comes within rifle-shot of this question, is that in the case of Matthews *v.* Martin.[23] This was an action between the *original parties* to a note which provided for *ten per cent.* counsel fees in case a suit became necessary for the recovery of any amount due; hence, it cannot be regarded as decisive of the question here, because in that case the question of negotiability was not involved; and, moreover, under the very terms of the note, it was not necessary to resort to extrinsic evidence for the purpose of making certain the amount due on the note. But, although our own reports furnish no aid in the solution of this question, yet the case of Garretson *v.* Purdy [24] may be briefly adverted to, as supporting the view just advanced. In that case, the note provided for attorney fees in case a suit became necessary for the recovery of the amount due. The trial judge charged the jury that the note was not negotiable, and the plaintiff having lost the case below, went to the supreme court on his exception to this charge. The court, after reviewing the authorities on both sides of this vexed question, proceeded to say: "We believe that promissory notes, to be negotiable, must be unincumbered by collateral agreement, to be determined by a jury, the better rule, more in conformity to the common law and the weight of authority. But independent of these conflicting decisions, and independent of the common law upon this question, the law of this territory provides in the civil code, under the title of 'Negotiable Instruments,' as follows:

"Section 1821. A negotiable instrument is a written promise or request for the payment of a certain sum of money to order or bearer, in conformity to the provisions of this article." "Section 1822. A negotiable instrument must be made payable in money only, and without any condition not certain of fulfillment." "Section 1827. A negotiable instrument must not contain any other contract than such as is specified in this article." And again, in section 6 of the civil code: "In this territory there is no common law in any case where the law is declared by the codes." In view of these express declarations in our code as to negotiable instruments, we are of opinion that the charge of the judge in the court below was correct. The judgment is affirmed."

This decision appears to me to suggest the true construction of our own civil code, and to be decisive of the question. It will be observed

[23] 3 P. C. L. J. Appendix; unwritten decision.

[24] 14 N. W. Rep. 100; Sup. Ct. Dak.

that the provisions of the territorial code referred to by the court, correspond respectively with sections 3087, 3088, 3093 and section 4 of our own civil code, thus investing the decision with some little value as an authority.

We may now assume that, under the law of this state, the negotiability of the note is destroyed by the insertion of the collateral contract to pay attorney's fees; and this being assumed, the further question presents itself, what is the liability of one who places his name upon the back of such a note? Clearly, no contract of *indorsement*, in a legal sense, can be presumed from the position of the signature, and since the signer must have intended to bind himself in some capacity, the court, acting upon the maxim *ut res magis valeat, quam pereat*, will construe his contract to be that of either co-maker with, or guarantor of the maker. Indorsement, in its technical sense, can be predicated of *negotiable* paper only; and, as was justly said by Emmett, C. J., in Helfer v. Alden,[25]: "A person indorsing a note not negotiable, certainly intends to make himself liable in some capacity. Very frequently the indorsement alone is what gives credit to the instrument, and consequently is the only inducement for taking it. If, therefore, the indorser in such cases is not responsible on his indorsement, it amounts to a denial of justice." And the same view is taken in New York, where it is held that one who writes his name upon the back of a non-negotiable note, may be held liable by the holder as a guarantor or maker, and is not entitled to notice of demand or non-payment.[26] This view, so far at least as it ascertains the legal quality of the liability, seems to be reasonable and just; and so, apparently, is it regarded by the courts of Minnesota,[27] Iowa,[28] Massachusetts,[29] Pennsylvania,[30] and England.[31] There is nothing in the law of this State, which militates against this view: the signer cannot be scientifically held as an indorser; and it really makes no great difference, under the code, whether his liability be denominated that of co-maker or guarantor, since the liability in the latter case would seem to be quite as onerous as in the former. The California rule may, however, be stated to be that the signer is liable as a guarantor; and, therefore, under section 2807 of the civil code, that he is liable to the guarantee immediately upon the default of the principal, and without demand or notice.

JOSEPH J. DUNNE.

San Francisco, Cal.

[25] 3 Minn. 333.

[26] Seymour v. Van Slyck, 8 Wend. 403; Cromwell v. Hewitt, 40 N. Y. 491; Newman v. Frost, 52 Id. 426; Coulter v. Richmond, 59 Id. 481.

[27] Helfer v. Alden, 3 Minn. 333.

[28] Peddicord v. Whittam, 9 Iowa, 471; Bellingham v. Bryan, 10 Id. 317.

[29] Jones v. Fales, 4 Mass. 245; Sanger v. Stimpson, 8 Id. 260; Sweetser v. French, 56 Mass. 309; Wareham Bank v. Lincoln, 85 Mass. 192.

[30] Leidy v. Tammany, 9 Watts 354; Raymond v. Middleton, 29 Pa. St. 532.

[31] Plimley v. Westley, 2 Bing. N. C. 249.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

CITY AND COUNTY OF SAN FRANCISCO *v.* JONES.

May 5, 1884.

DELINQUENT TAXES—ACTION AND LIEN FOR WHEN BARRED.—The statute of limitations of California is applicable to an action brought by the city and county of San Francisco, under the acts of 1878, to recover delinquent city and county and state taxes. Such action is barred, under section 338, subdivision 1, of the code of civil procedure, upon the expiration of three years after the cause of action accrues. When an action to collect such tax is barred, an action to enforce the lien thereof, created by sections 3716 and 3717 of the political code, is also barred.

DEMURRER to an action to collect delinquent taxes. The opinion states the facts.

B. C. Whitman, for the defendant.

John P. Bell and *Louis H. Sharp*, for the plaintiff.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

This is an action brought under the act of 1878, and supplementary act of the same year (Stat. 1877–8, pages 338, 962), to recover city and county, and state taxes, for the fiscal year 1875–6, ending June 30, 1876, with five per cent. penalty, and two per cent. per month interest on the city and county's portion from August 2, 1875, and on the states portion, from January 3, 1876. The complaint was filed October 5, 1883—eight years, or more, after the city and county taxes became delinquent. Defendant demurs on the ground, among others, that the action is barred by the statute of limitations, and we think the objection good. The provisions of the code of civil procedure relied on, are, as follows: Section 312. "Civil actions can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute."

SECTION 338. "Within three years: 1. An action upon a liability created by statute, other than a penalty, or forfeiture."

SECTION 339. "Within two years: 1. An action upon a contract, obligation, or liability, not founded upon an instrument of writing."

SECTION 343. "An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

SECTION 345. "The limitations prescribed in this chapter apply to actions brought in the name of the state, *or for the benefit of the state*, in the same manner as to actions by private parties."

Part of the amount claimed is for the benefit of the state, and, for the purposes of the action, the most favorable aspect of the case, is, that the city and county as to its own share of the taxes sued for, must be treated as a part of the state; for if the plaintiff with respect to its share, is to be regarded as a mere corporation, then the statute of limitations applies without reference to the provisions of section 345. The statute, then, by its express terms applies to

this action. We think the three years limitition of clause 1, section 338, applicable at least, as to the tax—the principal thing sued for—and the incident, doubtless, follows the principal thing claimed. It is a liability created by statute, within the meaning of the code. If not, then it is an "obligation or liability not founded upon an instrument in writing" and the two years limitation applies. If neither of these provisions is applicable, then, certainly, the action is "for relief not hereinbefore provided for," and under this general residuary clause, is barred in four years. In either event the time has run twice over. We think the three years limitation applies in which case the statute has run nearly three times the prescribed limitation. No decision of the courts of the state of California determining this point has been cited, and we are aware of none upon the question. The supreme court of Nevada has decided the precise point, upon the statute of that state, which is entirely similar in its provisions, and the statute was held to apply and to bar the action: State v. Y. J. S. M. Co. 14 Nevada, 226.

Sections 3716 and 3717 of the political code are as follows:

SECTION 3716. "Every tax has the effect of a judgment against the person, and every lien, created by this title has the force and effect of an execution duly levied against all property of the delinquent; the judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof."

SECTION 3717. "Every tax due upon personal property is a lien upon the real property of the owner thereof, from and after 12 o'clock M. of the first Monday in March in each year." Under these and other provisions of the political code no action is necessary to collect a valid tax.

But it is claimed, that, these provisions take the case of an action under the statute to recover a tax out of the statute of limitations. In the case already cited the supreme court of Nevada, on a similar statute, decided otherwise, and, we think, correctly: Ib. 230.

The statute of Nevada is as follows: "Section 3127. Every tax levied under the provisions or authority of this act is hereby made a lien against the property assessed, and a lien shall attach upon the real property for the tax levied upon the personal property of the owner of such real estate, on all the property then in this state, and on all other property whenever it reaches the state, and shall not be satisfied, or removed, until all the taxes are paid, or the property has, absolutely vested in a purchaser under a sale for taxes: II Compiled Laws, Nev. 178.

The lien is but an incident to the tax—the money due—and like the case of a mortgage, when an action to recover the debt is barred, the suit to enforce the lien is also barred. This has long been the settled doctrine in this state in relation to a mortgage. Neither the debt nor the lien is extinguished in the case of a mortgage, in any other sense than in the case of a tax, and the statutory lien incident to it. The remedy by action is barred, whatever the case may be as to other remedies. Besides, this is not a suit to enforce a lien,

at all. It is a statutory action, and just what the statute makes it. It says nothing about a lien, and authorizes no suit to enforce a lien. It simply authorizes the recovery of a personal judgment against the party charged with the tax, and that is all that is sought in the complaint, and all that the statute provides for. The suit is an additional statutory remedy, and the remedy is measured by the statute. All suits whether by the state, by corporations, or natural persons, without other exceptions than those expressly made by the statute are barred within the prescribed period. We are not only satisfied that this action is barred by the statute, but we think the policy of the statute limiting the time within which the state can sue, a good policy. We see no good reason, at this day, and under our laws for the levy and collection of taxes, for allowing the state to vex parties with suits for taxes after a lapse of many years, that is not equally applicable to private parties. The state has officers specially appointed to attend to these particular duties, and no others, and if they neglect their duties the state which appoints them, if any one, should be the party to suffer. To permit the state after a lapse of many years to recover by suit taxes allowed to run uncollected with five per cent. *penalty, and, in the language of* Mr. Justice Swayne, the "*most devouring rate*" of *two per* cent. per month interest, would be to inflict unindurable oppression.

The demurrer must be sustained upon this ground, and it is unnecessary to consider the other grounds relied on. It is so ordered.

SUPREME COURT OF COLORADO.

BRANDEXBURG *v.* REITHMAN.

Filed April 18, 1884.

FORCIBLE ENTRY AND DETAINER—APPEAL FROM COUNTY COURT.—An action under the forcible entry and detainer act, originally brought in the justice's court, and thence appealed to the county court, can not be taken to the supreme court on appeal. It must be taken, if at all, on writ of error. Such action does not involve any question as to the title to land.

THE SAME—EJECTMENT.—The statutory action of forcible entry and detainer has not been enlarged by section 267 of the civil code. Such section does not abolish all distinctions between that action and the action of ejectment.

WRIT OF ERROR AND APPEAL.—Whether an error of the county court in denying an appeal can be reviewed on a writ of error to the original judgment, *quære.*

TENANCY FROM YEAR TO YEAR.—A tenant from year to year ceases to be such when he enters into a lease with his landlord for a definite time.

ERROR to the county court of Arapohoe county. The opinion states the facts.

Waldheimer & Jenkins and *L. C. Rockwell*, for the plaintiff in error.

J. H. Brown, for the defendant in error.

BECK, C. J. This was an action under the forcible entry and detainer statute to recover possession of leased premises. It was originally instituted before a justice of the peace; the complaint alleging the letting of the premises for one year to the plaintiff in

error from May 1, 1880, and the holding over by the latter after the expiration of the term and demand made for possession.

The plaintiff obtained judgment before the justice, and likewise in the county court upon an appeal from the judgment of the justice.

An appeal from the latter judgment to this court was prayed by the plaintiff in error, and denied by the court below, which ruling is assigned as the first ground of error. We are of opinion that the ruling was correct, for the reason that no appeal lay to this court from the judgment of the county court.

Section 17 of the forcible entry and detainer statute provides that "appeals and writs of error to the supreme court from the judgments of the district court, and writs of error to the judgment of any county court, in proceedings under this chapter, shall be allowed as in other cases": Gen'l Stats. 505.

The same practice existed in this class of actions under the territorial organization. An appeal from the judgment of a district court lay to the supreme court, and a writ of error only lay to the judgment of a probate (now county) court: R. S. 1868, p. 336, sec. 17.

It is true that an appeal did not then lie from the judgment of a probate court, in any case; but this fact does not affect the question whether an appeal from the judgment of a county court now lies under the same statute. By the express language of the statute, only a writ of error lies in such case. Unless, then, the right of appeal is given by the civil code it does not exist. The code provision is: "Appeals to the supreme court from the district and county courts shall be allowed in all cases where the judgment or decree appealed from be final, and shall amount, exclusive of costs, to the sum of twenty dollars, or relate to a franchise or freehold." Civil Code, p. 124, sec. 415.

This is the same provision (excluding the words "and county courts") originally enacted in 1861: Laws 1861, p. 285, sec. 41. It was copied from the statute of Illinois, and the meaning of the phrase, "*or relate to a freehold,*" had been judiciously defined previous to the enactment of 1861. The supreme court of Illinois had said in Rose et al. v. Choteau, 15 Ill. 167: "To justify an appeal on the ground that the judgment relates to a freehold, the right of a freehold must have been directly the subject of the action—not incidentally or collaterally; and the judgment must be conclusive of the right until it is reversed." This is equivalent to saying that the title of the freehold must be involved in the litigation.

Under the amended practice act of 1877 of the state of Illinois, instead of the words, "*or relate to a franchise or freehold,*" the phraseology is, "where a franchise or freehold * * * is involved."

In the several decisions upon the effect of the amended provision no distinction has been made, that we are aware, between the force of the words, "*relate to a freehold,*" or the words, "*where a freehold is involved.*" In the absence of an adjudication upon the point, we are of opinion that the amendment does not exclude an appeal in

any case embraced in the original provision. Since the amendment it has been held that a proceeding in forcible entry and detainer does not involve or call in question the title to land; and that an appeal does not lie therefrom; also that a proceeding to foreclose a mortgage, or a proceeding to establish and enforce a mechanic's lien, does not involve a freehold: McGuirk v. Burry, 93 Ill. 118; Pinneo v. Knox, 100 Ib. 471; Clement v. Reitz, 103 Ib. 315.

We deem the cases cited upon this point conclusive as to the force and meaning of the phrase referred to: Sedgwick and Wait on trial of title to land, Sec. 94.

Another point made in favor of the right of appeal is, that section 267 of the civil code abolishes the distinction between the actions of *ejectment*, and *forcible entry and detainer;* makes the latter a concurrent remedy with the code substitute for ejectment, and makes all rules of practice, including appeals, equally applicable to the proceeding, whether it be under the code remedy, or the forcible entry and detainer statute.

This proposition is not maintainable. The code provision cited itself defeats the proposition. Forcible entry and detainer is therein recognized as an existing and concurrent remedy with the code substitute for ejectment, "in all actions relating to the possession of real estate." It is not stated that it may be prosecuted as a code remedy, or that the rules of practice provided by the code shall apply to this proceeding, but that it "may be presented in accordance with the law of this state relating to forcible entry and detainer."

When an action is instituted to try a question of title in a court having jurisdiction to try the question, the mere form of the complaint, is immaterial. Its substance is the test of its sufficiency. But if the action be instituted in a court not having such jurisdiction, an appeal from its judgment to one having jurisdiction does not invest the latter court with original jurisdiction to try that question: Downing v. Floner et al., 4 Colo. 209.

Forcible entry and detainer is a statutory remedy which still exists, notwithstanding the code. Justices of the peace still have jurisdiction of this remedy, although they may not now any more than heretofore, try the question of title to a freehold. It follows that this statutory remedy has not been enlarged by the code provision referred to, but remains in force for the purposes heretofore employed.

We have considered this assignment of error for the reason that it involves an important question of practice. It is doubtful, however, whether the correctness of the ruling of the court below, in denying an appeal to this court, can be properly presented on a writ of error to the original judgment. It is said in Eager v. Eager, 8 Bradwell, 356–362, that where a court improperly refuses to grant an appeal, the proper remedy is *mandamus* to the court below, requiring the allowance of the appeal.

The only other assignment of error necessary to notice is, that the court erred in rendering judgment for the plaintiff below.

The ground of this assignment is, that plaintiff in error was a tenant from year to year, and was entitled to three months' notice to quit under the statute.

The evidence shows that plaintiff in error occupied the premises, as tenant of defendant in error, for several years prior to the execution of the lease produced upon the trial. This lease bears date May 1, 1880, is signed by both parties, and is for the term of one year, with the following agreement as to another year: "And it is expressly understood and agreed, that in case the said party of the first part does not conclude to build a new building on the said premises at the expiration of this lease, then the said party of the second part is to have the first privilege of leasing said premises for another year, after the expiration of this lease." We cannot subscribe to the proposition that, because the plaintiff in error held over one year after the expiration of the term mentioned in the lease, that his former occupancy of the premises inured to his benefit, and that the facts of the case constitute him a tenant from year to year.

If his former relation was that of tenant from year to year, that relation ended when he entered into this lease as tenant for a single year. At the expiration of the year, the contingency mentioned having happened, the testimony, we think, shows an implied contract on his part, to hold the premises for the second year, on the same terms. The fact that he occupied the premises during the second year, and that he claimed to do so under the lease, as is shown by his testimony upon the trial, taken in connection with the stipulation for a second year in the lease itself, fairly implies a contract to this effect.

Prior to the expiration of the second year, he was notified to quit at the end of the year, and refusing to do so, possession of the premises was duly demanded after the termination of the tenancy, which he refused to surrender.

We think the judgment was correct, and it will be affirmed.

Judgment affirmed.

SUPREME COURT OF WASHINGTON TERRITORY.

MACKINTOSH v. RENTON, HOLMES & CO.

Filed July, 1882.

SALE OF "SOLDIERS ADDITIONAL HOMESTEAD SCRIP."—In the absence of a further equitable showing, money paid for the purchase of "Soldiers Additional Homestead Scrip," cannot be recovered back on the ground of a total failure of consideration. Under sections 2306 *et seq.*, of the United States revised statutes. the right to locate and make entries under such scrip belongs to the soldiers alone, and a contract for the sale thereof is against the policy of the law.

ERROR to the third district court. The opinion states the facts.

Struve, Haines & Leary for the plaintiff in error.

McNaught, Ferry, McNaught & Mitchell for the defendants in error.

GREENE, C. J. In endeavoring to get to an issue in the court below, the plaintiffs, who are here defendants in error, filed an amended complaint.

This complaint, the defendant, who is here plaintiff in error, saw fit to answer without demurring. Issues of fact were made, and a trial had before the judge. Findings of fact and judgment, following in due course, were for plaintiff. In bringing their action, the plaintiffs sought to recover back an amount paid by them upon a contract to purchase what goes by the name of "Soldiers Additional Homestead Scrip." Their complaint, in substance, declares that defendant contracted to sell them, at an agreed price, certain soldiers additional homestead scrip, which was afterwards duly delivered, and for which the price agreed was paid, but which turned out to be forged and valueless. It is now urged, in this court, that the complaint does not state facts sufficient to constitute a cause of action, since it appears on the face of it that the contract set up attempted to effect a sale which could not be made without contravening public policy. By the phrase "Soldiers Additional Homestead Scrip," no other scrip can be understood than such as purports to carry a soldier's right to make and perfect entries of land under section 2305 and connected sections of the United States revised statutes. Equally clear it is, that under those sections, the right to make such entries, and take the benefit of them, belongs to the soldier himself alone, and that it is against the plain intent and policy of congress for any one to negotiate or transfer it.

For ordinary cases the rule is well settled that no action can be maintained upon an agreement contrary to the policy of the law. This rule has exceptions. An exception occurs when the contract has been entered into under circumstances of mistake or misrepresentation, or when the party plaintiff is decidedly the less to blame. Of such circumstances, a court of equity would take cognizance, and in a fit case grant relief. Here, the complaint puts forward nothing but a supposed contract, an execution of it in plaintiff's part, and a total failure of consideration in defendant's—nothing, in fact, but what purports to be a mere legal cause of action.

Possibly it might be amended so as to show a state of affairs deserving of equitable redress, but as it stands it lacks the facts essential to a good pleading.

Persuaded of this, we do not need to express an opinion upon questions arising out of anything later in the cause. The judgment of the district court will be reversed, and the cause remanded to that court with directions to vacate all proceedings subsequent to the amended complaint, and to dismiss the cause, unless the plaintiffs within such reasonable time and upon such terms as that court may fix, shall so amend their complaint as to show themselves *prima facie* entitled to recover.

HOYT, J., concurred.

BACH, MESSE & CO. v. SMITH.

Filed July, 1882.

CONTRACT FOR THE SALE OF SPIRITUOUS LIQUORS, AT A CERTAIN PLACE, in quantities greater than one gallon, cannot be enforced by the vendor when he has neglected to take out a license for the place at which such sale is to be made.

ERROR to the district court The opinion states the facts.

HOYT, J. This was an action for damages for the breach of a contract for the sale of spirituous liquors and wine; and the defendant in his answer alleged, as his second affirmative defense, that said liquors were contracted to be sold at Seattle, King county, in quantities greater than one gallon; and that plaintiffs, or either of them, had not at the time of making said contract taken out any license authorizing them, or either of them, to make such sales in King county, and that, consequently, such contract was illegal and void. To this, among other separate defenses, there was a demurrer interposed which was overruled, to which ruling there was an exception allowed, and upon an error assigned thereon it is sought to reverse the judgment rendered in the court below in favor of defendant. Was the contract referred to an illegal one? The law provides that any person who shall engage in the sale of spirituous liquors without having first taken out a license so to do for the place at which the sale is to be made, shall be guilty of a crime, and liable to punishment by fine or imprisonment.

The contract in question then under the facts admitted by the demurrer, could only be carried into effect by the violation by the plaintiffs of a penal statute, and we are of the opinion that such a contract is illegal and cannot be enforced.

Beside the object of requiring a license for the sale of spirituous liquors, is that from the fee charged for such license a fund may be accumulated for the regulation of the traffic in such liquors, and if a contract for the sale thereof could be enforced if made by one having no such license, and not having paid the fee therefor, such fact would tend to decrease the amount of funds derived from such license fees, and thus defeat the policy of the government in providing for the accumulation of a fund for the regulation of such traffic. And for this reason also we think such contracts should not be enforced by the courts.

See Mitchell v. Smith, 1 Benney, 110; Gulick v. Ward & Bailey, 5 Halstead, 87; and Jones v. Caswell, 3 Johnson cases, 29. The answer below and the demurrer thereto raised several other questions, but as this cause was submitted upon the record without briefs, we have not thought it our duty to examine them.

The action of the court below was not erroneous, and the judgment therein rendered must be affirmed, and it is so ordered.

Greene, C. J., concurred.

DOCTOR JACK (an Indian) v. TERRITORY.

Filed July, 1882.

HOMICIDE—INSTRUCTIONS—INTENT—SELF-DEFENSE.—In a prosecution for a homicide when there is no evidence tending to show that the act producing the death was accidental or done in self-defense, an instruction is not erroneous which omits all reference to the intent with which such act was committed, and is silent upon the law of self-defense.

ARTICLES OF PERSONAL APPAREL, INTRODUCED IN EVIDENCE AS EXHIBITS, may be taken by the jury to their consultation room. Section 231 of the code of civil procedure does not prohibit such taking.

ERROR to the third district court. The opinion states the facts.

Burke & Rasin, for the plaintiff in error.

Elwood Evans, prosecuting attorney, for the defendant in error.

GREENE, C. J. Doctor Jack, an Indian, charged with stabbing to death Eliza, an Indian woman, and indicted and tried in the district court at Seattle for murder in the second degree, was convicted of manslaughter and sentenced to a term in the penitentiary. Errors, supposed to have been committed by the judge trying the case and based upon exceptions duly taken and allowed, are assigned here as ground for reversing the judgment and sending the case back to be tried anew. By the record, several such errors are presented. They all, however, relate to but two passages in the trial, and may be considered and decided most conveniently, as if they constituted but two complaints against its fairness. One is, that the jury were so instructed, as to prejudice the defendant, and the other that a hat and shirt, in evidence, were wrongly permitted, by direction of the judge, to be taken by the jury to their room. Regarding these we speak in their order.

The jury upon retiring, were given among others, the following instructions: "Inquire first whether or not the defendant gave the deceased the knife-wound. If, beyond all reasonable doubt, you find it established by the evidence, that he did inflict that wound, then defendant must be convicted of some grade of offense; but if you do not find it so established, you will acquit him entirely. If you find the defendant guilty of giving the knife-wound, then you will next consider whether that wound was, in its own nature, dangerous to the life of the deceased, and whether the wound actually contributed to cause her death. If having first found, under these instructions, that defendant inflicted the knife-wound, you further find beyond all reasonable doubt that the wound was dangerous to the life of the deceased, and actually contributed to her death, then you will be obliged to find that the defendant killed the deceased, and that he is guilty either of manslaughter or of murder in the second degree. If, on the other hand, you do not find beyond every reasonable doubt, both that the knife-wound was in itself thus dangerous to the life and that it was actually contributory to the death, you must acquit the defendant of any homicide. Suppose you find the defendant under these instructions guilty of homicide, the question that next presents itself is, whether he is guilty of manslaughter

or of murder. Your decision of this question, if you get so far, will depend on whether or not you find the defendant inflicted the knife wound maliciously. If the defendant was, at that time, in a transport of passion provoked by abusive words, and a violent blow from the deceased, and in that heat of passion stabbed the deceased, then he was not guilty of murder, and cannot be convicted of it, for the law will not impute malice under such circumstances, nor will the law impute malice to defendant if he, in a sudden heat caused by any such provocation as would have greatly exasperated a reasonable man in like circumstances, killed the deceased. If, however, you find beyond a reasonable doubt, that the defendant, while not in a heat of passion so induced, and without any just cause or excuse, killed the woman, then you are authorized to find malice, and to find defendant guilty of murder in the second degree." Of the soundness of these instructions, in one particular, it would seem that the judge, upon reflection, had some misgiving, and therefore when the jury returned with a verdict, he refused to receive it, and sent them out again with the same instructions modified by simply inserting the word "intentionally" before the words "inflict," "giving," and "inflicted" respectively, where they occur in the first four sentences of the foregoing quotation. Deliberation on the evidence, under the modified instructions, resulted in the jury's returning finally into court with the verdict upon which the defendant was afterward sentenced.

Objection is made that the instructions, before amendment, were wrong, because they excluded both the idea of intent and the idea of self-defense, and that the amendment cured no more than the first of the two defects. The judge's power and obligation to amend an erroneous instruction, before he receives the verdict and discharges the jury, even though a verdict has already been agreed upon, while questioned in the argument, seem conceded in the briefs. His duty as to the law is as indisputable as the jury's as to the fact. Each is bound, while the trial is pending, and up to the moment when it is completely ended by the reception of a verdict, to do everything necessary to get at a sound and stable conclusion. When a jury has reached a certain finding, under erroneous instructions which are afterwards corrected, it will not be presumed in its verdict to have clung against right to that which it found originally. Having its oath, and those impulses to rectitude which are common to mankind, it will not be presumed to have disregarded either. On the contrary, it will be presumed to have done its duty, to have applied the corrected law to the testimony, and to have found a verdict that is true. Looking, however, at all that was before the jury in this case, we fail to see that the district judge was at fault in his instructions as first given. Evidence tending to show, or affording any ground to suspect, that the blow, which the jury must have found fatal, was accidental or in self-defense, was totally wanting in the case. Leading the jury, then, to discuss and ponder whether accident or self-defense existed was uncalled for, and very possibly misleading. As

we view the matter, the instructions, as originally given, were fair for the defendant, and the subsequent amendment not only can not be deemed to have prejudiced him, but might be held to have tended to procure for him an erroneous acquittal.

We, therefore, overrule what he has urged against the instructions.

As to the hat and shirt going into the jury-room, it is to be presumed that these were exhibits introduced in evidence, the former as having belonged to defendant and been found near the place of homicide shortly after the mortal blow was struck, and as tending to show that he left the scene in haste, and the latter as having been taken off the person of the defendant on the next day after the homicide, with blood-stains on its right wristband and elsewhere, and as tending to show the defendant guilty of inflicting the blow, in the manner charged by the indictment and described in the testimony. Delivering these articles to the jury, upon their retirement, is said to be equivalent to sending witnesses to testify before them, away from the supervision of the judge, and in the absence of defendant and his counsel, and to be incompatible with the provisions of section 231 of the code. Exhibits, as regards their fitness to accompany the jury to their deliberations, are, we think, to be distinguished from witnesses, whether the latter testify orally or in writing.

By a figure of speech, the former may indeed be said to testify, but they come upon a stand by themselves, and are not to be classed with what is strictly testimony, for, having none of the qualities of personality, telling always (if one will only listen,) the same story, and the whole of all they have to tell, they are subject to none of the variations of memory and recital which unfortunately attend the living witness, and are entirely destitute of partisanship, and of all ability to influence a jury by feeling, argumentation or will. The introduction of a deposition into the jury-room, which is justly condemned by all the authorities, would generally put before the jury a mixture of competent and incompetent matters, between which they could not well discriminate, and would give to one human utterance, merely because it chanced to be written down, undue prominence and effect, over other equally, or more important or reliable, human utterances which happened to be oral. On the other hand, the delivery of exhibits to the jury, in all ordinary cases, where they are pertinent, seems to us not only not to be deprecated, but exceedingly to be desired, as tending to give, amid the mass of variable quantities that inevitably go to make up human testimony, certain trustworthy constants, upon which the mind can lean, and to which, for testing and harmony everything else can be brought and made fast. Referring to section 231, we find it to read as follows: "Upon retiring for deliberation the jury may take with them the pleadings in the cause, and all papers which have been received as evidence in the trial (except depositions), or copies of such parts of public records or private documents given in evidence,

as ought not, in the opinion of the court, to be taken from the person having them in possession." This is a part of the civil practice act. Obviously, it needs construction. Drive the word "papers" down into its own narrow literal sense, and you absurdly force out of it all the living and precious spirit of this law. Of what may be *upon* papers, rather than of *the papers themselves*, the legislature is speaking.

The writing, diagram, mark or spot which would under this section be admissible to the jury-room, if on paper, must, according to the liberal construction commanded by section 758 of the code, be also admissible, if upon bark, bone, wood, cloth, stone, metal or any other substance. Having got thus far, we are unable to see but that the spirit of the section requires the admission of any exhibit standing within the same reason, whether it be blank paper or blank anything else, moist or dried, solid or liquid. Ever since in 1854 this section was first enacted in this territory, such has been the liberal construction always given it in all the courts. We hold that it is the correct construction, and that, assuming section 231 to be applicable in criminal cases, the course of the judge below in allowing the hat and shirt to go to the jury-room was proper under that section.

However, it is to be remembered that section 231 is in the chapters prescribing civil practice, and is not anywhere, by reference or otherwise, expressly adopted as furnishing the rule in criminal procedure. Of such express adoption there was, perhaps, no need, for probably in all things, except where the statutes plainly indicate the contrary, the practice in criminal cases should be assimilated to that prescribed for other actions at law, the legislature having in many cases intimated a desire for such assimilation. Let that be as it may, the legislature has spoken in section 1105 of the code with sufficient clearness to show, as to this very matter of sending exhibits out with the jury in criminal cases, what it intends shall be the law. Expressly that section states the grounds upon which an application for a new trial shall be granted. Legitimately it implies that an application not so grounded shall be denied. Among the grounds it specifies the pertinent ones are as follows:

"1. When the jury has received any evidence, paper, document or book, not allowed by the court, to the prejudice of the substantial rights of the defendant.

"2. Misconduct of the jury."

We think that in the statement of the first ground in this section, the word "evidence," means tangible evidence, as a book, paper or document is tangible things, which have already assumed in the cause, the character of evidence—and that the words "paper, document, or book" mean a paper, document, or book not in evidence. By counsel it is argued that the word "evidence" associated as it is, can signify nothing but evidence on paper *i. e.*, depositions, but such an effort to make everything in the list papyriform, in order to give effect to the maxim, *noscitur a*

sociis, unnecessarily strains a point. Is not the principle of the maxim sufficiently honored when the word "evidence" has such an interpretation, that all the various things embraced are capable of being "received" by the jury in the same way and sense, that is to say, by manual act? Both the first and second grounds of the section should be construed together. Laying them side by side, we gather the legislative intention to be, that the reception by the jury at any time of any tangible matter in evidence, or of any book, paper or document not in evidence, when without violating statutory or constitutional right it is allowed by the court, or when though not so allowed, it cannot be supposed to be to the prejudice of the defendant's substantial rights, shall not be deemed misconduct in the jury or good cause for a new trial.

Each of the supposed objectionable passages of the trial having been shown, for the foregoing reasons, to be in harmony with the law, the judgment of the district court is affirmed.

HOYT, J., concurred.

CRAWFORD ET AL *v.* COCHRANE ET AL.

Filed July, 1882.

ACT OF THE TERRITORIAL LEGISLATURE OF 1879 PROVIDING FOR THE SCALING OF LOGS by the lumber inspector, is not within the inhibition of section 1889 of the revised statutes.

SALE OF LOGS BY AGENT WITHOUT SCALING. A gratuitous agent for the sale of certain booms of logs, who sells the same without having them scaled by the lumber inspector, is guilty of gross negligence, and is liable to his principal for the damage caused thereby.

APPEAL from a judgment of the district court, entered in favor of the plaintiff. The plaintiff appointed the defendant his agent to sell certain booms of logs. By custom the defendant was not entitled to any compensation for his services. The defendant made the sale without having the logs scaled by the lumber inspector, by reason of which the plaintiffs suffered the loss complained of in this action.

Struve & Haines, for the appellant.

Burke & Rasin, Hall & Osborne and *E. P. Ferry*, for the appellees.

WINGARD, J. This cause was submitted to a referee, whose finding was approved by the district court, and judgment was entered according thereto. From that judgment this appeal is taken.

We are unanimously of opinion that the act of the territorial legislature of 1879, providing for the scaling of logs by the lumber inspector, is not within the inhibition of section 1889 of the revised statutes. Doubtless degrees of negligence may exist in fact as well as in theory, although it may be difficult or impossible to draw the exact line between them, but when a party by neglecting or refusing to conform to a known law, in the discharge of an agency or charge, causes loss or damage to another, he should be held to be guilty of gross negligence, and so we regard the plaintiffs in error in this case.

We find no reason to disturb the judgment of the court below, and it is therefore affirmed.

GREENE, C. J., and HOYT, J., concurred.

ROSENTHAL v. SCHNIEDER.

Filed July, 1882.

A FRAUDULENT DISCHARGE IN INSOLVENCY CANNOT BE TAKEN advantage of by a creditor of the insolvent, when the latter pleads such discharge in an action by the former, who fails to allege that the fraud was unknown to him, or that he had no notice of the same at the time of the adjudication of insolvency.

ERROR to the district court. The opinion states the facts.

P. P. Carroll and *McNaught, Ferry, McNaught & Mitchell*, for the plaintiff in error.

Hanford & Judson, for the defendant in error.

WINGARD, J. The plaintiff in error brought his action for the recovery of money against the defendant in error, in the district court. The defendant set up his discharge under the "insolvent debtor's" act, in bar of the plaintiff's claim.

The plaintiff replied that the discharge was obtained by fraud, and therefore void, but failed to allege that the fraud was unknown to him, or that he had no notice of the same at the time of the adjudication of insolvency. A demurrer was interposed to this reply, which the court below sustained, and this is the error complained of. While we are not unanimous as to the proper construction to be given to section 2044 of the code, we are agreed that the judgment of the court below was not error, and it is therefore affirmed.

GREENE, C. J., and HOYT, J., concurred.

EAKIN v. MCCRAITH.

Filed July, 1882.

PLAINTIFF IN AN ACTION OF EJECTMENT IS BOUND BY A FORMER JUDGMENT in an action between his grantor and the present defendant, wherein their respective titles to the land in controversy were put in issue.

FAILURE TO FIND ON ALL THE MATERIAL ISSUES cannot be taken advantage of in the appellate court unless there has been a motion in the court below to make additional findings to meet the omitted issues.

ERROR to the district court. The opinion states the facts.

J. B. Allen and *Dolph, Bronaugh, Dolph & Simon*, for the plaintiff in error.

Anders, Budd, Caton & Crowley, for the defendant in error.

GREENE, C. J. Plaintiff sued in the district court to recover possession of lot seven in block thirteen in the city of Walla Walla. He alleged in usual form his ownership in fee and right to possession and the wrongful withholding of such possession by defendant.

Defendant answered, denying plaintiff's ownership, and affirming that he himself is administrator of one Dennis McCraith, deceased, and that in September, 1866, in a certain suit between defendant's decedent and plaintiff's grantor, the title and right to possession of the premises was duly litigated, and was upon such litigation duly adjudged in favor of defendant's decedent. In his reply the plaintiff denied the litigation and adjudication alleged in the answer.

On the trial it appeared that, in the suit mentioned in the answer, there had been no judgment regularly recorded. But evidence was adduced competent, and, in our opinion, sufficient, to prove that such a judgment had actually been rendered. It was in evidence also—and about this fact there seems to be no dispute—that a tract of land, including the premises in controversy, was, on July 17, 1865, entered pursuant to statute by the city of Walla Walla, and the purchase price then paid into the local land office. It further appears in evidence that on August 4, 1866, the city deeded the premises to one J. C. Hawthorne, who afterwards transmitted the paper title by a chain of conveyances to the plaintiff, and that the patent from the United States was issued to the city July 20, 1869.

The judge who tried the cause—a jury having been waived—found as follows: "That on the fourth day of September, 1866, Dennis McCraith brought suit in this court against J. C. Hawthorne, through whom Robert Eakin, the plaintiff, claims title in this suit, and recovered a judgment in 1867 against said Hawthorne for the identical real estate claimed by the plaintiff Eakin in his complaint in this suit.

As a conclusion of law I find that the defendant is entitled to a judgment in this case.

To the introduction of the evidence offered to show the former adjudication, and to each of the judge's findings, exception was duly taken and allowed. Judgment was given for defendant conformably to the legal finding of the judge, and this judgment is now brought here for reversal by this writ of error.

In making entry of the land the city acted under the town site act of twenty-third of May, 1844 (5 Stat. 657), which was subsequently amended and supplanted by the very similar act of second of March, 1867 (14 Stat. 541). By the entry and payment, and the instant they were consummated, the city of Walla Walla became vested with the legal title to the land: Hussey v. Smith, 99 U. S. 20, 22. This title it forthwith and thenceforth held "in trust for the several use and benefit of the occupants thereof, according to their respective interests," and not otherwise. Between plaintiff's grantor, Hawthorne, and defendant's decedent, after the passage of title out of the United States, and after the city had deeded to Hawthorne, the question of occupancy and interest was litigated and determined. That determination was in favor of defendant's decedent, and against Hawthorne, the plaintiffs' grantor.

Plaintiff is not here claiming any other title than what the city was able to give under the town site act, nor any other right to own-

ership or possession than what his grantor had, or is supposed to have had, at the date of the litigation. The result of the litigation, therefore, bound as privies in estate and representation, the parties now in this court.

The judge's findings of fact are so meagre that they do not cover all the material issues made by the pleadings.

His conclusions of law, therefore, does not flow as a logical sequence from the facts found.

But if advantage was to be taken of this, there should have been a motion addressed to the court below to make additional findings to meet the omitted issues. It is obvious upon the undisputed facts and the findings actually made that the substantial rights of the plaintiff are not affected by the judge's inadvertence. We must, therefore, following the rule laid down in section 113 of the code, direct that the judgment of the district court be affirmed.

HOYT, J., concurred.

PUGET SOUND COMMERCIAL CO. *v.* THE BARKENTINE C. L. TAYLOR.

THE BARKENTINE C. L. TAYLOR *v.* PUGET SOUND COMMERCIAL CO.

Filed July, 1882.

DAMAGES RESULTING FROM A COLLISION BETWEEN TWO VESSELS, when each is guilty of contributory fault, must be equally divided between them.

APPEALS in admiralty. The opinion states the facts.

McNaught, Terry, McNaught & Mitchell, for the company.

Lewis, Struve & Haines, for the barkentine.

WINGARD, J. A collision occurred between the barkentine C. L. Taylor and the bark Raineer off Cape Flattery, near the mouth of the Straits of Juan De Fuca.

The bark was owned by the Puget Sound Commercial Company. Actions for damages, civil and maritime, were brought by both parties; the causes were consolidated, and both parties appeal to this court from the judgment of the court below. The testimony of the officers and crews of the two vessels is conflicting, and the expert testimony being largely hypothetical, is unsatisfactory. On a careful review of the whole case, we are convinced that the findings of the district court are correct.

They are as follows:

"The damages suffered by the two vessels respectively, including demurrage, were as follows: by the Raineer, $4,000; by the Taylor, $5,000. Both vessels were guilty of contributory faults.

1. The Raineer was in fault for passing as close as she did astern of the Taylor, while the wind was baffling and variable, and the Taylor was in stays.

2. The Raineer was in fault for not keeping a man at her helm, and for not using greater diligence to keep herself under control while in the immediate neighborhood of the Taylor.

3. The Taylor was in fault for trying to pass astern of the Raineer while she saw that the latter was caught aback, and that the wind would tend to drift her under the former's bows.

4. The Taylor was in fault for not luffing when she approached the Raineer and found that the latter was making sternway and was unmanagable.

5. The Raineer was in fault for not recovering command of herself sooner.

6. The Taylor was in fault for not beginning to lower her sails the instant it was clearly inevitable that the vessels must come together.

7. The Raineer was in fault for not cutting her main topmast backstay lanyards as soon as it was evident that the Taylor's foreyard was held fast by them. Such loss as has been sustained should be divided between both. A decree should be rendered in favor of the Taylor for $500."

The judgment of the court below is affirmed. Costs being entirely in the discretion of the court, those made in this court will be equally divided between the parties.

GREENE, C. J., and HOYT, J., concurred.

HOLYOKE *v.* JACKSON.

Filed July, 1882.

COMMUNITY PROPERTY—HUSBAND'S POWER OF DISPOSITION OVER.—Subsequent to the Husband and Wife act of 1879, a husband cannot enter into a valid contract for the sale of community property without his wife joining therein. A vendee under such contract, with knowledge that the subject matter thereof was community property, cannot recover damages for the husband's failure to convey.

ERROR to the district court. The opinion states the facts.

C. H. Hanford, for the plaintiff in error.

McNaught, Terry, McNaught & Mitchell, for the defendant in error.

GREENE, C. J. The primary question involved in this question is whether subsequent to the Husband and Wife act of 1879, the plaintiff in error, being a husband, could without his wife joining, make valid contract to sell to defendant in error, community property.

By the provisions of the Husband and Wife acts passed in 1879 and previously, the husband and wife are conceived as constituting together a compound creature of the statute called a community. This creature is sometimes, though inaccurately, denominated a species of partnership. It probably approaches more nearly to that kind of partnership called *universal* than to any other business relationship known to the civil or common law.

A *conventional* community, in a state where statutes would permit, might be contrived which would be substantially a partnership; but an ordinary *legal* community is, in many important particulars, quite distinct. It is like a partnership, in that some property coming

from or through one or other or both of the individuals, forms for both a common stock which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike, in that there is no regard paid to proportionate contribution, service or business fidelity, that each individual once in it, is incapable of disposing of his or her interest, and that both are powerless to escape from the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution, a community resembles a corporation. It is similar to a corporation in this also, that the state originates it, and that its powers and liabilities are ordained by statute. In it the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is *sui generis*, a creatue of the statute. By virtue of the statute, this husband and wife creature acquires property. That property must be procurable, manageable, convertible, and transferable in some way. In somebody must be vested a power in behalf of the community to deal with and dispose of it. To somebody it must go in case of death or divorce. Its exemptions and liabilites as to indebtednees must be defined. All this is regulated by statute. Management and disposition may be vested in either one or both of the members. If in one, then that one is not thereby made the holder of larger proprietary rights than the other, but is clothed, in addition to his or her proprietary rights, with a bare power in trust for the community. This power the statute of 1873 chose to lay upon the husband, while the statute of 1879 thought proper to take it from the husband and lay it upon husband and and wife together. As the husband's "like absolute power of disposition as of his own separate estate" bestowed by the ninth section of the act of 1873, was a mere power conferred upon him as member and head of the community in trust for the community, and not a proprietary right, it was perfectly competent for the legislature of 1879 to take it from him and assign it to himself and his wife conjointly. This was done. When, therefore, in 1880, the plaintiff in error, without his wife, entered into an agreement to sell the land in question, he agreed to do, what he himself, by himself, could not do, and, therefore, could not agree to do. To make an actual sale or conveyance without his wife, he had no power. The law says such a thing shall not be done. An agreement proposing it, is in conflict with the law, and void.

As the defendant in error knew of the marriage, and that the property was community property, he was a participant in an invalid transaction, wherein the law charged him with knowledge of the invalidity. He was doing what he is presumed to have known was against the law. So circumstanced, he is entitled to no redress for the failure of plaintiff in error to carry out the void contract to sell. A second, exceedingly interesting question arose in this case, and has been ably discussed upon the argument. It is the measure of damages for a breach of a contract to convey lands.

Our conclusion upon the other question, makes any discussion of this unnecessary to a decision of the cause. We, therefore, decline to enter upon it.

Let the judgment of the district court be reversed, and the cause be remanded to that court with directions to vacate the order setting aside the judgment of nonsuit.

HOYT, J., concurred.

On a motion for a re-hearing the following opinion was delivered:

GREENE, C. J. Community property was created by statute of December 2, 1869, although called "common property" by that statute and by the statute of 1873.

By the statute of 1879, it was first denominated "community prperty."

The rights referred to in the 31 section of the act of 1879, are proprietary rights, and not such naked power of management, control, or disposition, as are devolved upon any married person to be exercised in trust for the community. Therefore all the provisions of the act of 1879, which operate to create, vary or assign powers of that description, are applicable to property previously acquired.

By section 8 of the statute of 1879, the husband is clothed with a certain trust in respect to community real property. The management and control of it is vested in him, not for himself, but for the community. Besides this, he, with the wife, is endowed with power to dispose of it. This power, two, is in trust for the community.

For we must distinguish the community called into existence by the statutes, from the two individuals who composed it.

By a like distinction a corporation is conceived to differ from its stockholders. When the husband, therefore, thus situated, undertakes to dispose of the community property as his own, he stands differently from the absolute proprietor of a homestead, who has the power to shift the domicile of his family at pleasure, and who is required to have his wife join, not because she is joint trustee with him, nor because he without her is not owner, but merely as a check on his power of disposition, lest certain consequences follow injurious to the proper policy of the state. In the matter of disposing of community real property, husband and wife are, by the law of 1879, joint trustees for their mutual benefit in the community. Within the scope of their joint trust, neither can act without the other. No contract of disposition undertaken by either husband or wife, in contravention of his or her fiduciary relation to community real property can be enforced so as to reach any such property directly or indirectly. And if, at the time of making the supposed contract, the would be purchaser knows it to be in breach of fiduciary duty, then it is void in every aspect and cannot be the foundation of any liability whatever.

In the case at bar, the supposed contract was made without consulting the wife, without her knowledge, against her will, notwithstanding the defendant well knew that under the statute she was entitled to and bound to exercise an equal voice and responsibility in the matter with her husband.

Let the motion for a re-hearing be denied.

BREWSTER, Receiver, etc., v. BAXTER.

Filed July, 1882.

PRACTICE OF ASSIGNING MORE ERRORS THAN ARE NECESSARY to present the points relied on, strongly condemned.

THE CIRCUMSTANCES SURROUNDING THE EXECUTION OF A WRITTEN CONTRACT may be shown by parol evidence. Held, therefore, in this case, that where a written contract was executed by a woman in her own name, parol evidence was admissible to show that she executed the same as an executrix.

REFUSAL TO GIVE INSTRUCTIONS ASKED IS NOT ERROR, if the jury have been properly instructed upon all questions left for their determination.

FACTS CLEARLY PROVEN NEED NOT BE LEFT TO THE JURY to decide.

INFORMALITY IN THE DELIVERY OF PERSONAL PROPERTY SOLD BY AN EXECUTRIX DOES NOT VITIATE the sale so as to render it impossible of subsequent ratification by the probate court.

A SALE OF THE PROPERTY of an estate without an order therefor by the probate court, may be subsequently ratified by such court, or by the parties interested in such estate, so far as their interest is concerned.

ERROR to the district court. The opinion states the facts.

Haller & Engle, for the plaintiff in error.

Struve & Haines, for the defendant in error.

HOYT, J. The defendant in error brought this action to recover certain hay which he claimed to have purchased of Mary A. Dodge, as executrix of the last will and testament of Edwin T. Dodge, deceased, which hay had been taken possession of by the plaintiff in error, as receiver, in a certain foreclosure suit, wherein G. O. and H. M. Haller were plaintiffs, and said executrix, as such, and others were defendants; and the only questions made upon the trial of the cause were as to whether certain negotiations as to the hay between the plaintiff below and said executrix amounted to a legal sale thereof, and if they did not, then as to whether they were sufficient to found acts of ratification upon, and were they in fact ratified by any one authorized to bind the plaintiffs in said foreclosure suit. Upon the evidence introduced in regard to the said issues, the defendant below presented eighteen separate requests for instructions to the jury, and upon the errors growing out of the action of the court in regard thereto, and other questions in the case, now brings it here and assigns thirty separate errors as grounds for reversal of the judgment rendered in the court below. With these facts before us, we think it our duty to say that in our opinion we would be entirely justified in affirming the judgment for want of any proper assignment of errors, for the reason that in a case of this kind it would be as nearly in accordance with the spirit of our statute and a correct rule of practice for the plaintiff in error to

have said that he relied upon each and every error committed by the court below, as it was for him to assign, in a case of this kind thirty different errors, and rely upon one and all of them. And as the first method would be clearly insufficient, so we think the latter to be; but as this is the first time this matter has been referred to in this court, we have concluded to look into this case, so far as is necessary to decide it, and only say what we have, that it may be understood that the practice of assigning so many errors as to confuse rather than aid the court and opposite counsel as to the real question in the case, will not be tolerated in the future.

The only questions we feel called upon to decide in this case are:

1. Did the court err in allowing parol proof to explain and amplify the writing given at the time of the alleged foreclosure by the defendant in error?

2. Did the court err in refusing to give the instructions asked for by plaintiff in error?

3. Were the instructions which the court gave the jury upon its own motion correct and sufficient in view of the circumstances of the case?

As to the first question, all the proof admitted, excepting that which sought to show that though the paper was signed "Mrs. Mary A. Dodge," it was in fact executed by her as executrix of the estate of said Edwin T. Dodge, deceased, come so clearly within the general rule that all the circumstances surrounding the execution of any instrument in writing may be shown by parol, and so clearly shown that said writing was only an incomplete memorandum of a sale made before its execution, that we do not think it necessary to discuss it, and will only say, as to this point, that, in view of the undisputed facts in the case as to the farm upon which Mrs. Dodge lived being that of the estate and not her own, and that said paper was dated at "Dodge's Farm," and that the hay which was the subject matter of the sale, was known by all to be the property of the estate, as well as other circumstances in the case, we are of the opinion that parol proof as to the capacity in which Mrs. Dodge signed, was properly admitted: See Mechanics' Bank of Alexandria v. Bank of Columbia, 5 Wheaton, 326; Baldwin v. Bank of Newbury, 1 Wallace, 239.

The answer to the second question depends entirely upon that given to the third, for it is well settled that it is not error in this territory to refuse to give instructions asked for, if the jury are in fact properly instructed as to all the questions left for them to decide; and we therefore now proceed to the final and material question in the case, and in order to properly examine the instructions actually given we must look into the record to see what facts are undisputed, or so clearly proven that the court could properly assume them to be conceded, for as to such facts nothing need be said to the jury. It was not disputed but what defendant in error had had a certain transaction with Mrs. Dodge as executrix of the estate of Edwin T. Dodge, deceased, in regard to the hay in ques-

tion, which had by them been treated as a sale, and that defendant in error had paid a portion of the purchase price thereof and given his promissory note for the balance; but it was contended that such sale was void, for the reason that no order therefor had been made by the probate court, and because there had been no delivery of the property.

As to the latter objection, it is so clear to us that if there were any informality as to the delivery, it would not make the sale so far void that it could not be ratified, that we do not care to discuss the question, and as to the former, we think that it was not the intention of our legislature to take from the probate court the power to ratify a sale made by an executor without its order, if it were clearly in the interest of the estate, that such sale should be ratified, as we believe said statute to have been enacted in aid of estates, and that what the legislature meant was that sales so made should not in themselves be valid and binding, but might be ratified by the probate court, and then become of full force, and if the probate court could have ratified the sale of the hay in question for said estate, then the plaintiffs in said foreclosure suit or any one authorized to act for them in that behalf could ratify so far as their interest was concerned.

It was also conceded that, under the direction of one of the attorneys for the plaintiffs in said foreclosure suit, the said receiver made and sent to the defendant in error notice in words and figures as follows, to wit: "In the district court of Washington Territory, holding terms at La Connor.

NOTICE.—Granville O. Haller and Henrietta M. Haller, plaintiffs, v. Mary Alice Dodge, Mary A. Dodge, executrix of the estate of Edwin T. Dodge, deceased, and Fanny Dodge and Lena Dodge, defendants. To D. K. Baxter: You are hereby notified that you are by the court required to pay to Joseph P. Brewster, the duly appointed and qualified receiver in the above entitled action, any and all proceeds of the crops of grain and hay in you hands or under you control, arising from the sale of said crops raised and produced on the farm of Mary A. Dodge.

Dated La Connor, December 20th, 1880.

JOSEPH P. BREWSTER, Receiver."

Under these circumstances the court instructed the jury as follows: "If from the evidence the jury find—1st, that the defendant by direction or with the knowledge and assent of G. O. and H. M. Haller, or of their attorneys of record, Haller and Engle, or either of them, sent to plaintiff the notice marked exhibit B"; and—2d, that said G. O. and H. M. Haller, or their attorneys, or either of them, had at the time they gave such direction, or such assent, knowledge of the supposed sale from Mrs. Dodge to Mr. Baxter, or had any information sufficient to make them think that such a sale had been attempted or made; if, I say, the jury find both of these two things, then they will find a verdict for the plaintiff."

Were such instructions correct and sufficient? They assumed that the sale in question, though invalid, was yet not so absolutely

void as to be incapable of ratification; and in view of what we have said as to the conceded facts and the law applicable thereto this was right; they further assume that the attorneys for the plaintiffs in said foreclosure suit could ratify the sale, and under the circumstances of this case we think that such assumption was correct, for the question as to whether they would pursue the hay itself or the proceeds thereof was, we think, left to their discretion, as the attorneys for plaintiffs in said foreclosure suit. With this view of the law, a careful examination of the instructions will show them to have been sufficient, for it will be noticed that the court therein did not say if they had knowledge of *a* sale, but of *the* sale, and again *such* sale, thus showing that the jury, in order to find for plaintiff, must find that the ratification thereof was made with knowledge not simply of *a* sale in general but of the particular acts in evidence, which for convenience were termed a sale.

We find no error in the record, and the judgment of the court below must be affirmed, and it is so ordered.

GREENE, C. J., concurred.

BAXTER *v.* SMITH ET AL.

Filed July, 1882.

MECHANIC'S LIEN FOR WORK DONE IN CUTTING LUMBER attaches upon the identical timber cut.

FAILURE TO HAVE THE SURETIES ON AN ATTACHMENT BOND justify is a mere irregularity which can be cured, and, therefore, such failure does not render the attachment void.

A SUBSEQUENT ATTACHING CREDITOR, WITHOUT NOTICE, takes priority over a prior mortgagee under an unrecorded chattel mortgage,

AN UNRECORDED MORTGAGE OF PERSONAL PROPERTY IS ABSOLUTELY VOID as to the creditors of the mortgagor, although such creditors had actual notice thereof.

APPEAL from a judgment of the district court. The opinion states the facts.

Struve & Haines, for the appellant.

G. Morris, and *McNaught, Ferry, McNaught & Mitchell*, for the appellees.

HOYT, J. A large number of suits were pending in the court below against the firm of Kems Brothers and certain rafts of logs owned by them, a part of said logs being marked "K," and the rest "I. K." All of said suits were consolidated by consent and adjudication had established the order in which the claims of the several plaintiffs should attach to the fund in the registry of the court which had been derived from a sale of said logs.

Baxter, the appellant herein, claimed by virtue of a chattel mortgage duly executed and covering that portion of said logs marked "I. K." and he prosecutes this appeal to reverse that portion of the decree entered below, which postponed his claim to those of Cariel, Bush and Monroe who claimed as lienors under the lien law of the territory, and Smith, Merwin and McCabe, who were attaching creditors. It

is conceded that as to the claims of said lienors the action of the court below was right if the "lien notices" introduced in evidence to support said claims were sufficient, but it is contended that said notices are void in that there is no sufficient statement of the demand and of the amount due thereon after deducting set-offs. We have carefully examined said notices, and as to those of Bush and Monroe, we think that they clearly show, when we construe the statement of the demand as a whole, not only what amount is now due, but also the amount of the entire claim before off-sets were deducted, and that, therefore, these two notices are not within the rule established by the case of Wheeler v. The Port Blakely Mill Company, 2 West Coast Rep. 555, decided by this court at its last term and that they are sufficient. As to the notice of Cariel's lien there is greater difficulty; but in view of the fact that this was a lien for timber and that such a lien attaches upon the identical timber cut, and that under the contract set out in this notice the sale of each log of timber can be considered as a separate contract for which a lien to the amount to which said log would come at the agreed price per thousand would attach, we are of the opinion that this notice also was sufficient, and that the action of the court in giving all three claims priority over appellants mortgage was proper and should not be disturbed.

As to the question of priority as between said appellant and said attaching creditors, it is conceded that said mortgage was executed before the attachment of the logs by either of said creditors; it is also conceded that before the levying of his attachment McCabe had actual notice of the appellant's said mortgage, but it is not claimed that Smith and Merwin had any such notice, nor is it claimed that there was any proof in the case showing that said mortgage had ever been recorded. In each of the attachment suits the bond required to be given before the writ issues was defective in that the sureties therein did not justify as to their responsibility, and it is claimed by appellant that such defect rendered said bonds void, and that, therefore, the writs of attachment were issued without authority, and all proceedings thereunder of no effect. But we think that if appellant is in a situation to raise any question as to the said bonds, which we do not now decide, still the defect complained of was a mere irregularity which could have been cured and that, therefore, it did not render the proceedings under said writs void. As said attachments were valid as to said appellant, and levy thereunder was made before said mortgage was recorded, it follows that the claim of Smith and Merwin was properly given priority, and that the claim under said mortgage must be also postponed to that of McCabe unless the fact that he had actual notice of said mortgage had the effect to subject the attachments thereafter made by him to the claim thereunder. Did said notice have such an effect? The language of the statute, the construction of which must decide this question, is as follows: "A mortgage of personal property is void as against creditors of the mortgagors or subsequent purchasers

or incumbrances of the property for value and in good faith unless * * * it is recorded as required by law." And a fair interpretation thereof will lead to the conclusion that the legislature intended thereby to provide that as to creditors, an unrecorded mortgage on personal property should be absolutely void, and that as to the subsequent purchases or incumbrances, it should be void if they had paid value and acted in good faith. In fact, this is not only the most natural construction, but as the words, for value and in good faith seem to be conjoined, it is the only one that will make any sense at all if we are to give force to each word used.

The notice to McCabe then of appellant's mortgage was of no effect, and his claim by attachment is prior to said mortgage.

We find no error in the record, and the decree entered in the court below must be affirmed with costs. Let the cause be remanded to the district court with instructions that said decree should be carried into effect.

GREENE, C. J., concurred.

BLINN *v.* CROSBY ET AL.

Filed July, 1882.

SERVICE OF NOTICE OF APPEAL, PROOF OF.—The certificate of the clerk of the district court acknowledging due service of appeal is not sufficient proof of such service to confer jurisdiction upon the supreme court. After rendition of judgment the proof of such service may be shown by affidavit, when the validity of such judgment is attacked in a collateral action.

APPEAL from a judgment of the district court. The opinion states the facts.

J. R. Lewis, for the appellant.

J. P. Judson and *McNaught, Ferry, McNaught & Mitchell*, for the appellees.

HOYT, J. This action was brought to secure the foreclosure of a certain mortgage upon real estate, and the only controversy therein was as to an issue raised by the answer of certain defendants, who claimed under a judgment and decree of this court, upon which the land described in the complaint of the plaintiff herein had been levied upon and sold; and the principal question made in the court below and here, and the only one which it is necessary for us to decide, is as to whether or not this court had jurisdiction of the cause in which said judgment and decree was made and entered. At the time said cause was heard and said judgment rendered the only proof of the service of the notice of appeal on the clerk of the district court was a certificate made by him that he thereby acknowledged due service of such notice of appeal, and as there was no appearance by the appellees in this court, if the record in said cause now discloses no more as to the service on such clerk, we should be of the opinion that the said case would

fall within the rule of the case of the Port Blakely Mill Company v. Clymer, 1st Wash. T'y, Reports 607; and unless the judgment therein rendered would be aided by the presumption that the court would not have proceeded without other proof of the service of said notice on the clerk, it would be void and of no effect. But since the rendition of said judgment, by leave of this court first obtained, certain affidavits have been filed in said cause tending to show service of said notice upon said clerk, and upon an examination thereof we are of the opinion that while the service shown by them to have been made may have been to some extent irregular, and thus subject to a direct attack in said action, yet it was not so far irregular as to be absolutely void, and that therefore the service shown by said affidavits was sufficient to give this court jurisdiction, and that the judgment therein rendered would be valid and not subject to collateral attack. An objection is made, however, by the plaintiff in this action that this court had not the power to allow said affidavits to be filed in said action, and that they are no more part of the record, and cannot be considered in determining the question of the validity of said judgments. But with this claim we cannot agree, as we are of the opinion that whenever a court has assumed jurisdiction of a cause, and has proceeded to judgment therein, it should allow proof of any fact that existed at the time said judgment was rendered to be made, in order that the jurisdiction thus assumed should be upheld and the judgment rendered be sustained when assailed in a collateral proceeding. And what was done in the said cause was clearly within the rule. It was the service on the clerk that gave the jurisdiction, and not the proof of such service, and, therefore, it was the duty of the court upon ascertaining that it had assumed to enter judgment in the cause, when the record did not show service, to allow proof to be then made and filed as to what was in fact done, and if it appeared from the facts thus established that due service had been made, the defect in the record would be cured and the jurisdiction assumed sustained.

It follows that, in our opinion, the judgment in question was valid, and the action of the court below in sustaining the defense thereunder not error, and that the judgment and decree rendered in the court below must be affirmed with costs. Let the cause be remanded to the district court, with instructions to carry into effect the judgment heretofore rendered therein.

GREENE, C. J., concurred.

ONG *v.* WHIPPLE, Executor, etc.

Filed July 20, 1882.

THE DISTRICT COURT HAS JURISDICTION OF AN ACTION for an accounting brought by a ward against the executor of his deceased guardian, although such guardian was appointed in another state.

APPEAL from a judgment of the district court. This was an action for an accounting brought by a ward against the executor of his deceased guardian. Such guardian was appointed by a court in Indiana. The defendant demurred, and his demurrer was sustained.

C. W. Hartman and *C. H. Hanford*, for the appellant.

McNaught, Ferry, McNaught & Mitchell, for the appellee.

WINGARD, J. In this case we are of the opinion that the guardian of the plaintiff being dead, he would be without any adequate remedy unless he can maintain his suit against the executor: Pedeman, administrator of Robb, 8 Ohio Reports, page 227. The judgment of the district court in sustaining the demurrer to the plaintiff's complaint is therefore overruled, and the cause is remanded for further proceedings. We do not consider the complaint exposed to the second, third and fourth objections urged by the appellee.

GREENE, C. J., and HOYT, J., concurred.

MCLEOD *v.* PORT BLAKELEY MILL COMPANY.

Filed July 20, 1881.

MECHANIC'S LIENS—REQUISITES OF STATEMENT OF DEMAND.—Judgment affirmed on authority of Wheeler v. Port Blakeley Mill Co., 2 West Coast Rep. 555.

ERROR to the district court, in an action to recover damages for sawing up certain logs upon which plaintiff in error claimed to have had liens. The defendant demurred on the ground of insufficiency in the statement of the demand contained in the notice of the lien The facts were similar to those of Wheeler v. Port Blakeley Mill Co., 2 West Coast Rep. 555.

Struve, Haines & Leary, for the plaintiff in error.

McNaught, Ferry & McNaught, for the defendant in error.

HOYT, J. This cause presented the same questions as that of Duncan T. Wheeler v. The Port Blakeley Mill Co., and was argued herewith.

The decision of that case is therefore conclusive as to this, and for the reason stated in the opinion on file in said cause, it follows that the judgment of the court below in this case must be affirmed, and it is so ordered.

GREENE, C. J., and WINGARD, J., concurred.

MURNE v. SCHWABACHER BROS. & CO.

Filed August 6, 1883.

PROCEEDINGS SUPPLEMENTARY TO EXECUTION, UNDER CHAPTER XXXV OF THE CODE.—Prior to the adoption of the code, a judgment creditor had a vested right, within five years after the rendition of his judgment, to have execution issue thereon, and to institute supplementary proceeding at any time. A subsequent statute might limit such right to expire at the end of a reasonable time, but it could not summarily take it away.

THE SAME—TRIAL BY JURY—AMENDMENT.—The affidavit filed for the institution of such proceedings, may be amended so as to make the description of the judgment conform to the facts. Such proceedings are equitable in their nature, and the defendant therein has no constitutional right to a trial by jury. If upon a trial of the issues raised thereon, it appears that a person, not a party thereto, claims an interest in the property affected thereby, the court should cause him to be brought in.

JUDGMENT BY DEFAULT OUT OF TERM.—A judge of the district court has power to render judgment at his chambers, and out of term, in a case where the defendant has made default.

ERROR to the Third district court. The opinion states the facts.

J. R. Lewis for the plaintiff in error.

McNaught, Ferry, McNaught & Mitchell for the defendants in error.

GREENE, C. J. This was a supplementary proceeding based upon affidavit under Chapter XXXV of the code. Plaintiffs in execution had their defendant Murne arrested agreeably to section 381, and brought before the judge. Witnesses were thereupon examined and a trial had without a jury.

As a result, there was a finding that defendant had certain property in his hands, which he was unjustly refusing to apply toward the satisfaction of the judgment.

Upon this finding, the judge ordered defendant to make such application, and in default thereof to be committed as for a contempt. From this order defendant seeks relief in this court.

First, it is said that the judgment upon which the execution issued was void, because not rendered in term time. It appears to have been rendered by the judge sitting at his chambers in Seattle, while the cause was pending at Port Townsend. As the case was a defaulted one, and came to judgment in February, 1876, while the statute of 1875 authorizing the district judge at chambers in vacation, to hear and determine all matters whatsoever not requiring the intervention of a jury, including a final judgment against a party in default, was in force, we think the judgment should be deemed good. The obvious intent of the legislature in that statute, though not in terms so stated, was to have all the courts in each district open at all times for the transaction of certain specified business, and to provide that for the uniform speeding of causes throughout the district, such business might be passed upon by the judge, wherever in the district he might happen to be. It is further objected, that as more than five years have elapsed since the rendition of this judgment, it is now dormant and no proceedings looking to its satisfaction will lie until it has been revived. We think this would be true, were chapters XXIX and XXX of the code to be held operative against these judgment creditors. But that cannot be. Their judgment, at the date of the adoption of the code, had

been in being more than five years, and within those five years, they had issued execution upon it. Under the then existing law, they thus had still a live judgment, and a right to issue execution and institute supplementary proceeding on it at any time. That right was a valuable and vested right. Power to execute it might, by a new statute, have been limited to expire at the end of a reasonable time, but it could not have been summarily taken away without limitation. Again, it is objected that the affidavit was erroneously allowed to be amended. It described the judgment, which was in fact against two defendants, as if it were against one. An amendment was permitted making the description conform to the fact.

This might not have been proper, had the supplementary proceeding been independent of the original action. But it was a proceeding in, or in continuation of that action, drawing readily thence data whereby it could be amended, and certainly amendable within the very liberal rules prescribed by sections 109 and 113 of our code. A fourth objection is, that plaintiff in error was against his protest denied a trial by jury. He contends that a jury trial was his constitutional right under the fifth and seventh amendments to the constitution of the United States. We are clear that these constitutional amendments are part of the organic law of the territory, but they do not avail to give a trial by jury in an equity cause. This supplemental proceeding is of equitable jurisdiction, intended to serve the end of a creditor's bill, and is to be heard and determined by the judge as a chancellor, with or without the assistance of a jury as he may desire. Such seems to be the generally adopted theory respecting proceedings of this sort. *Ex parte* Grace, 12 Iowa, 208, though in point is not followed in courts outside of Iowa. Its reasoning does not convince us that we ought to follow it. If the reasoning it pursues, is to lead to the conclusion it reaches, then we do not see but that a trial by jury, on an issue of fraud, is in every chancery, as well as every law case, a constitutional right.

The last objection we shall notice, is, that another person should have been made a party to the proceeding. On this we have had considerable difficulty. Looking at the testimony before us, we cannot help thinking that John Elwood, who is asserted by some witnesses to have an interest in the property, should in equity and good conscience have been called in as a party. At the same time chapter XXXV does not seem to contemplate such a thing and makes no provision for it. After much consideration, we have come to the opinion that the case falls within section 20 of the code, requiring that "when a complete dertermination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in." By an order to show cause, or by some other reasonable notice, any party whose rights are involved can readily be brought into a proceeding of this character. A new party should be brought in, whenever in the progress of the proceeding and before the final order, there appears reason to believe

that he owns an interest in the money or other property sought to be subjected to the judgment. In so holding we simply give full effect to the idea, that this is a matter of equitable cognizance to be heard and adjudicated as fully and with as careful regard to the rights of all interested as though it were an original suit. This cause, though properly in equity has been brought up here by writ of error. No exception has been taken in brief or argument on this score. We shall, therefore, give judgment as if it were regularly here as a case at law.

Let the final order of the district court be reversed, and the cause remanded for further proceedings, with direction to bring in such other party or parties as may be right and equitable.

HOYT, J., concurred.

HAYS v. PARKER.

Filed August 6th, 1883.

EJECTMENT.—EVIDENCE.—CANCELLATION OF CERTIFICATE OF PURCHASE.—In an action of ejectment, where the plaintiff relies on a certificate of the receiver of public moneys, evidence tending to show a cancellation of such certificate, and the reasons therefor, are admissible on the part of the defendant.

DISTRICT COURT HAS NO JURISDICTION OF A CONTROVERSY TO DETERMINE the conflicting rights of claimants to a portion of the public domain, when such controversy is already undetermined before the department of the interior.

ERROR to the district court. The opinion states the facts.

Allen & Thompson, for the plaintiff in error.

A. E. Isham, for the defendant in error.

HOYT, J. This was an action of ejectment brought by the defendant in error, who alleged in his complaint that he was entitled to the land by virtue of a certificate of purchase, issued by a receiver of public moneys of the United States.

The defendant in the court below, as a part of his answer, set up the existence of certain facts tending to show that said certificate was illegally issued, and that on account of such illegality the commissioner of the general land office had cancelled said certificate. The court, on motion of plaintiff, struck out all that was alleged in the answer as leading to the action of the said commissioner in so cancelling said certificate, and this we think was error, as in our opinion such allegations were proper by way of explanation, and defendant should have been allowed to prove them as a matter of explanation of the commissioner's said action. Besides, we think that the letter of said commissioner, offered in evidence by the defendant, should have been admitted as tending to prove the cancellation of said certificate, and its exclusion was error which entitles defendant to a new trial. But we find from the evidence that it appeared, by the testimony of both parties, that at the time this suit was commenced the claims of the respective parties thereto to the

land in question, were being waged in the department of the interior of the United States; and this fact being conceded, as we think it is by the record in this case, it was not proper for the court to interfere to aid either party (by way of affirmative relief) until the matter had been fully terminated by the executive branch of the government; and upon this fact appearing to the court, it should have dismissed the cause at the cost of the plaintiff, and its refusal or failure so to do was error, for which the judgment and vedict must be set aside.

Owing to the existence of the facts above stated no new trial can be had, and a judgment will be entered here reversing the judgment of the lower court with costs, and the cause remanded, with directions to the court below to dismiss said action at the costs of the said plaintiff.

GREENE, C. J., concurred.

BOOK REVIEWS.

HIGH'S EXTRAORDINARY LEGAL REMEDIES. A treatise on extraordinary legal remedies embracing Mandamus, Quo Warranto and Probibition. By James L. High, second edition. Callaghan & Co, Chicago. 1884.

The first edition of this standard work appeared in 1874. During the ten years which have since elapsed it has become so well and favorably known that no extended review of its merits is necessary. It is sufficient to say that it is the most complete and accurate treatise upon the subjects discussed, to which the profession has ever been favored. In the present edition, the text remains substantially the same, although some modifications have been found necessary in order to adapt it to the existing state of the law. Over eight hundred decisions which have appered since the former edition have been added. The index is full and large, covering nearly on hundred pages. The mechanical execution of the book conforms to that high degree of excellence which is a characteristic of its publishers.

WEST COAST REPORTER.

WHOLE No. 21. MAY 22, 1884. VOL. II. No. 13.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

RIPARIAN PROPRIETORS AND RIPARIAN RIGHTS ON PRIVATE STREAMS.

The following communication involves a question of importance, and for that reason it is inserted. "In your discussion of water rights you have not yet presented your views on one very important point. How does prior appropriation affect the rights of an owner of a Mexican grant confirmed and patented subsequent to the appropriation? 1. Suppose, for example, L. creek rises in public lands, and flows ten miles through such lands, then flows ten miles through a rancho granted by the Mexican government before the United States acquired the territory of California, and then flows again through public lands into the sea. Suppose that, pending the proceedings for the confirmation of this grant, the waters of the creek were all appropriated for the irrigation of farming lands other than said grant, and have been used for that purpose ten years. The grant is then confirmed, and a patent is issued, and the owner of the grant subdivides it and sells to A, B, C, etc. What are their rights to the water? Is it possible that the doctrine of riparian rights has been lost by the prior appropriation? The title to the grant comes from the Mexican government, and hence is prior to the appropriation for irrigation. Can those riparian rights be thus cut off, and a whole stream be taken away from the grant? 2. Can a person wishing to appropriate water which runs through a patented Mexican grant, go upon the grant and put up his notice of appropriation? or would he be a trespasser? Yours, etc., *Lex.*"

Since this communication comes from an anoymous contributor, and since it bears evident marks of relating to an existing controversy, which may perhaps be even now pending in the courts, we do not feel warranted in attempting any answer to its specific inquiries. It suggests, however, one general question upon which we may not inappropriately express an opinion. What are the rights of a private riparian proprietor who obtains his title by a grant from the Mexican government, guaranteed and protected by the treaty between the United States and Mexico, and

finally confirmed to him in the proceedings authorized by congress for the purpose of carrying into effect the stipulations of that treaty? We see no reason why the riparian rights of such a riparian proprietor should differ in any respect from those held by any other riparian proprietor who derives his title immediately or mediately from the United States by patent or otherwise. All the doctrines and rules of the law which define and regulate the water rights of private riparian proprietors upon *unnavigable* streams at least, even if not upon navigable streams, belong entirely and exclusively to the jurisdiction and domain of state legislation. Congress has no power to interfere directly or indirectly with matters of this kind; any attempt of congress to control them by legislation would be wholly nugatory. The stipulations of the treaty with Mexico simply referred to, operated upon, and protected the *titles* of those private proprietors who held tracts of land, within the territory ceded to the United States, under grants from the Mexican government. These stipulations say in substance that such actual and *bona fide* grantees shall continue to be owners of their respective tracts, although the territory has passed into the domain of the United States; and that their right of ownership shall be respected by the United States government.

The legislation of congress and the judicial proceedings instituted under it, were intended to carry into effect these treaty stipulations, and they operate solely upon the titles, by declaring, confirming and establishing the private ownership of the grantees as derived from the Mexican government, the original sovereign proprietor. The treaty and the legislation of congress which carries it into effect, are of course binding, not only upon the federal government, but also upon the governments of all the states which have been established within the ceded territory, and within whose boundaries the granted lands are situated. The treaty with Mexico while thus securing to the private proprietors the *title* and *ownership* of the tracts of land which had been granted to them by Mexico, did not attempt to provide that this ownership should be governed and controlled by the rules of the Mexican law, nor by any other rules of law different from those which would govern and control all private ownership of land within the territorial jurisdiction of the United States, or within the jurisdiction of any particular states. Even if the treaty with Mexico had expressly stipulated, not only that the *titles* of private persons holding under Mexican grants should be protected and should continue to be valid and perfect, but also that the ownership of such lands, when situated on the banks of streams, should be governed and regulated by the rules of the Mexican law concerning water and other riparian rights, such a stipulation would be completely inoperative and void as soon as the territory embracing these granted lands was

organized into a state; the whole subject matter would belong exclusively to the jurisdiction of the state; the rules concerning riparian rights would fall exclusively within the domain of the state municipal law,—whether that law adopted the common law doctines, or promulgated other rules in the form of statutes.[1] It seems plain, therefore, that the riparian rights of a private proprietor holding by a Mexican grant duly confirmed are exactly the same, governed by the same rules, as those held and enjoyed by any other private riparian proprietor within the state. The *source* of his *title* can make no difference as to the rights of property which accompany and flow from his ownership. The question of priority between such a grantee and a person who has appropriated the waters of the stream before his grant was confirmed by the United States authorities, must depend, we apprehend, upon the legal effect given to the confirmation. Does the confirmation relate back to the date of the treaty, so that the grantee is regarded as deriving his title directly, and holding it continuously from the Mexican government; or does the confirmation operate only from its own date, so that the grantee is regarded as deriving and holding his title immediately and directly from the United States, in pursuance of an executory agreement made with Mexico? This question we shall not examine.

We are now brought to the question, how far do the riparian rights of a private riparian proprietor, under the law of California and of Nevada, include the right to use the water of the stream for the purpose of irrigating his land? The only recent decision which deals directly with this question to any extent, or in any manner, is found in the case of Ellis v Tone,[2] decided in 1881. Unfortunately this case is so reported that it does not throw much light upon the general question. The action was tried before a jury, but the report does not give the entire charge of the court, so that it may be seen upon what general theory of the law, or upon what admitted doctrine the cause was tried and the recovery had. Certain detached clauses of the charge were excepted to, and certain special instructions were refused, and these alone have been given by the reporter.

The opinion of the court is also confined to an examination of the specific exceptions, and does not enter into any discussion of the general doctrines upon which the case, as a whole, must have rested. The case, however, is the most recent published decision which deals with the right to use water for purposes of irrigation, and we shall state it in substance by way of introduction to the discussion of this most important ques-

[1] This principle, and the authorities which support it, are discussed by Sawyer, J., in Woodruff v. North Bloomfield, etc., Co., 1 West Coast Rep. pp. 204-206; the same principle is discussed by Mr. Justice Field, in delivering the opinion of the court in the case of Hagar v. Reclamation District No. 108, decided by the United States Supreme Court on the fifth of May. 1884.

[2] 58 Cal., 289.

tion. The action was brought to recover from defendants damages for diverting water from Mormon Slough, a natural water-course, by which plaintiffs were prevented from irrigating their growing crops in 1877. A verdict was rendered in favor of the plaintiffs. Defendants moved for a new trial, which was denied, and they appealed. The facts, as stated in the report, were as follows: Mormon Slough or channel heads from and runs out of the Calaveras river east of Stockton, and about four miles north-easterly from plaintiffs' land, and flows thence in a south-westerly direction to the Stockton channel, a distance of about twenty miles. The slough runs through the land of the plaintiffs in two channels. The defendants own land on the Calaveras river, below the point where the Mormon Slough runs out of that river. The slough is a natural water course, having a well-defined channel and banks. In 1850, before the channel of the Calaveras river was filled in by mining debris, it (the lower channel of said river) was from four to six feet lower than the bed of the slough, so that the waters of the river did not flow into the slough until the waters of the river had risen from four to six feet. But the channel of the river has since been so filled up by debris, that when the water is low, most, or nearly all of it, runs and has run into and through the slough. That has been the case since 1862, unless prevented by artificial means, so that in dry seasons, or in the dry season of the year, nearly all of the water ran into the slough; and during the whole of the year water was in the slough, while in the dry season little or none ran in the river below the head of the slough. In the fall of 1876 and winter of 1877 plaintiffs put in a crop of wheat and barley on their land, through which the slough ran as above stated.

The plaintiffs made arrangements to irrigate this land in the next spring (of 1877) by damming the north channel of the slough, so as to make the water flow into the south channel, on the banks of which their crop was growing. This arrangement was completed in April, 1877. They then found that defendants had stopped the entrance of the slough by digging a ditch in the bed of the river, and by damming the exit of the slough from the river, so that the water was compelled to flow down the river, instead of flowing, as had been the case for fifteen years, into the slough. In consequence of this the water was cut off from the slough, the plaintiffs were unable to irrigate, and their crop was a failure. Evidence also showed that in the spring of 1877 the defendants had purchased from the Mokelumne canal company four hundred miner's inches of water, to be furnished between April 15th and the 1st of June. This water was taken from the Mokelumne river, and was turned into the Calaveras river, at a point above the head of the Mormon slough, and flowed down that river to the lands of the defendants, so that they could use it for purposes of irrigation.

The court held that there was evidence sufficient to sustain the verdict for the plaintiff. The trial court charged the jury as follows:

"This is an action brought by the plaintiffs against these defendants, wherein the plaintiffs allege themselves to be the owners of certain lands described in their complaint, and allege that the Mormon Slough was a natural stream of water flowing through their lands. If you believe from the evidence that the Mormon Slough was a natural stream of water, and that the water would have flowed through their lands but for the diversion of the natural flow of that water by the defendants, the plaintiffs are entitled to a verdict for whatever damages they may have sustained to their crops, provided they were prepared to use the water, and had made the necessary preparations as they have alleged in their complaint. The measure of damages in this case is the amount of injury to the crops described in the complaint by the act of the defendants in diverting the natural flow of the water, if they did divert it. If, however, the plaintiffs received no damage by any act of the defendants, or they did not divert the natural waters of this stream to the injury of the plaintiffs, then your verdict will be for the defendants." To this paragraph the defendants excepted; and objected on the appeal that it assumed the fact of diversion; that it in effect directed the jury to find a verdict for damages to plaintiffs' crops, no matter from what cause the damages originated; and that it did not give the correct rule of damages.

The supreme court held that these objections were without any foundation; that the instruction did leave the question to the jury whether defendants had or had not diverted the water; and that the trial court was not bound of his own motion to state any rule of damage to the jury, but the defendants must request him to lay down such rule as they claimed to be the true one, and if he refused, then they could except to his refusal. The defendants requested the trial court to give the following instruction, which the judge refused to give: "A riparian proprietor who takes water from a channel in which it naturally flows, has no legal right to take it beyond his own land before returning it to its natural channel. So, if the jury believe from the evidence that the natural waters of the Calaveras river and Mormon channel would have flowed in the main Mormon channel (i. e., the north channel which plaintiffs dammed up) after plaintiffs had built their dams, unless diverted by said dams or other means, and if the jury further believe from the evidence that plaintiff's dam in the main channel (i. e., the north channel) of Mormon slough was not built on their own land for purposes of irrigation, but on the land of one Murphy, whose lands did not adjoin the land of plaintiffs, and unless the jury believe from the evidence that the proprietors of intermediate lands consented to the diverson of said natural water from the main

(north) channel of the Mormon Slough, by a dam placed therein by plaintiffs (and such consent should be shown by the evidence), then the jury should find for the defendants." The defendants having excepted to the trial judge's refusal to give this instruction, claimed on the appeal that this refusal was error. The supreme court say: "It is urged that in this there was error, because plaintiffs did not show the consent of the intermediate owners of land referred to in the request. As to this, it is only necessary to say, that no intermediate land owner is here objecting to plaintiffs' bringing the water through their lands. As they made no objection, we cannot see that the defendants could make the objection for them, or either of them. No objection appearing, it is proper to conclude that no one of such owners ever objected."

J. N. P.

[TO BE CONTINUED.]

SUPREME COURT OF IDAHO.

THE PEOPLE, ETC., v. PIERSON.

Filed February 20, 1884.

REVIEW OF EVIDENCE ON APPEAL.—On an appeal from the judgment only, the court cannot inquire whether the verdict is supported by the evidence; this can be done only upon an appeal from the order denying a new trial.

MURDER—MANSLAUGHTER.—In case of a homicide committed by the defendants where the fatal shot was fired while the deceased was retreating, and after all danger from him was over and while defendant was pursuing him, then the defendant is guilty of murder or manslaughter as the case may be.

THE SAME—AN INSTRUCTION AS TO THE CREDIT THAT SHOULD BE GIVEN TO A WITNESS, and one that the same weight should be given to the testimony of defendant when corroborated, as to that of any other witness, invades the province of the jury and is properly refused.

THE SAME—WHERE THE DEFENDANT SEEKS TO JUSTIFY A HOMICIDE ON THE GROUND that the killing was necessary to protect the person of his wife, evidence on the part of the prosecution tending to show the bad character of the woman alleged to be the wife of the defendant, and that she kept a house of prostitution, with a view of showing that the deceased was upon the premises for purposes other than felonious, is proper.

THE SAME—AN INSTRUCTION, that "if the jury believes from the evidence beyond a reasonable doubt, that the defendant killed deceased on account of a desire for revenge for some real or imagined injury, then defendant is guilty of murder," is proper.

THE SAME—WHEN THE DECEASED WAS SLAIN WHILE ENDEAVORING TO ESCAPE from the defendant and had succeeded in wholly withdrawing in good faith from the vicinity of defendant and his house, and all danger to the person of defendant, to his habitation or to anyone residing therein was over, then the killing can neither be justified, excused or mitigated by declarations of defendant made to another person shortly before the homicide, and evidence thereof was properly refused.

APPEAL from a judgment of the district court for Alturas county, convicting the defendant of murder. The opinion states the facts.

L. Vineyard, for the appellant.

Jos. H. Hawley and *F. D. Cahulan*, prosecuting attorney, for the respondent.

MORGAN, C. J. The defendant, George Pierson, was indicted, tried and convicted at the October term, A. D. 1882, of the district court for Alturas county, for the murder of John T. Hall at Vienna in said county, on the twenty-fifth day of August, 1882.

The case is brought to this court by an appeal from the judgment.

In the argument of the case considerable time was occupied in the apparent effort to show that the verdict was contrary to the evidence.

The court is unable to see any substantial objection to the verdict upon that ground. There is no occasion however to consider that branch of the argument.

The appeal is taken from the judgment.

The bill of exceptions alleges as error the refusal of the court to allow the declarations of the defendant to the deputy sheriff in endeavoring to procure the arrest of deceased for alleged offences against the wife of defendant, made on the day of the homicide and immediately preceding the same.

And the ruling of the court in refusing to instruct the jury at the request of the defendant that, "If the jury believe from the evidence that the deceased approached the defendant's dwelling at the time

of the fatal affray, with the intent of committing a felony upon the person of the defendant or upon the woman in the dwelling of defendant, whom he claims as his wife and who claimed the protection of the defendant and an asylum in his house, and that the defendant did the killing in order to prevent such felony, then the killing was justifiable and the jury should acquit."

Also in giving the following instructions, to wit:

"If you find from the evidence that the defendant was justified, under the rules of the law given above, in firing the first shot, but that after such shot had been fired by the defendant, the deceased, Hall, retreated and all danger from him was over, and that while deceased was still retreating, and all danger from him being over, the defendant pursued him and fired upon him, thereby inflicting the mortal wound, then the defendant is guilty."

While the law recognizes the right of the husband to protect the person of his wife from assault or personal injury even to the taking of the life of the assailant, still, before this plea can be invoked, it is incumbent upon the defendant to establish two precedent facts to the satisfaction of the jury, to wit: First—That the relation of husband and wife actually existed between the defendant and the person against whom the assault was threatened or made; Second—that an assault was actually being made or attempted against the wife of the husband, at the time the homicide was committed, and that in the judgment of a reasonable person the killing of the deceased was necessary at the time to protect the wife from death or great bodily harm.

The appellant also set out in his brief certain assignments of error in admitting and rejecting testimony on the trial which do not appear in the bill of exceptions, and therefore cannot be considered.

The defendant urges error, in the court refusing to give two instructions as follows:

"When the defendant is a witness in his own behalf as in this case, his evidence is entitled to the same credit as that of any disinterested witness, provided his testimony is sustained and corroborated by other credible and unimpeached evidence; and, also, that the defendant Pierson's testimony was to be weighed like the testimony of the other witnesses in the case, provided it was corroborated by other unimpeached testimony."

In the one case the court is asked to charge the jury as to the credit which they should accord to the witness, and in the other as to the weight they should give to certain testimony.

Either of these charges, if given, would be an invasion by the court of the especial province of the jury, and they were properly refused.

Defendant also claims error in the admission of evidence of the character of the wife of the defendant, not for the purpose of impeachment, but with a view of showing, on the part of the prosecution, that the deceased was upon the premises of defendant at the time of the homicide for purposes other than felonious.

This exception is founded upon an assumption that the woman called Banjo Nell was the wife of defendant. The fact is, that whether she was his wife or not was a matter before the jury on the trial.

At the time this evidence was objected to, the prosecuting attorney stated that he expected to inquire into the pretended marriage which had been testified to on the defense, and also that he expected to show the character of the alleged wife of the defendant, the house she kept, and the right of deceased to be there. We think, for these purposes, the evidence was properly admitted. The object of proving marriage on the part of the defense, was to allow defendant the protection of the law in defending the sanctity of his home; but proof that his house was a house of prostitution, the sanctity of which had been destroyed by the common and public prostitution of his wife, would be competent evidence to rebut the presumption that the deceased was there with a felonious intent.

Error is claimed in the following instruction:

"If the jury believe from the evidence that at the time defendant killed deceased, he the defendant was actuated by a desire so to do in revenge for some real or imagined injury the deceased had inflicted upon the wife of the defendant, if she were his wife, and not in the necessary defence of his (the defendant's) own person, or the person of his wife (if she were his wife), then the defendant is guilty of murder, and the jury should so find."

It is difficult to conceive of any substantial objection to this charge. Revenge is defined to be a malicious injury inflicted in return for an injury. The law does not excuse one who kills another for revenge. This instruction is in accordance with law and properly given.

The remaining exceptions to the instructions involve the same principles which are at issue in the exception to the ruling of the court in rejecting the declarations of defendant at the time he sought the services of deputy sheriff Either, a short time prior to the affray, and the conclusion of the court upon that exception will dispose of the entire case.

The defendant, by his counsel at the trial, excepted to the ruling of the district court excluding the declarations of the defendant made to the witness Either, deputy sheriff, when applying to such deputy sheriff to arrest Hall, the deceased, for alleged acts and intentions in regard to the woman called Banjo Nell, and her personal security in the house claimed by the defendant as his own. His application is shown by the testimony of Either to have been made by the defendant on the day of and but a short time before the killing. And such refusal is alleged as error.

Declarations of a defendant, in his own favor, are *prima facie* inadmissible, and if the declarations and statements of the defendant made when trying to procure the arrest of Hall were admissible at all, it must be on the ground that they were part of the *res gestae* and as tending to show the condition of the defendant's mind at the

time of firing the fatal shot. If defendant had killed Hall with the first shot fired by him at or near the door of the cabin, evidence of his declarations made concerning Hall a few minutes before, accompanying his request to the officer, might have been properly admitted as tending to indicate the state of defendant's mind, for the purpose of enabling the jury to fix the degree of the crime, but the evidence clearly shows that the first shot did not strike the person of Hall, and that the fatal shot was fired by the defendant while Hall was running and endeavoring to escape, and when all appearance of danger either to the defendant himself, his habitation, or to any person residing or being therein, was past and over, if it had ever existed. There is no disputing the evidence on this point, for there is no conflict.

Under these circumstances, when Hall had succeeded in wholly withdrawing himself from the immediate vicinity of the house, and that so palpably as to manifest his good faith and to remove any just apprehension of danger from the defendant's mind, there can be nothing to mitigate, excuse or justify the killing.

The judgment of the court below is therefore affirmed, and the cause remanded to the second district court in and for Alturas county, with directions to fix anew the time for executing its judgment.

PRICKETT, J., concurred.

BUCK, J., dissenting: While I concur in most of the opinion as read by the court, I am compelled to dissent from so much thereof as refers to the refusal of the court to admit the declarations of defendant at the time he called upon the deputy sheriff for protection, a short time prior to the homicide. The record shows that defendant did not ask protection for himself, but for his habitation. Under section 25, p. 324, Revised Laws of Idaho, a person has at least as much, and possibly more, protection in law in defending his property as he has in the protection of his person.

The evidence admitted prior to the offer to prove the declarations referred to tended to show that the deceased Hall had, on several occasions prior to the homicide, during the three or four months prior thereto, been in the premises of defendant, overthrown the stove, broken the door, discharged his revolver, and done other acts of violence. One of these occasions had been four or five days prior to the shooting and the last one on the day of the shooting, but just how long before does not appear. The sheriff or deputy had frequently been to the house to quiet the disturbance, had ejected the deceased, and deceased had violated his promise not to return to the premises. Within a short time before the homicide defendant had returned to his house, or his alleged house, found the stove overthrown, his wife, or his alleged wife, beaten; within ten or fifteen minutes prior to the homicide he had sent for a physician, and he himself had gone to the sheriff Either and asked protection for his property. The doctor arrived soon after his return. Dr. Patterson testifies that defendant seemed agitated

about something—seemed somewhat exercised. This was from three to five minutes prior to the shooting.

Our statutes, page 323, section 17, provides that to constitute murder in the first degree there must be deliberation and premeditation. The doctrine of the *resgestue*, as stated by Bishop C. P., section 1086, is that declarations are competent whenever near enough to the act either before or after to be probably prompted by the same motive. The act of going to the sheriff and seeking protection from an officer of the law would seem to be prompted by the same motive as sending for the physician, and the same alleged motive of committing the homicide—that is, the protection of his property.

The whole transaction occurred within a half hour, and it is claimed that the declarations offered in evidence were not more than ten or fifteen minutes prior to the shooting. The objection to such declarations is that they are self-serving, and may have been made for the occasion. But in the case at bar the condition of the house and the bruising of the wife, or alleged wife, were facts existing outside of the defendant's co-operation. In sending for a physician and in going for a peace officer he acted as any good citizen would act, and it is hard to presume fraud upon a defendant when all his acts may be accounted for in the same manner that we would account for the same acts by any other person.

I cannot avoid the conclusion that his going for the sheriff was so connected with the protection of his property as to form a part of the *resgestae*, and the act, with the accompanying declarations, should have been admitted, not to justify the homicide, but as bearing upon the question of deliberation and premeditation necessary to constitute murder in the first degree: State v. Mack, 47 Wis. 271; State v. Kane, 50 Mo. 358.

SUPREME COURT OF OREGON.

SMITH v. SHERWIN.

Filed March 11, 1884.

WIFE'S LIABILITY FOR GOODS SOLD FOR FAMILY USE.—A wife cannot be held liable, under section 10 of the act of 1878, in an ordinary action for goods sold and delivered, when such goods were sold upon the order of the husband, although the same were devoted to family use.

APPEAL from a judgment of the circuit court for Multnomah county. The opinion states the facts.

A. H. Tanner for the appellant.

Seurs and *McGuin* for the respondent.

WATSON, C. J. The complaint in this case charges the sale and delivery of goods, wares, and merchandise to the respondent at her special instance and request, and her promise to pay their reasonable value. The answer contains simply denials of the material allegations in the complaint.

Some evidence tending to show th
which the action was brought, were d
her husband Joseph Sherwin, since
for family use, was admitted on the t

The appellant asked the court to ins
respondent would be liable in this a
family use, although delivered on the

The court refused to so instruct th
to find a verdict against the responde
goods, or some portion of them, had

The jury found for the responder
upon the action of the court below
tions. This action was apparently fo
of 1878, which provides: "Contrac
liabilities incurred, and the same enf
same extent and in the same man
Sess. L. 1878. Section 10 of the sa
both husband and wife chargeable wi
nothing in the complaint in the pres
the liability thus created by positiv
enforced.

The complaint in this instance d
would make the respondent liable u
and we cannot regard the action as f

It is claimed on behalf of the app
estopped from claiming the instructi
failure to object to the evidence tend
family use at the time it was offered.

There was no issue to which it w
stood, and no attempt was made
record shows, to obtain leave to am

It was still in the power of the c
have allowed such an amendment:
course taken by the lower court, w
jury, was entirely proper: Rogers v.

The judgment is affirmed.

WATSON ET AL. v. BROOKS ET AL.

Filed March 11, 1884.

SALE OF REAL ESTATE—COMMISSIONERS—TIME WHEN ESSENCE OF CONTRACT.—The respondents authorized the appellants in writing to sell certain real and personal property for them at a given price and within a specified time. On the last day of such time the appellants produced as a purchaser one who professed to be able to pay the price agreed upon, and willing to do so if the respondents would allow him a reasonable time to examine the title to the property. This the respondents refused, but tendered him a deed for the property, which he refused to accept, for want of an opportunity to make such examination. *Held*, that the appellants were not entitled to the stipulated commissions; that time was of the essence of the contract for the sale; that a reasonable time for the examination of title could not be implied where the limit for acceptance was definitely fixed by the terms of the offer; that to entitle them to commissions the appellants should have produced a purchaser both able and willing to consummate the purchase within the stipulated time.

APPEAL from a judgment of the circuit court for Multnomah county. The opinion states the facts.

Effinger & Bourne, for the appellants.

Williams, Hill & Thompson, and *P. L. Willis*, for the respondents.

WATSON, C. J. A brief statement of the facts, without reference to the pleadings, will sufficiently disclose the important question to be passed upon by this court.

On July 27, 1881, the respondents, Brooks and Dekum, duly authorized the appellants, W. P. Watson and son, real estate agents, to sell certain personal and real property situated at The Dalles, for not less than forty-seven thousand five hundred dollars net cash to them, the said agents to have as commissions all beyond said sum. The time given was until August 25, 1881. This authority and the extension of time are both in writing.

The other appellant, Clark, claims by assignment from W. P. Watson & Son.

On the last day given by extension, the appellants produced one Henry D. Green as a purchaser of the property, upon the terms as to price specified in such written authority, at Portland, Oregon. Green professed to be both able to pay the price agreed upon—fifty thousand dollars—and willing to do so if the respondents would allow him a reasonable time to examine the title to the property upon the county records of Wasco county, at The Dalles, so that he might be advised as to whether the respondents could convey a perfect title thereto. This the respondents refused to accede to but tendered him a deed for the property, which he refused to accept for want of an opportunity to make such an examination without the allowance of the additional time asked for, for the purpose.

No question is made here as to the sufficiency of the respondents title at that time.

Upon this state of the facts, which are taken as true for the purposes of a decision in the case, did the appellants become entitled to the stipulated commission. It seems plain to us that they did not. Granting that their contract only bound them to find a purchaser both able and willing to take the property and pay for it, and present him to the respondents within the time specified, did they per-

form such obligation on their part? They certainly did not. Their alleged purchaser, Green, was not willing to become bound finally as a purchaser within the time, and actually refused to so bind himself.

He entered into no contract with the respondents, and made no offer to do so. Time, it seems to us, was the very essence of the engagement between the parties.

A reasonable time for the examination of the title to property offered for sale cannot be implied in a case like the present, where the limit for acceptance is definitely fixed and settled by the terms of the offer itself. The appellants were bound to have produced a purchaser not only able but willing to consummate the purchase, within the stipulated time, to meet their own obligation and entitle themselves to the commission.

It was for them to furnish the party desiring to make the purchase such opportunity for examining the title as he might require within the time allowed to them by the owners for effecting a sale. Neither they nor the party desiring to purchase could claim a further extension of time for the purpose as a matter of legal right. The facts in the case show that they did not perform their part of the agreement with the respondents and that there was no waiver on the part of the latter of their right to a strict and literal performance.

If the position which the appellants are compelled to take to sustain their action be tenable, then every proposition to sell real property by a specified day may be kept open against the will of the party making it after the day has passed, for an indefinite period, to enable parties desiring to purchase to examine the title and finally determine whether to purchase or not, and without being under any legal obligations to do so, no matter what the result of such examination may be.

The law decisive of the point, and with it the entire case, must be regarded strictly elementary.

The appellants never performed their agreement at all, and the respondents have nowhere waived their right to such performance, nor prevented the appellants from fully complying with their engagement.

It would be idle to consider whether there could be any legal claim for commissions under such circumstances.

The judgment of the circuit court is clearly right, and should be affirmed.

Judgment affirmed.

WALDO, J., did not sit in this case.

TAYLOR v. JENKINS.

Filed March 11, 1884.

JURISDICTION OF JUSTICE'S COURT—SERVICE OF SUMMONS.—A justice's court has jurisdiction, without regard to the residence of the parties, when personal service of the summons is made on the defendant in any precinct in the county, although such precinct is not the one in which the action is brought. Such service may be made by the constable of the precinct in which the action is brought.

APPEAL from a judgment of the circuit court for Coos county. The opinion states the facts.

William R. Willis, for the appellant.

S. H. Hagard, for the respondent.

THE COURT. This appeal is from a judgment of the circuit court annulling a judgment of the justice's court and directing restitution in a proceeding upon a writ of review.

The action in which the vacated judgment was rendered was commenced in Coquelle city precinct, but the constable's return simply shows personal service of the summons in the county.

There is nothing in the record showing the residence of either party to have been in the precinct where the action was begun.

Judgment was rendered on default. The only important questions for this court to pass upon arise from these facts.

Applying the well settled rule with regard to the records of inferior courts and the questions presented are:

1. Whether a justice's court without regard to the residence of the parties to an action commenced in it, acquires jurisdiction to render judgment by personal service of the summons on the defendant in any other precinct in the county than that in which the action is brought?

2. Whether service of the summons in such action by the constable of the precinct in which such court is holden in any other precinct in the county, is valid?

The views expressed in the opinion of this court in Craig v. Mosier, 2 Or. 323, and Stoper and Kelso v. Cary, 9 Or. 511, if adopted here would require each of these questions to be answered in the affirmative. But in neither case were these points directly involved and consequently neither has any binding force as a precedent.

The views so expressed, however, appear to be entirely sound. The decision of the qustions presented by the record here must be determined by the construction of section 883 of the civil code, and section 9 of the justice's code.

Section 883 had been amended when this action was begun. The changes thus made in the section as originally enacted are extremely significant, and the intention of the legislature very clearly expressed. Under the original section the justice's court had jurisdiction where the defendants, or either of them, resided in the precinct where the action was brought: Civil Code 1864.

But, under the section as amended, jurisdiction exists where either party resides in the precinct where the action is commenced, or the

defendant is a non-resident, or where personal service of the summons is obtained in any precinct in the county: Civil Code, 1872. The general purpose to enlarge the jurisdiction is apparent throughout the amendment, and the language denoting the enlargement in the last mentioned case is quite clear and explicit.

There is no rule of construction which would justify a restricted interpretation of the general terms in which the jurisdiction is conferred, and no good reason is apparent for not allowing them a fair and full operation.

Section 9 of the justice's code authorizes the service of a summons from a justice's court by the constable of the precinct in which the court is held.

The foregoing observations equally apply here. The power conferred is general and without any express limitation, and no ground for implying any can be perceived.

But the power to serve generally must be construed as coextensive with the jurisdiction of the court acquired by such service itself: Crocker on Sheriffs, 1019; Wells v. Kenedy, 1 John. 502; Gurnsey v. Lovell, 9 Wen. 322; People v. Gary, 6 Cow. 644.

This court holds, therefore, that the record of the justice's court showed jurisdiction and a valid judgment. The judgment of the circuit court should be reversed.

SOLOMON *v.* BUSHNELL.

Filed March 15, 1884.

WARE-HOUSEMAN'S RECEIPT, TRANSFER OF.—In the absence of statutory enactment a warehouseman's receipt is not a negotiable instrument, and an assignment thereof operates merely as a transfer of the property deposited, and passes no better title to the purchaser than the vendor had.

APPEAL from a judgment of the circuit court for Lane county. The opinion states the facts.

George B. Dorris, for the appellant.

George S. Washburne and *Strahan & Bilgen*, for the respondent.

LORD, J. This was an action of replevin, brought for the possession of one thousand bushels of wheat, or its value, if delivery could not be had, upon a warehouse receipt given by the defendant to one Skye Meek, and by him transferred to the plaintiff.

Sufficient for the purposes of this case that the facts are that Skye Meek, a tenant of Samuel Meek, delivered to the defendant, at his warehouse for storage, twenty-three hundred and eighteen bushels of wheat, for which he received from the defendant three warehouse receipts. Two of these receipts, viz., for six hundred bushels and one thousand bushels of wheat, were issued in the name of Skye Meek, and the other, viz., for seven hundred and eighteen bushels of wheat, was issued in the name of S. Meek. Of the twenty-three hundred and eighteen bushels of wheat deposited for storage, Skye

Meek was entitled to one-half of that amount as the tenant of Samuel Meek, to whom the other half belonged; but of the respective interests of these parties in the wheat, the defendant had no knowledge at the time such wheat receipts were issued. Skye Meek transferred these receipts to the plaintiff, who purchased them of him in good faith, and for value, and also gave notice to the defendant of his purchase of the same when done; and upon which receipts the defendant delivered to the plaintiff thirteen hundred and ninety-four bushels of the wheat thus stored; but the delivery of the same to the plaintiff was not made under any particular receipt or receipts, nor were any of the receipts delivered up to the defendant, but were and are still held and retained by the plaintiff.

Prior to the demand of the plaintiff for the wheat mentioned in the receipt for one thousand bushels, and before the commencement of this action for the same, Samuel Meek had demanded of the defendant his half of the wheat stored (one thousand one hundred and fifty-nine bushels), and the defendant delivered to him nine hundred and twenty-four bushels, being the balance in his possession. Upon this state of facts, substantially, the action was tried before the court, without the intervention of a jury, and a judgment was rendered against the plaintiff and in favor the defendant for his costs and disbursements.

The only real or important question presented by this record is as to the negotiability of warehouse receipts. In the court below, as well as here, the theory upon which the plaintiff maintained his action was that a warehouse receipt is negotiable, and that, consequently, it is immaterial whether Skye Meek owned the wheat for which the receipt called, the transfer of the wheat receipt gave him the right to the wheat.

At the outset, it must be premised that there is no statute of this state which makes such receipts negotiable, and in the absence of such legislation warehouse receipts are not negotiable instruments in the commercial sense, so as to bind the maker to the assignee in all cases.

The holder of such a receipt takes no better title, nor occupies any more advantageous position than if the goods themselves were held by him. A receipt given by a warehouseman for property placed in his possession for storage is not, in a technical sense, like a bill of exchange, a negotiable instrument, but it merely stands in the place of the property it represents, and a delivery of the receipt has the same effect in transferring the title to the property as the delivery of the property. In Burton v. Curyea, 40 Ill. 327, the court say: "The principle applied in all cases is that the delivery of warehouse receipts is a symbolic delivery of the property itself; that it has the same effect as the delivery, and can have no greater, and that a transfer of a warehouse receipt by the person in possession of it gives no higher title than would the transfer of the property by the same person." In Hale et al. v. Milwaukee Dock, 29 Wis. 485, it is held that a warehouse receipt is negotiable only to the

same extent and for the same purpose as a bill of lading or carrier's receipt. The indorsement or delivery of it does not convey the contract itself, but only the property represented by it, and it becomes the mere evidence of the title of the holder in such property.

These cases ably and exhaustively review the authorities upon this subject, and the analogies of law as applied to instruments of similar purport, and the conclusion to be deduced from them, and which is decisive of this case, is that the transfer of a wheat receipt issued by a warehouseman is simply in effect a transfer of the wheat, or operates as a symbolical delivery equivalent in the then situation of the property to the delivery of the property itself, and passes no better title to the purchaser than a delivery of the wheat itself: Lickbarrow v. Mason, 1 Smith L. C. (7 Am. ed.), 1879; Second Nat. Bank v. Wolbridge, 19 Ohio St. 419; Insurance Co. v. Kiger, 103 U. S. R. 356.

The judgment of the court below is affirmed.

WATSON, C. J., concurred.

JONES v. KEARNS.

Filed March 17, 1884.

DECLARATIONS OF AGENT—HEARSAY EVIDENCE.—Where issue is joined as to the price for which certain flour was sold, evidence obtained by the party making the sale, from the declarations of his agent, is inadmissible in his own behalf. Such evidence is hearsay.

APPEAL from a judgment of the circuit court for Marion county. The opinion states the facts.

George K. Sheil and *Bonham & Ramsey*, for the appellant.

J. A. Stratton, for the respondent.

WATSON, C. J. The respondent, Jones, brought this action in the court below, to recover the amount of an alleged over payment from the appellant.

The respondent and one George Powell undertook to grind some wheat furnished by the appellant, and market the flour made therefrom, and account to him for the proceeds.

It is alleged in the complaint that they advanced the respondent a sum greater, by the amount for which judgment is asked, than was received from the proceeds of the flour. The respondent has succeeded to Powell's interest in the claim. The only issue made by the pleadings is as to the amount for which the flour was sold.

Upon the trial one Church, a witness for the respondent, testified without being asked by the party calling him, that the flour shipped by the respondent was damaged on the way to Liverpool and that he obtained his information on this subject from the agent of Sibson, Church & Co., who acted for the respondent and Powell at Liverpool and sold the flour there, and that in consequence of such damage the flour sold for less price.

Appellant by his counsel asked the court to exclude the testimony from the consideration of the jury as being incompetent, which was refused and exception taken. This evidence tended to prove the respondent's side of the issue. He claimed to have sold for the less price and the appellant contended that he had sold it for a greater amount. The evidence was therefore material and if improperly admitted it is ground for reversal.

We can preceive no ground upon which its admissibility can be successfully maintained. No such relation between the appellant and the agent of Sibson, Church & Co., is shown as would justify the admission of his declarations against the appellant nor will any presumption in favor of the regularity of the proceedings in the lower court, which we are permitted to indulge in, supply the omission.

The evidence given by Chruch was mere hearsay and should have been excluded. The failure to do so was error on the part of the court below affecting the substantial rights of the appellant.

The objections to the admission of the exhibits "A," "B," and "C," are insufficient in the present state of the bill of exceptions to raise the points relied on to secure a reversal.

But for the error in refusing to exclude the testimony of Church the judgment is reversed and a new trial ordered.

OREGON RAILWAY COMPANY v. BRIDWELL, ET AL.

Filed March 18, 1884.

ACTION FOR CONDEMNATION OF LAND—FORM OF VERDICT.—In an action for the condemnation of land for the use of a railroad a verdict is sufficient in form which finds, in effect, that the defendants are entitled to damages in the sum named therein.

THE SAME—FORM OF JUDGMENT.—In such action no judgment *in personam* against the plaintiff can be rendered. The judgment should appropriate the right of way to the plaintiff's use after payment of the damages assessed by the jury.

APPEAL from a judgment of the circuit court. The opinion states the facts.

Daly & Butler, for the appellant.

Truitt & Johns, for the respondent.

WATSON, C. J. This is an action under the statute for condemning a right of way for a railroad.

The necessity for the right of way and the damage resulting from its establishment were the only issues submitted to the jury. The jury found for the defendants in the sum of two thousand seven hundred dollars, and a judgment thereon in their favor was entered in the common form for the recovery of the sum found for them by the verdict. The plaintiff, the railroad company, appeals, and assigns for error:

1. The insufficiency of the virdict to support any judgment.
2. The improper form of the judgment actually entered.

The verdict finds in effect that the respondents are entitled to damages in the sum named therein.

This finding necessarily includes the determination of the issue as to the right of way being necessary to the appellants as well as the issue as to the amount of the respondents damages.

The respondents were not entitled to any damages unless the appellant was entitled to have the right of way condemned to its use, and finding the former necessarily included a determination of the latter: White v. Bailey, 10 Mich. 155.

The judgment entered upon the verdict is not, however, in proper form. No judgment *in personam* against the appellant was permissible. The only judgment the court was authorized to render was one appropriating the right of way to the appellants use after payment of the damages assessed by the jury to the respondents: Oregonian Ry. Co. v. Hill, 9 Or. 377.

It is not necessary however, to disturb the verdict. The error lies in the form of the judgment alone. The judgment must be reversed with directions to the court below to proceed upon the verdict in conformity with the views herein expressed.

Judgment reversed.

GAMMONS, Assignee, etc., *v.* HOLMAN ET AL.

Filed March 18, 1884.

A PAROL TRANSFER OF GOODS TO ARRIVE, AS SECURITY FOR A PRE-EXISTING INDEBTEDNESS and for advances subsequently to be made, is valid as against the assignee for the benefit of the creditors of the transferor, although actual possession of such goods is not obtained by the pledgee until after the assignment for the benefit of creditors.

AN ASSIGNEE FOR THE BENEFIT OF CREDITORS ACQUIRES ONLY SUCH RIGHTS in the property assigned as his assignor had at the date of the assignment.

APPEAL from a judgment of the circuit court for Multnomah county. The opinion states the facts.

Fred. R. & Thomas N. Strong, for the appellant.

Thayer & Williams, for the respondent.

WATSON, C. J. The respondents were draymen engaged in business at Portland, Oregon, under the firm name of Holman & Co. The appellant's assignor, Klingel, was dealing in drugs, stationery, etc., at the same place.

The latter became indebted to the former for drayage and money advanced for freight upon goods consigned to him, but received by them and delivered to him at his place of business, to the amount of several hundred dollars.

Finally, sometime prior to April 19, 1882, the parties entered into a parol agreement by which the respondents were to advance freight upon twenty-three packages, at the time on board the steamer Oregon bound for Portland, and consigned to Klingel at that place, and take and receive such packages into their possession upon their arrival, and hold the same as security for the payment of all his indebtedness to them, with power to sell in case of his failure to pay off such indebtedness.

The respondents made the additional advances thus stipulated on said nineteenth of April, 1882, and received possession of the goods on the arrival of the steamer three days after.

In the meantime, on April 20, 1882, Klingel executed an assignment for the benefit of all his creditors, covering all his property, to the appellant. The appellant afterwards brought this action as such assignee to recover the value of the property, alleging its conversion by the respondents.

The important question arising upon the record before us of the proceedings had in the case in the lower court, is whether the respondents acquired any right to the possession and disposal of the property, as against the appellant, by virtue of their agreement with Klingel and their act of taking possession under it?

Their agreement with Klingel was a valid one beyond question, and had no assignment been made by him their right to retain the property or dispose of it for non-payment of their claim against him, after obtaining possession, could not be disputed: Parshall *et al.* v. Eggert, 54 N. Y. 18.

But we are unable to discover wherein the rights of the assignee with relation to the property in such cases are either greater or different than previously belonged to the assignor.

He takes the legal title, nothing more, and acquires just such rights in the property as his assignor had and none other.

There is nothing in our assignment act indicating any such difference, and it certainly cannot be sustained on common law principles: Sess. L. 1878; Lempriere v. Pasley, 2 T. R. 485. This case indeed is directly in point and decisive of the one under consideration.

The judgment of the circuit court must be affirmed.

NORTHERN PACIFIC TERMINAL CO. v. LOWENBERG, ET AL.

Filed March 18, 1884.

AN UNDERTAKING ON APPEAL MUST BE FILED WITHIN TEN DAYS from the time of the service of the notice of appeal. If filed on the eleventh day, the appeal will be dismissed.

THE ASSIGNMENT OF ERRORS IN A NOTICE OF APPEAL must be specific. It is not sufficient to state generally, that the errors relied on consisted in admitting or excluding testimony as shown by the bill of exceptions.

APPEAL from a judgment of the circuit court for Multnomah county. The opinion states the facts.

Fechheimer & Ach, for the appellant.

Joseph Simon, for the respondent.

WATSON, C. J. This is a motion to dismiss the appeal upon the grounds:

1. The notice of appeal was not served and filed in the lower court within the time allowed by the statute providing the mode of taking appeals to this court.

2. The undertaking for the appeal was not given within the period prescribed by such statute.

3. There is no assignment of errors in the notice of appeal.

The transcript shows that the judgment attempted to be brought here for review, was entered August 15, 1883, and that the notice of appeal was served on February 14, 1884, but not filed in the lower court until the day following.

The notice of appeal, however, describes the judgment as having been made and entered August 14, 1883, but the description given in the notice is otherwise sufficient to fully identify the judgment and demonstrate the mistake as to the date of its entry.

The undertaking appears not to have been filed until February 25, 1884.

The only assignments of error in the notice of appeal, are that the court below erred:

1. In admitting certain testimony as is fully stated in the bill of exceptions herein filed.

2. In excluding certain testimony as is fully stated in said bill of exceptions.

The statute requires the undertaking for appeal to be filed with the clerk of the court, from whose decision the appeal is sought, within ten days from the service of the notice: Civil Code 527.

It is plain that this provision was not complied with in this instance. The ten days expired on February 24, 1884, while the undertaking was not filed until the day after. And the objection to the sufficiency of the assignments of error is also well founded.

The particular errors relied upon must be specified. This has so often been ruled by this court that no further examination of the principle seems necessary: State of Oregon v. McKinnon, 8 Or. 485.

It is clearly not sufficient to assign error generally in admitting or excluding testimony, as shown by the bill of exceptions.

The first ground stated in the motion to dismiss is obviated by an inspection of the record itself.

From that the service and filing of the notice of appeal appears to have taken place within the time prescribed by the statute.

But upon both the second and third grounds the motion to dismiss must be sustained.

The appeal is dismissed.

MCGUIRE ET AL. v. LOGUS ET AL.

Filed March 26, 1884.

MECHANICS' LIEN.—Evidence held sufficient to sustain the findings.

APPEAL from a judgment of the circuit court for Multnomah county. The opinion states the facts.

W. T. Burney, for the appellants.

W. H. Adams, for the respondents.

LORD, J. This is a suit brought to enforce a lien under the provisions of the act of the legislature of 1874, entitled, "An act to provide for liens of mechanics, laborers, material-men and others, and prescribing the manner of their enforcement." The plaintiffs, H. D. & H. P. McGuire, claim a lien as sub-contractors for painting in and about the construction of a building by defendant, Joseph Monroe, original contractor for defendant Charles Logus, the owner of such building.

The objection is that the plaintiffs failed to notify the owners of the building of the nature and extent of their claim until after the building had been completed and accepted according to the terms of the contract, and the last payment had become due for the construction thereof.

The court below found that the building was completed and accepted on the eighteenth day of July, 1881, and rendered judgment for the defendants.

The question here is simply one of fact. Without going into details it is sufficient to say that we have examined the testimony and reached the conclusion therefrom that the judgment must be affirmed.

GIBBS v. DAVIS.

Filed March 26, 1884

A DEMAND FOR PAYMENT IS NOT NECESSARY TO THE STATEMENT of a cause of action by an attorney to recover the reasonable worth of his services.

APPEAL from a judgment of the circuit court. The opinion states the facts.

W. W. Gibbs, for the appellant.

W. T. Burney, for the respondent.

THE COURT. A complaint alleging the retainer of the plaintiff as an attorney and counsellor at law, a promise by the defendant to pay the reasonable worth of the plaintiff's services, the rendering of certain services under such retainer, the subsequent discharge of the plaintiff, and the reasonable worth of the services rendered, states a good cause of action. A demand of payment in such a case in not necessary.

Judgment reversed.

SUPREME COURT OF CALIFORNIA.

No. 7,595.

NEVADA BANK OF SAN FRANCISCO *v.* STEINMETZ, Treasurer, etc.

In Bank. Filed May 6, 1884.

NEW TRIAL—WRIT OF ERROR—SUPERSEDEAS.—The pendency of a motion for a new trial operates as a postponement of the time for filing a writ of error and bond for the removal of a cause to the supreme court of the United States, until the disposition of such motion. The filing of such writ and bond within sixty days after the disposition of the motion for a new trial will operate as a supersedeas, although they were not filed within sixty days after the rendition of the judgment complained of.

MOTION for the issuance of a writ of mandate. The opinion states the facts.

McAllister & Bergin, for the plaintiff.

Skirm & Storey, for the defendant.

MYRICK, J. This is a motion by the plaintiff that a writ of mandate issue according to the judgment of this court.

On the 17th day of November, 1882, this court rendered judgment in favor of plaintiff that it was entitled to a writ of mandate as prayed for. A petition for rehearing was denied December 16, 1882. The defendant moved for a new trial, which was denied November 27, 1883. A writ of error, for the removal of the cause to the supreme court of the United States was allowed and filed January 23, 1884, and on the same day a bond, approved by the Chief Justice of this court, was filed.

It thus appears that the writ of error and bond were not filed within sixty days after the judgment awarding the writ of mandate, but were filed within sixty days after the order denying the motion for a new trial. The point for determination is, whether the writ of error and bond operates as a supersedeas. Section 1,007, Revised Statutes, United States, requires that the writ and bond, to operate as a supersedeas, must be lodged in the clerk's office, where the record remains, within sixty days after the rendering of the judgment complained of.

We are of the opinion that, for the purposes of the present motion, the motion for a new trial operated as a postponement of the time for filing the writ of error and bond until the disposition of that motion and, as they were filed within sixty days after such disposition, a stay of proceedings on the judgment was effected.

The motion is denied.

MORRISON, C. J., and MCKEE, J., concurred.

THORNTON, J. I concur in the order.

ROSS, J., and SHARPSTEIN, J., dissenting. A supersedeas is a statutory remedy, and can only be obtained by a compliance with all the required conditions. By the express language of the act of congress, in order to obtain such supersedeas, a copy of the writ of error must be lodged for the adverse party in the clerk's office, where the record remains, within sixty days, Sundays exclusive,

after the rendering of the judgment complained of, and giving the security required by law. In the present case it is not claimed that this was done. Said the court in Sage v. Central R. R. Co. 3 Otto. 417. "Time is an essential element in the proceeding, and one which neither the court nor the judges can disregard. If a delay beyond the time limited occurs, the right to the remedy is gone, and the successful party holds his judgment or decree freed and discharged from this means of staying proceedings for its collection or enforcement."

The matter being regulated by the statutes of the United States, we are unable to see what the proceedings on motion for a new trial in the state court have to do with it. In our opinion, the petitioner is entitled to the writ adjudged him.

No. 10,964.

PEOPLE v. SWAFFORD.

Department One. Filed May 8, 1884.

PUBLIC TRIAL—EXCLUSION FROM COURT-ROOM.—An order in a criminal prosecution excluding all persons from the court-room, except those connected with the trial, in the absence of a showing to the contrary, will be presumed to have been assented to by the defendant. The phrase "public trial," in the constitutional provision guaranteeing to every one accused of crime, the right to a public trial is used in opposition to a secret trial. It does not mean that every person who sees fit shall in all cases be permitted to attend criminal trials.

APPEAL from a judgment of the superior court for Tehama county, entered in favor of the plaintiff. The opinion states the facts.

Gale & Hitchcock, for the appellant.

Attorney-General, for the respondent.

The COURT. It is contended by appellant that the court had no power to order that all persons be excluded from the court-room, except the judge, jurors, witnesses, and persons connected with the case.

The constitution of the state provides that every person accused of crime shall have the right to a public trial: Const. Art. 1 Sec. 13.

Non constat, but defendant, who was charged with abducting a chaste female, under age, for purposes of prostitution, assented to or demanded the order.

It is said on behalf of appellant: First—It cannot be presumed that defendant waived a constitutional right by remaining silent; second, the right to a public trial cannot be waived, because the court below had no jurisdiction to try defendant otherwise than publicly.

As to the first point, there is no bill of exceptions in the transcript, and in the absence of evidence as to what took place when the order was made, we cannot presume that defendant remained silent, but, on the contrary, in support of the action of the court below, must presume that defendant assented to the order, if his assent was necessary to its validity.

With respect to the second point, the order does not prove that defendant was denied a public trial. The word *public* is used in the clause of the constitution in opposition to secret. As said by Judge Cooley, it is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions, and the requirement is fairly observed, if without partiality or favoritism, a reasonable portion of the public is suffered to attend, notwithstanding that those persons whose presence would be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether": Cons. Lim. Side, p. 312.

Judgment affirmed.

No. 9,241.

BROWN ET AL., *v.* GREENE ET AL.

Department One. Filed May 8, 1884.

AN APPEAL FROM AN ORDER DENYING A NEW TRIAL MUST BE TAKEN within sixty days after the entry thereof.

SERVICE OF NOTICE OF APPEAL—FILING UNDERTAKING.—An undertaking on appeal must be filed within five days after service of the notice of appeal. When such service is by mail, the undertaking must be filed within five days after the deposit of a copy of the notice in the post office. Section 1013 of the code of civil procedure, extending the time in which acts may be done, in certain cases, has no application to such case.

THE SAME—THE TRANSCRIPT MUST CONTAIN PROOF OF THE SERVICE of the notice of appeal upon the opposite party or his attorney.

Motion to dismiss certain appeals from the superior court for Yolo county. The opinion states the facts.

Flournoy, Mhoon & Thomas, for the appellants.

McKune and *Catlin*, for the respondents.

MCKINSTRY, J. This is a motion to dismiss appeals from the judgment and from an order denying a motion for a new trial.

The judgment was entered December 6, 1882, and the order denying a new trial April 11, 1883.

The notice of appeal was filed December 3, 1883, more than sixty days after the order was made and entered. The appeal from the order must be dismissed. (C. C. P. 939.)

A notice of appeal from the judgment was filed within one year after the entry of the judgment. But the transcript contains no evidence that a similar notice was served upon the adverse party or his attorney. (C. C. P., 940.)

At the foot of the notice of appeals are printed the words and figures, "Service admitted December 3, 1883," but to them is subscribed neither the name of the adverse party nor that of his attorney.

Even if we were authorized to supply the name of the attorney for the adverse party, the appeal must be dismissed, because the undertaking on appeal was not filed until the 11th day of December, 1883, more than five days after service of the notice.

It seems to us very plain that a written statement "service admitted," signed by the attorneys of the respondent, would mean "personal service admitted."

It is contended, however, that the service may have been by mail, (C. C. P., 1,012) and that we should take notice that the attorneys for one of the parties reside in San Francisco, and the attorneys for the other party in Sacramento; that the distance between the two cities is eighty-six miles. Even if all this could be assumed, the admission of service as of the third of December, 1883, would be an admission that the service was made on that day. The service is complete at the time of the deposit of the "similar notice" in the post office: C. C. P., 1,013. And to render an appeal effectual for any purpose the undertaking on appeal must be filed within five days after service of the notice of appeal: C. C. P., 940. On the other hand, if the service were not complete until the expiration of eight days after the copy notice of appeal was deposited in the post office, the presumption would be that the eight days had expired on the third day of December, 1883, the date of the admission of service. But that portion of section 1,013 which, in certain cases, extends the time one day for each twenty-five miles has no application when the question is as to service of notice of *appeal*. After service of the notice of appeal by mail, which, as we have seen, is complete at the time of the deposit in the post office, there is no given number of days within which the *adverse party* may exercise a right or do an act. The adverse party is the party on whom the service is made. There is no reason why the appellant should not file his undertaking on appeal within five days after he has deposited the notice of appeal in the post office. *He* knows when it was deposited. The right of the adverse party to except to the sureties begins to run from the filing of the undertaking, not from service of the notice of appeal: C. C. P., 948. Under section 1,013 the party serving a notice can never be a party adverse to himself.

Appeals dismissed.

ROSS, J., and MCKEE, J., concurred.

No. 10,954.

PEOPLE v. YOUNG.

Department One. Filed May 8, 1884.

BURGLARY—INTENT—INSTRUCTIONS.—The information charged the defendant with burglary in feloniously entering the ticket office of a railroad with intent to commit larceny. *Held*, that an instruction that the defendant could not be convicted unless he entered the building with the intent to commit "some felony," was properly refused, since the information charged an intent to commit larceny.

THE SAME.—One who enters with burglarious intent, a room of a house, enters the house with such intent. Where such room was known as a ticket office, it may be properly described as "a building, to wit., the ticket office."

BURGLARY MAY BE DEFINED IN THE LANGUAGE of the penal code.

A ROOM MAY BE CONSTRUCTED WITHOUT A PARTITION reaching to the ceiling, and the court may so instruct the jury

CERTAIN INSTRUCTIONS REVIEWED AND HELD CORRECT.

APPEAL from a judgment of the superior court for Alameda county, entered upon a verdict convicting the defendant of burglary, and from an order denying him a new trial. The opinion states the facts.

Gibson & Whitmore, for the appellant.
Attorney General, for the respondent.

THE COURT. The information charges a burglary, in that the defendant, and etc., did feloniously, etc., enter "the building, to wit, the ticket office of the Central Pacific Railroad Company, a corporation, etc.," with intent then and therein to commit larceny.

The evidence showed that the outer door of the house at the railway station led into a waiting-room for passengers, and in this room was a door leading into an inner room—the "ticket office"—from which the evidence tended to prove the goods were stolen.

1. The information charged an intent to commit larceny. The court was, therefore, justified in refusing to charge the jury that defendant could not be convicted, unless he entered the building known as the ticket office with intent to commit "some felony." The charge would have been error against defendant, since it would imply that he could be convicted if he entered with intent to commit *any* felony.

2. The court did not err is refusing to charge that if defendant conceived the purpose of stealing after he entered the *waiting-room*, nor in charging that if the ticket office was a room or apartment, and defendant entered it with felonious intent, the jury should find him guilty. One who enters with burglarious intent a room of a house enters the house with such intent: 2 Bish. Cr. L. 97; 2 Whar. 1536, and cases there cited; State v. Scripture, 42 N. H. 485; 4 Black. Com. 226. Here, where the room in a building was known as the ticket office it was properly described as a "building, to wit, the ticket office." If the room was in the house, and the house was a building, a felonious entry into the room was a felonious entry into the building, since burglary consists not of entry alone but of *felonious* entry.

3. The court was asked by defendant to charge: "The position of the room mentioned in the testimony as the ticket office is not a room sufficient to sustain the allegation of the information," etc.

Of course the position of a room is not a room, but the court could not be required so to tell the jury.

4. There was no error in giving the definition of burglary laid down in section 459 of the penal code.

5. The court did not err in charging that to constitute a room the partition between it and the rest of the house need not extend to the ceiling or roof of the house, but that a partition eight or nine feet high from the floor would be a sufficient partition. This was not charging a fact, (the facts were left to the jury), but stating that a room may be constructed without a partition reaching to the ceiling, etc.

6. The charge as to drunkenness was given conditionally, the jury being cautioned that they alone were to determine whether there was evidence on that subject. Besides, there was evidence that the defendant had been drinking before the alleged crime was committed.

7. The jury were properly told that the case must be decided by reference to the evidence bearing upon the issues, and that it was of no consequence whether defendant was married or single, etc.

Judgment and order affirmed.

No. 9,117.

ROUGH v. SIMMONS.

In Bank. Filed May 9, 1884.

ACTION TO QUIET TITLE—ALLEGATIONS OF COMPLAINT.—A complaint to quiet title is sufficient, which alleges ownership in the plaintiff in the land in controversy, and that the defendant claims an estate or interest therein adverse to him, which claim is without right, and that defendant has no estate, right, title or interest.

APPEAL from a judgment of the superior court for Siskiyou county, entered in favor of the defendants. The opinion states the facts.

W. H. H. Hart, for the appellant.

Gillis and *Edgerton*, for the respondent.

THE COURT. The complaint alleges that plaintiff is the owner or in possession of the easterly eleven and forty-two one-hundredths acres of the Colonel Limberger Placer Mine, and that defendant claims an estate or interest therein adverse to the plaintiff, which claim is without right, and that defendant has no estate, right, title or interest in the said eleven and forty-two one-hundredths acres, etc. A general demurrer to the complaint was sustained by the superior court. This was error.

Judgment reversed and cause remanded, with directions to the court below to overrule the defendant's demurrer to the complaint.

No. 9,116.

ROUGH *v.* BOOTH.

In Bank. Filed May 9, 1884.

JUDGMENT REVERSED on authority of Rough v. Simmons, *ante.*

APPEAL from a judgment of the superior court of Siskiyou county entered in favor of the defendant. The facts in this case are similar to those of Rough v. Simmons, *ante.*

W. H. H. Hart, for the appellant.

Gillis and *Edgerton*, for the respondent.

THE COURT. On authority of Rough v. Simmons, No. 9,117, judgment reversed and cause remanded, with direction to the court below to overrule defendant's demurrer to the complaint.

No. 8,350.

BONNET *v.* CITY AND COUNTY OF SAN FRANCISCO.

In Bank. Filed May 10, 1884.

ACCEPTANCE OF STREET.—SIDEWALKS.—ROADWAY.—Under section 21 of the act of 1866 the power of acceptance of a street by the board of supervisors of the city and county of San Francisco is not limited to the roadway, but may include the sidewalk. After the acceptance of a street the expense of repairing the sidewalks thereof must be borne by the city and county.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

William Craig, for the appellant.

C. H. Parker, for the respondent.

MYRICK, J. The plaintiff had a contract for the construction of asphaltum sidewalks on Montgomery street, between Jackson and Pacific streets, in the city and county of San Francisco.

On streets not accepted the expense of constructing and repairing sidewalks is to be borne by property-owners; on accepted streets the expense is to be borne by the city and county. Before the commencement of the proceedings resulting in the contract with plaintiff, the portion of Montgomery street above specified had been accepted.

The argument of appellant's counsel is that when the statute of the state and the ordinance of the board of supervisors speak of "street" they mean "roadway." Section 21 of the act of 1866—statutes 1865–66, p. 550—reads: "When any street or portion of a street has been or shall hereafter be constructed to the satisfaction of the committee on streets, etc., of the board of supervisors, and of the superintendent of public streets, etc., and shall have a brick sewer constructed therein, under such regulations as the said board shall adopt, the same shall be accepted by the board of supervisors, and shall thereafter be improved by the city, etc. * * * Provided, that the board of supervisors shall not accept of any portion of

the street less than the entire width of the roadway, including the curbing and one block in length, or one entire crossing." To hold that the word "street" in the body of the section means "roadway" would make the *proviso* meaningless. When it is said that the board, upon certain conditions, may accept a street, but shall not accept any portion of it less than the entire width of the roadway, it is very plain that the street it is authorized to accept may be wider than the roadway; in other words, that it may include the sidewalks. And we see nothing in the ordinance in question manifesting the intention to limit the acceptance of the street in question to the width of the roadway.

Judgment and order affirmed.

SHARPSTEIN, J., MORRISON, C. J., and ROSS, J., concurred.

No. 7,453

SANTA CRUZ RAILROAD COMPANY *v.* SPRECKLES.

In Bank. Filed May 12, 1884.

ASSESSMENT ON FULLY PAID UP STOCK—DISSENTING OPINION OF THORNTON, J.

Appeal from a judgment of the superior court for Santa Cruz county, entered in favor of the defendant. The facts are stated in the opinion of the majority of the court, reported in 2 West Coast Rep. 752.

C. B. Younger, for the appellant.

Jarboe & Harrison and *Craig*, for the respondent.

THORNTON, J. I dissent: I adhere to the opinion filed in this case on the thirtieth of June, 1882, and I desire to add to it what follows:

The limitation in the first subdivision of section 332, C. C., is not changed by the provisions of section 333 so as to allow a recovery here. The purpose of this latter section is to authorize an assessment when any portion of a previous assessment remained unpaid.

Now that is not the case here. It does not appear that there was any portion of any previous assessment remaining unpaid. The *casus legis* not appearing, it is the same, as far as regards the case under consideration, as if it did not exist.

Conceding, then, that an assessment may be levied in cases of the subscribed capital stock to pay a portion of a previous assessment remaining unpaid, no such state of things appearing herein, the assessment sued on as to this defendant, who has paid for his stock in full, is invalid.

There is no reason to hold that the provisions of section 333, which constitute a limitation on section 332, enlarge in any way the provisions of the last-named section any further than conceded above. I have examined with much care the case of Sullivan v. Triunfo M. Co., reported in 39 Cal. 459. The question herein considered was not made in that case. Certainly it was not raised or

discussed by counsel. No such objection as is here made to the validity of the assessment was made in that case. Nor do I think it was passed on by the court. The act of 1864, under which the assessment under consideration in the case cited was levied, has no provisions similar to those in section 332. The difference between the two systems, viz., that created by the act of 1864, and that created by the civil code, is plainly apparent. The court in the Sullivan case held, substantially, that the act of 1864 repealed the act of 1853, and did away with all the limitations and restrictions in the act of 1853. It left the power to levy assessments without limit, except the restriction on the power to levy one assessment when any portion of a previous assessment remained unpaid.

The decision amounts to this only, that the power of assessment was not limited by the amount of the capital stock by the act of 1864. This may be admitted to be correct under the provisions of the act of 1864, because this act contains no such restrictions as are set forth in section 332, C. C., or the tenth section of the act of 1853, this last section having been repealed by the act of 1864.

To explain my meaning more fully: In the case cited the court remarked as follows: "We express no opinion as to whether the *provisions of the act* are applicable to calls or assessments for subscriptions to the capital stock. The question does not arise in this case, for we infer from the complaint that the stock was issued in the usual mode of mining corporations: that is, the stock was issued to the owners of the mine in proportion to their several interests therein." The point as to which the court expresses no opinion is this, whether the provisions of the act of 1864, in regard to assessments, include assessments for the subscribed capital stock. That act authorizes the "trustees of any corporation" * * * "to levy and collect assessments upon the capital stock thereof, for the purpose of paying the proper and legal expenses of such corporation. The question might arise whether the words "proper and legal expenses of such corporation" included the subscription to the capital stock. This is the question which I understand the court in the case referred to decline to express any opinion on. The remark following the statement that the question did not arise in the case, may be interpreted to mean that the capital stock in that case was fully paid up for the reason given. Concede this to be the meaning, and it only amounts to this, that if the capital stock was fully paid, yet the act authorizes assessments for the purpose of paying the proper and legal expenses of the corporation; the power to levy and collect assessments having under this act no such limit as the full payment for the subscribed capital stock. This limit, in my opinion, is found in section 332, and is not in the act of 1864. I express no opinion as to the question discussed in this opinion, in regard to mining corporations. It is unnecessary to do so, and I therefore forbear to say anything in relation to such corporations.

I am still of opinion that the judgment of the court below is without error and should be affirmed.

McKEE, J., and MYRICK, J., concurred.

WEST COAST REPORTER.

WHOLE No. 22. MAY 29, 1884. VOL. II. No. 14.

RIPARIAN RIGHTS—THE WEST COAST DOCTRINE.

(*Continued.*)

RIPARIAN PROPRIETORS AND RIPARIAN RIGHTS ON PRIVATE STREAMS.

The defendants also requested the trial court to instruct the jury as follows: "The plaintiffs are not in any event entitled to recover damages for the diverting from Mormon channel any waters which were not the natural waters of the Calaveras river, nor for the diverting of any waters in excess of plaintiffs' just and fair proportion of the natural waters of the Calaveras river and Mormon slough. If the jury believe from the evidence that the defendants caused to be turned in and run down the Calaveras river, above Mormon slough, prior to the erection of plaintiffs' dam, and until the first of June, 1877, waters taken from the Mokelumne river; and if the jury further believe from the evidence that the natural waters of the Calaveras river did not run down the river to the head of Mormon slough in sufficient quantity to irrigate plaintiffs' land in the spring of 1877, and after plaintiffs had constructed their dams, then the jury should find for the defendant." The court refused to give these instructions, and the defendants excepted. In regard to these exceptions the supreme court said: "The court did in effect charge all these propositions in giving the following requests asked by defendants: 'Third. In no event were the plaintiffs entitled to the use as riparian proprietors of any water except the water which would naturally flow down the Calaveras river and the Mormon slough, and if the jury believe from the evidence that any water was turned into the Calaveras river above the head of the Mormon slough, at the request of the defendants or any of them, from ditches which drew their water from Mokelumne river, then the plaintiffs cannot recover any damages for being deprived of the use of the water which was so turned into the Calaveras river. Fourth. The plaintiffs had not the legal right to use for the purpose of irrigation all of the natural waters of the Calaveras river which flowed down the Calaveras river and Mormon slough. The other riparian proprietors of land on the Mormon slough had a legal right to use such natural waters equally with plaintiffs. The plaintiffs had no legal

exclusive right to use such natural waters for the purpose of irrigation in excess of their just and fair proportion thereof. Ninth. If the jury believe from the evidence that the defendants, or any of them, caused to be turned into the Calaveras river, above the head of Mormon slough, waters taken from the Mokelumne river, and such waters continued to flow down the Calaveras river from the middle of April until the first of June, 1877, then the plaintiffs cannot recover because the defendants prevented them from using such waters.' "

With respect to other exceptions and objections by the defendants, the supreme court further said: "An exception was reserved to the following instruction asked by the plaintiffs: 'Every riparian owner upon a stream has a right to use, in a reasonable way, the water of said stream for domestic purposes, for the irrigation of his land, or for propelling machinery, if the quantity of water will warrant such use above the amount required for domestic purposes.' As to this, the counsel for defendants said: 'The plaintiffs were entitled to the reasonable use of the natural waters of the Mormon slough. By reasonable use is meant reasonable *quantity* as well as reasonableness in the *manner* of its use. The vice of the instruction is that the right to use the water is qualified by the reasonable *manner* of its use, and not by an unreasonableness in respect to the *quantity* used.' In our judgment, the criticism of the learned counsel is not warranted. It savors of hypercriticism. The instruction as given embraced *quantity* as well as manner. We do not see that any injury was done to the defendants in giving the instruction eight, asked by the plaintiffs. It was in these words: 'In the state of California the right to the use of water becomes fixed after five years' adverse enjoyment of the same.' There was some evidence, in our view, on which such a charge might be predicated. Further, in our opinion, the plaintiffs were entitled to recover if there was a diversion, which seems to have been clearly shown. In fact, the diversion was not denied in the answer, so that the charge objected to was immaterial and did no injury."

We have thus quoted in full every instruction of the trial court, and every portion of the opinion of the supreme court in this case, which directly or indirectly relates to the riparian rights of riparian owners, or to unlawful diversion of water, or to the general question concerning the right to use the water for purposes of irrigation. All the other instructions as reported, and all the remaining portions of the opinion, deal exclusively with the measure of damages in this particular case, how far the plaintiffs were entitled to recover for the value of the crops which they would have raised if their land had been irrigated, and by what evidence that value could be established. In this discussion no allusion whatever is made to riparian rights in general, nor to the gene-

ral right of a riparian proprietor to use the water of the stream for the purpose of irrigating his land.

It is very plain, from the foregoing description and quotations, that the general questions concerning the extent of private riparian rights, and especially concerning the right to use the waters of the stream for irrigation, are not determined by this case, except so far as a doctrine may be regarded as settled, when it is tacitly accepted by both the litigant parties at a trial, and its correctness, therefore, is not questioned before or by the appellate court. The instructions of the trial court, purporting to embody the general rules as to the use of water for irrigation by a private riparian proprietor, were not excepted to by the defendants, and the rules thus laid down were, therefore, assumed to be correct *for this case* by the supreme court on appeal; but such assumption does not *necessarily* establish these rules as correct for all cases,—does not settle them as general rules of the law defining and fixing the rights which belong to private riparian proprietorship. There are other features of this case, as reported, which prevent it from being a final settlement of the important general questions under discussion. In the first place, it does not clearly appear in what relations the two litigant parties, plaintiffs and defendants, were regarded by the court as standing towards each other;—whether they were both regarded as two riparian proprietors upon the same stream, and, therefore, as having equal rights to the use of its waters; or whether the plaintiffs were regarded as riparian proprietors upon one stream,—viz., the Mormon slough,—and the defendants, as appropriating and diverting the water of that stream for the benefit of their land, which was not situated upon its banks. The Calaveras river and the Mormon slough might be regarded as one stream, although divided into two branches, in which case the plaintiffs might be in the position of upper, and the defendants of lower, proprietors on the single stream. The instructions of the trial court seem to have taken this view. On the other hand, the Mormon slough might be regarded as a single stream, and the plaintiffs, as riparian proprietors, upon it, while the defendants were *wrongfully* diverting and appropriating its waters, because they were not proprietors of land upon its banks. The language of the opinion of the supreme court, already quoted,—"Further, in our opinion, the plaintiffs were entitled to recover if there was a diversion,"—tend somewhat to sustain this view, as the one taken by that court.

In the second place, the two instructions of the trial court, which purported to embody the general rules concerning the use of water for irrigation, and which were not substantially objected to by the defendants, will be found, on careful examination, not to be entirely harmonious; in fact, they are susceptible of such a construction as will make

them directly conflicting. In one of these instructions the trial court said: "The plaintiff had not the legal right to use for the purpose of irrigation all of the natural waters of the Calaveras river, which flowed down the Calaveras river and the Mormon slough. The other riparian proprietors of land on the Mormon slough had a legal right to use such natural waters equally with the plaintiffs. The plaintiffs had no legal exclusive right to use such natural waters for the purpose of irrigation in excess of their just and fair proportion thereof." It will be noticed here, in confirmation of what we have already said, that the court does not say "the other riparian proprietors of land on the Mormon slough, *and on the Calaveras river*, had a legal right to use the waters equally with the plaintiffs." It thus fails to show clearly whether the plaintiffs and the defendants were regarded as riparian proprietors on the same stream. But, passing by this criticism, the instruction furnishes a plain, definite rule. It places the rights of all riparian proprietors to use the stream for irrigation upon a perfect equality; no proprietor has any advantage or superior right to use the water for such purpose, by reason of his being located higher up on the stream than others. This rule clearly and unequivocally distinguishes between the use of water for irrigation, and its use for so-called *natural* purposes, viz., domestic purposes and watering of stock. By this rule the right of every riparian proprietor to use the water for irrigation is limited, regulated and controlled by the *equal* right of every other proprietor on the same stream to use its waters for similar purposes.

It will be remembered that the common law doctrines distinguish between certain uses of water called *natural* and all others. It is the settled rule that while a riparian proprietor must use the water in a reasonable manner and to a reasonable amount, he is entitled to take all of the water which is reasonably necessary in manner and amount to supply his *natural* purposes—namely, his domestic purposes and the watering of his stock, even if so much of the water of the stream is thus consumed that there is not a sufficient amount left flowing in its channel to supply the similar uses of the proprietors below him. In this single respect the common law gives a natural superiority of right to a proprietor higher up the stream over one lower down; but the superiority is strictly confined to the natural uses of domestic purposes and watering stock.[1] The real question to be determined is, whether the irrigation of lands is one of these natural uses, standing upon the same footing with domestic uses and the watering of stock. The instruction quoted above most unequivocally answers this question in the negative, and gives one proprietor no preference whatsoever over the other proprietors in the use of the stream for the purpose of irrigation. The second instruction, to which we

[1] See Ferrea v. Knipe, 28 Cal. 341, 344, per Currey, J.

have referred, seems to put irrigation on the same footing with domestic purposes. This instruction was as follows: "Every riparian owner upon a stream has a right to use, in a reasonable way, the water of said stream for domestic purposes, for the irrigation of his land, or for propelling machinery, if the quantity of water will warrant such use above the amount required for domestic purposes." So far as this instruction can be construed as laying down any rule, it plainly seems to place irrigation and domestic purposes upon the same footing, and if so, it is conflicting with the doctrine announced in the other instruction previously quoted. We have thus analyzed these instructions and the rules which they purport to embody, for the purpose of showing that, although tacitly adopted by the supreme court, because not objected to on the trial, they do not furnish any authoritative and final settlement of the questions at issue. The instruction last above quoted is open to the gravest criticism; it mingles up subjects entirely unlike. The use of water for "domestic" purposes, necessarily *consumes* it. And yet, if the manner and amount are reasonable, the proprietor may use and thereby consume all that is reasonably necessary, under the circumstances, even though the natural flow of the stream is thus so diminished that there is not left a supply for the proprietors below. The use of water for irrigation also consumes it. It has been claimed that irrigation is a natural use, and that the right of a proprietor to use and consume water for irrigation is the same in nature and extent as the right to use and consume it for domestic purposes and for the watering of stock.

But, on the other hand, the use of water for propelling machinery does not consume it. The settled doctrines of the common law allow a riparian proprietor to use the water of a stream—the whole stream if needed—as it passes through his land, for the purpose of propelling machinery, provided he returns the water undiminished in quantity and undeteriorated in quality, into the natural channel of the stream before it leaves his own land and enters that of the proprietor next below him. Such a use for propelling machinery, under these limitations, cannot possibly injure the other riparian proprietors either above or below him on the same stream. There is, therefore, no analogy between the use of water for propelling machinery, and its use for domestic purposes, or for irrigation. These various uses are governed by entirely different rules and depend upon entirely different considerations. Our review of this case does not touch upon the decision made by the supreme court. That tribunal could, of course, only deal with the questions presented to it by the record,—the questions raised by the exceptions.

Although this case of Ellis v. Tone, as we have shown by the foregoing examination, is of little value in *settling* the important, general doctrines as to the rights of private riparian proprietors in the law of

California, yet it has a certain *tendency* towards such a settlement. It plainly distinguished between the case of a stream running wholly through public land, and that of a stream bordered by the lands of private owners. Although the cause of action arose in 1877, several years after the civil code took effect, no allusion whatever is made, by the court or the counsel, to the provisions of the code relating to water rights. The title of the code on this subject seems to have been tacitly ignored as inapplicabe to such a case. The argument of the counsel for both parties, as reported, freely cite text books and decisions based upon and representing the common law doctrines, but they do not cite the code. It is probable that the case, as a whole, proceeded upon the assumption that the Calaveras river and the Mormon slough running out of it formed one stream in contemplation of law, and intended to deal with the rights of the two litigant parties as though both were riparian proprietors upon that single stream; in other words, it intended to lay down rules of law applicable to two proprietors in such a condition. In regard to the use of water for irrigation, the decision, as a whole seems to deny the right of any riparian proprietor to use all the amount of water which may be reasonably necessary to irrigate his lands, if by such use the water left flowing down the stream is rendered insufficient for the similar purposes of other riparian proprietors. On the contrary, the case seems to regard the right to use the water of a stream for irrigation, as belonging alike to all the riparian proprietors upon the stream; that each proprietor is entitled to use, for irrigating his lands, only so much of the water of the stream as is in excess over and above the amounts which are requsite to supply the similar purposes and uses of all the other proprietors upon the same stream. In fact, the right of each riparian proprietor upon any particular stream to use its water for irrigation must depend, among other things, upon the size of the stream, the amount and volume of water naturally flowing down its channel, the number of riparian proprietors upon it, the amount or acreage of the land entitled to irrigation held by each of these proprietors, and other similar considerations. Such as it appears to us, is the *tendency* of the decision in Ellis v. Tone, although it cannot, in our opinion, be said that the case authoritatively and finally decides or settles any of these conclusions.

J. N. P.

[TO BE CONTINUED.]

SUPREME COURT OF COLORADO.

CITY OF DENVER v. DUNSMORE.

Filed April 18, 1883.

LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLECTING TO REPAIR HIGHWAYS.—When municipal corporations are invested with exclusive authority and control over the streets and bridges within their corporate limits, with ample power of raising money for their construction, improvement and repair, the duty is imposed upon such corporation, from the nature of the powers granted, to keep such highways in a reasonable safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon them to respond in damages to those injured by a neglect to perform such duty.

THE SAME—THE CITY OF DENVER BEING OBLIGED TO KEEP IN REPAIR the streets and bridges within its corporate limits, is impliedly liable for any special damages suffered in consequence of its neglect so to do.

THE SAME—TO ENTITLE A PLAINTIFF TO A RECOVERY FOR SUCH DAMAGES he must have used reasonable or ordinary care, or such care as is usually exercised, under like circumstances, by persons of ordinary prudence, to avoid the accident. If the plaintiff's own testimony shows that he brought the injury upon himself, by his own carelessness, he must be non-suited; otherwise, the proof of contributory negligence must come from the defendant.

CONTRIBUTORY NEGLIGENCE—CASE IN JUDGMENT.—The appellant had permitted a bridge in one of its principal thoroughfares to become unsafe for the ordinary use to which it was daily subjected, and with full knowledge of its unsafe condition, had failed to either repair it or give any warning of its unsafe condition. While in such condition the plaintiff attempted to cross the bridge with a load of rocks. In so doing the wheel of his wagon crushed through the floor of the bridge, going down to the hub, and while endeavoring to pry it up, by the use of levers and fulcrums, the timbers gave away and the plaintiff fell and broke his leg. According to the plaintiff's testimony, he did not know that the bridge was unsafe, although he knew that it was much worn and would shake when a load of freight was crossing. *Held*, that whether the plaintiff was guilty of contributory negligence in adopting the means used by him in attempting to extricate his wagon, was a question for the jury.

AMOUNT OF DAMAGES TO BE AWARDED IN AN ACTION FOR A PERSONAL INJURY is in the sound discretion of the jury, whose verdict will not be disturbed, unless it appears that they were influenced by prejudice, misapprehension, or by some corrupt or improper consideration.

INTRODUCTION OF EVIDENCE--ORDER OF.—It is not error authorizing a reversal for the trial court, after the defendant has closed, to permit the plaintiff to introduce evidence not in rebuttal, if the defendant makes no effort to contradict the same.

APPEAL from a judgment of the district court for Arapahoe county, entered in favor of the plaintiff. The opinion states the facts.

John L. Jerome, for the appellant.

W. S. Decker and *C. W. Wright*, for the appellee.

BECK, C. J. The principal question raised by the assignment of errors and discussed in the briefs of counsel for both parties is, whether an implied liability rests upon municipal corporations proper under the laws of this state, to keep in repair the streets and bridges within their corporate limits, and whether actions lie against them at the suit of individuals for special damages suffered in consequence of their neglect so to do.

It is conceded that the legislature has not expressly given such right of action either by the general statute, or by the special charter under which the city of Denver was incorporated. The right to maintain such actions for damages therefor, if it exists, depends upon principle and precedent.

Judgment was rendered against the city in the court below, and upon this appeal its counsel says: "In seeking a reversal of this judgment, the reasons urged by appellant may be submitted under two heads:

1. The corporation of the city of Denver is exempt from all liability to individuals for special damages suffered by reason of failure to repair streets or bridges. The functions of the corporation are purely governmental, and the remedy for malfeasance by public officers is by indictment.

2. We rely upon the specific exceptions reserved by appellant in the court below.

Counsel on both sides have discussed the questions involved very fully, and have cited and rely upon as precedents supporting their respective theories, a list of cases extending from an early period in the seventeenth century up to the present time.

The several propositions of counsel for the city upon the first ground for reversal, as we understand them, are substantially as follows:

First. That at common law no action for damages lay against a municipality for negligence in the exercise of its public duties or powers.

Second. The almost universal rule of decision is, that in the absence of statute to that effect, no such liability attaches to *quasi* municipal corporations, such as counties and unincorporated towns.

Third. No such liability is created by any statute of this state, as against either municipal corporations, proper or *quasi* municipal corporations while the powers conferred by charter, in the one case, and by the general law, in the other, respecting the opening and maintenance of highways and the building and repairs of bridges are practically the same in both cases. No such liability therefore exists in either case. Illustrative of the doctrine contended for, counsel for appellant says, if this accident had occurred upon a highway outside the city limits the action could not be maintained against Arapahoe county.

The substance of the whole argument is that the courts which have held municipal corporations liable to individuals for special damages, have done so in violation of common law, principles and precedents, and without assigning any logical reasons why, in absence of an express statute fixing such liability, the same rule of decision should not be applied as in cases of *quasi* corporations, against which it is not pretended that such liability attaches.

Counsel for appellant insists throughout the entire discussion that unless this court can point out a tangible distinction between the powers, privileges and duties of these two classes of corporations, under our statutes, the precedent to be established for this state respecting their liabilities in actions of this character must be the same for both classes.

As to this proposition we are of opinion that the argument of counsel, as well as the authorities cited, furnish much stronger reasons for maintaining the liability of *quasi* corporations, in view of their extended privileges and powers in this country, than for the

rule of non-liability contended for as to municipal corporations proper.

The line of reasoning employed, if pursued to the extent insisted upon, would compel us to decide what may be an open question in this state, and one not presented by the record before us, viz: Whether, under the statutes of this state, a county is liable to an individual for injuries resulting to him or his property from neglect of the county authorities to repair a bridge or highway. It is sufficient to say that we do not consider it either necessary or proper to decide that question in this case.

That *quasi* corporations, such as counties and unincorporated towns and villages, did not incur such liability by the rules of the common law is clear from the decisions of the English courts. It is likewise true that the same rule of decision, with few exceptions, has been followed in this country as to this class of corporations.

The doctrine seems to have been first announced in the court of King's Bench, in 1788, in the case of Russell and others *v.* The Men dwelling in the county of Devon, reported in 2d term reports, 667.

The wagon of the plaintiffs was damaged in consequence of a county bridge being out of repair, and they brought suit for damages against the inhabitants of the county. It was held that the action could not be maintained, the ground of the ruling appearing to be that the county was not a corporation, and had no corporate fund or estate out of which a judgment for damages could be satisfied; if collected out of the private estate of one or more individuals, all the other inhabitants would be liable to contribute their respective proportions, and this would give rise to a multiplicity of suits for reimbursement; that even if the county could be regarded as a corporation, the principle that damages cannot be recovered against the corporators in their individual capacity, would prevent a recovery; also that there was no precedent for the recovery of a judgment under such circumstances, save where the legislature had given a remedy.

We perceive nothing in the grounds assigned for denying the right of action, or in the reasoning of the court, to warrant an inference that such an action would not lie, at common law, against a municipal corporation, as to which the obstacles mentioned in that case did not exist. The almost necessary inference, from the language of the court, would seem to be the other way. We have examined a number of the English cases cited in the briefs of counsel, and find that the right of action by individuals, against chartered municipal corporations, for damages sustained in consequence of a failure to repair public improvements were usually upheld.

It was held in Henly v. The Mayor of Lynne, 5 Bing. 91, that the corporation of the borough of Lynne, under the terms of its royal charter, was liable to an individual whose property had been damaged by an overflow of the sea, caused by the neglect of the corporation to repair certain banks, mounds and sea-walls.

Another leading English case, holding that a chartered corporation was liable for neglect to perform duties enjoined by the charter, was Mersey Docks v. Gill, and Mersey Docks v. Pierce, (tried together in one action), 11 House of Lords cases, 686.

Plaintiffs were the owners of a cargo of guano, and when the ship carrying it arrived at the port of Liverpool, in endeavoring to enter one of the docks, it struck against and became imbedded in a large bank of mud which had negligently been permitted to accumulate at the entrance, and the ship and cargo were damaged in consequence.

Mr. Justice Blackburn delivered the joint opinion of the judges who heard the arguments, reviewed a long list of cases bearing on the questions raised, and held that defendants were liable. This opinion was approved by the house of lords.

The basis of the recovery in these and similar cases seems to have been, that the privileges and emoluments granted by the charters constituted a consideration for the performance of the duties imposed upon the corporations, and by the voluntary acceptance of the charters, the corporations had bound themselves, in the nature of a contract, to the performance of such municipal duties.

In Henly v. Mayor of Lynne, *supra*, the royal charter cast upon the corporation the burden of maintaining and repairing sea walls, and other public improvements, which formerly devolved upon the crown. As a consideration for the performance of the duties imposed, valuable franchises and property rights were conferred upon the corporation. It was considered in that case that the acceptance of the grant was the equivalent of a contract voluntarily entered into by the corporation to make the repairs.

When the Mersey Docks cases, *supra*, were before the house of lords, the Lord Chancellor, Cranworth, referred to the case of Parnaby v. The Lancaster Canal Company, 11 A. & E. 223, where it was held that the trustees, having the right, by virtue of their charter, to levy tolls for their own profit, in consideration of making a dock or canal, the common law imposed upon them the duty of taking reasonable care to keep it in such repair that those choosing to navigate it might do so without danger to their lives or property. He then stated that the only difference between the latter case, and the appeals under consideration, was that the appellants here, in whom the docks were vested, did not collect tolls for their own profit, but merely as trustees for the benefit of the public, adding: "I do not, however, think that this makes any difference in principle in respect to their liability. It would be a strange distinction to persons coming with their ships to different ports of this country, that in some ports, if they sustain damage by the negligence of those who have the management of the docks, they will be entitled to compensation, and in others they will not; such a distinction arising, not from any vissible difference in the docks themselves, but from some municipal difference in the constitution of the bodies by which the docks are managed."

Mr. Justice Blackburn, on the authority of Coe v. Wise, 5 Best & S. 440, says of corporations like the Liverpool Docks, formed for trading and other purposes, that though they act without reward to themselves, yet in their very nature they are substitutions on a larger scale for individual enterprise. He then lays down the following rule in respect to their liability: "We think that in the absence of anything in the statutes (which create such corporations), showing a contrary intention in the legislature, the true rule of construction is that the legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works." The justice further said that if the legislature had, by express enactment or necessary intendment, enacted that the trustees of the Liverpool Docks should not be subject to such liability, it would be an end of the question, or if it were enacted that none of the revenues received should be applied to the purpose of discharging liabilities of the corporation, it would go far to show that the legislature intended that it should not be liable.

Other actions of the same character were sustained upon similar grounds.

In the case of the Mayor of Lynn v. Turner, Cowper 86, an action for damages was brought against the corporation for not repairing and cleansing a certain creek, into which the tide of the sea had been accustomed to flow and reflow. By reason of the neglect to repair, as had been the custom from time immemorial, the sea was prevented from flowing therein, the creek became unnavigable and the plaintiff was obliged to carry his corn round about. The opinion of Lord Mansfield bases the liability of the corporation upon the ground of prescription, inferred from the fact that they had been accustomed to repair from time immemorial. He adds that it might be the very condition and terms of their creation and charter.

Upon due consideration of these and other cases, we are of opinion that sufficient similarity exists in the franchises conferred upon municipal corporations by our statutes, with those granted by charter under English laws to bring our corporations within the rule of the common law respecting duties and liabilities.

The differences between franchises conferred by royal charter, on the one hand, and by our statutes on the other, relate more to the extent of the privileges granted, than to the powers conferred.

Important powers and valuable benefits are granted in both instances, and in neither instance are they forced upon such corporations. Taking the mostconservative view, they are voluntarily accepted by the citizens composing such municipal bodies.

We see no reason why these domestic organizations, upon accepting the benefits of a charter of incorporation conferring the powers ordinarily granted over streets and bridges, should not be held to assume corresponding burdens and responsibilities in respect to them.

In this case the special charter of the city of Denver, which is very similar in its provisions to the general incorporation acts, vests the complete control and government of the city in the corporation. It is empowered to make all necessary ordinances, and to elect and appoint all necessary officers, to carry into effect the powers granted. The corporation is empowered to take, hold, possess and enjoy both real and personal property, by deed, gift, bequest or otherwise, and to sell and convey the same for the use of the city. It is empowered to sue and be sued, and ample provision is made for the raising of revenue for all purposes of the corporation.

Full supervision and control is given over streets and bridges, with power "to establish, erect and help in repair bridges:" and to establish grades, open, abolish, widen, pave, grade, or otherwise to keep the streets and avenues in repair, and to remove all obstructions, and to prevent all encroachments into or upon the same.

A strong implication arises upon the language employed in the charter, that it was the legislative intention, in conferring upon the city the full supervision and control over the streets and bridges within its corporate limits, with the means of creating a corporate fund for all necessary purposes of the corporation, that the city should assume the burden of keeping the streets and bridges in repair. If such can be said to have been the legislative intent, the liability for damages resulting to individuals from neglect to repair, logically follows, and the principles of the common law doctrine become applicable.

That doctrine seems, in brief, to have been that the grant and acceptance of franchises from the government, whether by individuals or corporations, imposed upon the grantee the duty of performing all the conditions upon which it issued, whether such conditions were expressly stated in the grant, or arose by necessary implication as the consideration of the grant.

We are aware that this view is not in harmony with all the adjudications upon the subject in this county; but we believe it to be founded in sound reason, and know that it has the sanction of a great preponderance of authorities.

In Weightman *v.* The Corporation of Washington, 1 Black., U. S. 39, which was an action brought against the corporation to recover damages for injuries sustained by the falling of a bridge constructed by the corporation, the point was raised that no action would lie at common law in such a case. Mr. Justice Clifford, in announcing the opinion of the court, ruled against the objection, remarking: "Reference is often made to the case of Russell *v.* The Men of Devon (2 term r. 667) as an authority, to show that no action will lie against a municipal corporation in a case like the present; but it is a misapplication of the doctrine there laid down. Suit was brought in that case against the inhabitants of a district, called a county, where there was no act of incorporation, and the court held that the action would not lie; admitting, however, at the same time, that the rule was otherwise in respect to corporations. But whether

that be so or not, the rule here adopted has been fully sanctioned in all the English courts."

The rule referred to in the opinion as adopted in that case was that when a duty was imposed upon a municipal corporation, by its charter, to keep a bridge in repair, in consideration of privileges granted thereby, the means to perform being within the control of the corporation, it became liable for damages sustained by individuals from neglect to comply with the requirements.

The only difference we observe between that case and the case at bar is, that the duty of repairing and rebuilding were there expressly enjoined by the charter, whereas they arise, as we think; by necessary implication in the present instance.

The supreme court of Virginia, referring to the English adjudications upon this subject, says: "These decisions proceed on the ground that where a municipal corporation acts in the exercise of powers or the discharge of duties, in nowise discretionary or governmental, but purely ministerial in their character, it incurs, like a private person, the common law liability for the acts of its servants; and that it does not matter, as was once intimated, if there be the absence of special rewards or advantages, it being considered and allowed that such gratuitous function is to be regarded as a burthen accepted under the charter, in consideration of its privileges": The City of Richmond v. Long's adm'r, 17 Gratt. 375.

Mr. Justice Selden, in his very able opinion in Weet v. Trustees of the Village of Brockport, 16 N. Y. 161, makes the declaration that, "upon investigation it will be found that, from the earliest perion of the common law, all grantees of franchises, whether individuals or corporations, have been held by a uniform and unbroken series of decisions to the strictest performance of every condition of the grant, either express or implied.

Mr. Justice Hunt, referring to the case of the City of Detroit v. Blackeby, 21 Mich. 84, and other cases which hold that no such liability attaches to incorporate cities, says: "The authorities establishing the contrary doctrine, that a city is responsible for its negligence, are so numerous and so well considered that the law must be deemed to be settled in accordance with them: Barnes v. District of Columbia, 91 U. S. 540. See, also, Nebraska City v. Campbell, 2 Black. U. S. 590; Weet v. Village of Brockport, 16 N. Y. 161; Erie City v. Schrimgle, 22 Pa. St. 385; City of Dayton v. Pease, 4 Ohio St. 80; Soper v. Henry County, 26 Iowa, 264; Browning v. City of Springfield, 17 Ill. 143; Town of Waltham v. Kemper, 55 Ill. 346; City of Richmond v. Long's admr.'s, 17 Gratt. 375; Mears v. Com'rs. of Wilmington, 9 Iredell, 73; Junsen v. City of Atchison, 16 Kan. 358. Smoot v. Mayor of Wecumpka, 24 Ala. 112; Grove v. City of Fort Wayne, 45 Ind. 429; 2 Dill Mun'l. Corps., 3 Ed. secs. 980, 1017. The above list might be largely extended.

While the decisions of many respectable courts are opposed to to the foregoing views, we are satisfied that the rule announced for this state is a safe and equitable one. That it ought to be the law,

is evident from natural reason, and the plainest principles of justice. That it is the law, sufficiently appears from precedent, and the decided weight of authority.

Whether a logical distinction is made, by the courts of this country, between municipal corporations and *quasi* municipal corporations, respecting the liabilities of the two classes, in view of the greater powers and privileges now conferred upon the latter class by the statutes of the several states, does not affect the question under consideration. The general current of authority supports the view, that when municipal corporations are invested with exclusive authority and control over the streets and bridges within their corporate limits, with ample power of raising money for their construction, improvement and repair, a duty arises to the public, from the nature of the powers granted, to keep the avenues of travel within such jurisdiction, in a reasonably safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon the corporation to respond in damages to those injured by a neglect to perform the duty. That the same rule obtains in such case, whether the duty is specifically imposed by the act of incorporation or not. This duty is municipal or ministerial, and not governmental, as asserted by appellant. This view of the case, and the rule here announced, in nowise conflicts with the ruling referred to in Daniels et al. v. City of Denver, 2 Colo. 669. The failure or neglect there complained of, was the failure to exercise a discretionary power conferred by the charter, to wit: the power of making sewers and drains. All courts agree that the failure to exercise a discretionary power is not actionable. But the neglect here complained of is to keep in repair improvements made by the city. When the power to construct such improvements is assumed, the duty to keep them in repair is fairly implied and becomes preemptory.

Common reason teaches that streets and bridges must be kept in a safe condition for ordinary use. Under the charter of this city, no one, without authority from the corporation, can in any manner interfere with its streets or bridges either for the purpose of making repairs, or otherwise.

The duty of making repairs is essentially a corporate, as distinguished from a governmental duty, and it does not extend outside the corporate limits, Property within the city limits is not taxable for road purposes outside such limits.

For the reasons assigned, the city must be held liable, unless the exceptions reserved by the appellant upon the trial in the district court, and referred to by its counsel under the second head of his argument, shall disclose sufficient error to warrant a reversal.

First—Under the second head of the argument, it is claimed that the right of recovery was defeated by the contributory negligence of the appellee.

The general rule on this subject is that to entitle the plaintiff to damages he must have used reasonable or ordinary care to avoid

the accident; that is such care as is usually exercised under like circumstances by persons of average prudence. If the plaintiff in his own case shows that he brought the injury upon himself by his own carelessness, he may be nonsuited. But if the defendant's failure of duty and the injury to the plaintiff are shown, and it does not appear that the plaintiff brought on the injury by his own negligence, such proof must come from the defendant: Wharton on Negligence, secs. 423, 427; Mays v. Boston & Maine R. R., 104 Mass. 137; K. P. Rw'y Co. v. Twombley, adm'r, 3 Colo. 125.

Williams, J., says in W. C. & P. R. R. Co. v. McElwee, 67 Pa. St. 315: "It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such cases the standard of duty is not fixed, but variable. Under some circumstances, a higher degree of care is demanded than under others. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as matter of law, and must be submitted to the jury to determine what it is and whether it has been complied with."

The following is mentioned as an exception to this rule: "When there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as matter of law." Another judge cites several cases as properly withdrawn from the consideration of the jury, on account of inexcusable acts appearing therein, as attempting to cross a railroad track by going between two cars in motion; leaping from a train in motion; crossing a railroad track in front of an approaching train without looking up, and the like; adding: "But in all these cases there was no dispute about the facts; nothing material was left in doubt; there was no question as to the credibility of witnesses, and nothing was left to be inferred in the way of explanation or excuse:" Brooks v. Somerville, 106 Mass. 271.

In the case at bar the plaintiff's testimony had made out a *prima facie* case against the defendant, at the time the motion for nonsuit was presented. It had been shown that the appellant had permitted a bridge in one of the principal thoroughfares of the city to become unsafe for the ordinary use to which it was daily subjected and, with full notice of its unsafe condition, had failed to either properly repair it, or to give any warning of its unsafe condition; that while one of the freight teams belonging to the City Transfer Company, of which appellee was foreman, was crossing the bridge with a load of rock of less than the ordinary weight for such teams, a wheel of the wagon crushed through the floor of the bridge, going down to the hub, and while endeavoring to pry it up, by the use of levers and fulcrums, the timbers gave way and the bridge fell to the bottom of the creek, carrying the appellee with it and breaking his leg. According to his own testimony he did not know the bridge was unsafe. He did know that the surface of the bridge was worn by the immense traffic over it, and that it would shake when a load

of freight was crossing, but did not know of the unsoundness of the frame or timbers.

It is difficult to perceive, in view of the authorities, how it could be determined, as a question of law, at the close of the appellee's testimony, that he had been guilty of contributory negligence. Such conclusion could only be reached by deciding that he did not adopt proper means to extricate the wagon. Up to that time no proof to that effect had been introduced. It could only have been inferred from the falling of the bridge. As appellee's counsel aptly says, "the very inquiry was, whether the means employed were careful and prudent, and this was a question for the jury."

It is clear that at this stage of the case no cause existed for taking the case from the consideration of the jury.

The same authorities, and the same considerations demonstrate that the question of contributory negligence was properly submitted to the jury at the close of the trial—whenever all the testimony was in. There was then a dispute about the facts; there were questions as to the credibility of the witnesses, and the main question, whether proper measures and appliances were employed to extricate the wagon, was, we think, in doubt.

That an expect bridge builder was able to testify that the appellee was negligent, on information of the condition of the bridge and bridge timbers, and upon mathematical calculations of the amount of weight or pressure brought to bear upon one stringer of the bridge, is not conclusive.

The appellee was not an expert. He did know as much about the strength and condition of the bridge as the witness did, and while it was his duty to use reasonable and ordinary care to avoid the accident, it was not necessary to suspend the work of extricating his wagon for mathematical calculations as to the strength of the bridge. The question is, whether he acted as a person of average prudence would have acted under the circumstances, and this question was properly left to the jury.

Second. Upon the exception reserved to the overruling of the motion for a new trial, on the ground assigned by appellant, that the damages given by the jury were excessive, many of the same principles just announced apply. The true measure of damages is, as contended for, compensatory only. But where the amount of damage does not depend on computation, as in cases for personal injuries, as we said in Wall et al. v. Lingay, 6 Col. 465: "It is exclusively the province of the jury to estimate and assess the damages, and the amount to be allowed in such cases rests largely in their sound discretion." And, as there announced, to warrant the court in interfering with that discretion, it must be apparent that the amount of damages given by the jury is so disproportionate to the injury received as to show that the jury were influenced by prejudice, misapprehension, or by some corrupt or improper consideration: Stillman v. Proprietors of Canal Bridge, 16 Pick. 641, see authorities in opinion, also

Where there is no fixed standard for computing the damages, but the measure thereof rests in the exercise of sound judgment and discretion, different minds are likely to arrive at different results upon consideration of the facts of a given case. The case before us furnishes an illustration of the proposition.

The jury, upon consideration of the loss of time, expenses incurred, and the inconvenience and suffering consequent upon the injury received, adjudged the plaintiff to be entitled to a certain compensation. The district judge thought the amount awarded exceeded actual compensation by the sum of five hundred dollars, and required the plaintiff to remit that sum, which was done. If the duty of assessing the damages devolved upon this court, we might fix a still smaller sum as the result of our judgment. But this is not the test. It was the province of the jury to determine the amount, and we cannot say, as matter of law, that the amount of the judgment is so exorbitant, and disproportioned to the injuries received, as to warrant us in declaring it excessive.

Third—Upon the error assigned respecting the admission of improper evidence, appellant claims that error was committed in allowing the plaintiff to show, in rebuttal, a different arrangement of the blocks and lever from that brought out in the original presentation of his case. Counsel says that the appellant was injured by this ruling, because expert witnesses had been called by appellant and had testified to hypothetical questions based on the facts as originally submitted, and that the admission of the testimony complained of tended to confuse the mind of the jury as to the position of the lifting apparatus, and to weaken the effect of the expert testimony.

The order of proof specified by the civil code confines the parties, after the introduction of their evidence in chief, to rebutting evidence, "unless the court for good reasons, in furtherance of justice, permits them to offer evidence in their original case": Civil Code, sec. 168.

If, by inadvertence, the appellee omitted to produce, as testimony in chief, all the facts relating to the manner and means employed to extricate the wagon, the court had the discretion to allow the omission to be supplied at a later stage of the trial. But the appellant was entitled to have its expert testimony go to the jury upon the appellee's full case, on this point. Had appellant offered to recall its experts after the admission of the new testimony, and the offer been denied, there would have been ground of complaint. But no such offer was made. The mere statement that the expert witnesses had been dismissed, and could not be recalled, is not sufficient to maintain the error assigned.

The judgment must be affirmed.

CITY OF DENVER *v.* MULLEN ET AL.

Filed April 25, 1884.

NUISANCE—ABATEMENT OF BY MUNICIPALITY.—A city, the charter of which empowers it to "make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same," may by ordinance define, classify and enact what things or classes of things, and under what conditions and circumstances such specified things are to constitute and be deemed a nuisance. But it cannot, by a mere resolution, declare a particular thing, such as a water ditch, a nuisance, which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination, and order its summary removal. Whether such ditch is a public nuisance must be judicially determined before it can be lawfully abated, either by the public or an individual.

THE SAME—BESIDES THE REMEDY BY INDICTMENT, a civil action lies to prevent or abate a public nuisance, on behalf of the public, by its proper officers.

CERTIFICATE OF INCORPORATION—ATTACK ON.—The corporate existence and validity of the acts of a *de facto* corporation, whose user is established, can not be attacked collaterally upon the ground that its certificate of incorporation does not contain certain specifications which it was required by statute to contain.

DEDICATION OF STREETS—RIGHTS OF DITCH OWNERS.—Where a right of way for a water ditch had been acquired over a certain tract of land, the owners of which subsequently laid it out in lots and dedicated the streets thus formed to the city of Denver, subject to the pre-existing right of way of the ditch, such city will be held to have accepted such dedication subject to such existing right of way, and must render passable such streets and keep them in repair, without interfering with the rightful and accustomed use of said ditch.

In 1864 a company was incorporated for the construction of a water ditch through the city of Denver. Such ditch was completed during the following year. Long prior to the incorporation of such company, and the construction of such ditch, certain streets intersected by it were laid out on the map of said city, which map was recorded in the proper office of the county records. At this time the title to the lands included in the city of Denver, as so mapped, was in the United States, and part of the public domain. In pursuance of the act of congress of May 28, 1864, such lands were entered by the probate judge as a town site, and a certificate of entry thereof was issued to him on May 6, 1865, and a patent for the same was issued on June 8, 1868. The city of Denver was incorporated in 1861, and authorized to exercise general control over the streets, alleys and highways within the city. *Held*, that the title of the city of Denver to the lands acquired by the entry of May 8, 1865, did not relate back to the date of the act of May 28, 1864, authorizing such entry, as such last mentioned act was not in the nature of a grant, but simply a provision to enable the city to acquire title to land for a town site, if it should elect to avail itself of the provisions of the act; that the authority conferred by the act of 1861, incorporating the city of Denver, in respect to controlling the streets of the city, can not be extended to invalidate the acquisition thereafter by the ditch company of a right of way through the public domain, to which the city had not as yet acquired title, although streets had been previously laid out thereon.

ERROR to the district court of Arapahoe county. The opinion state the facts.

John C. Stallcup, city attorney, for the plaintiff in error.

Markham, Patterson & Thomas, for the defendant in error.

STONE, J. The defendants in error, J. K. Mullen, Dennis Mullen and Charles R. Davis, who were the plaintiffs below, applied to the judge of the district court for relief by way of injunction against the city of Denver, the mayor and the street commissioner thereof, to restrain the said parties from interfering with the flow of water in a certain irrigating and mill ditch, known as the Platte and Denver Ditch, which conveys water to the flouring mills of said complainants, situate in that portion of the city known as West Denver. The bill of complaint averred that the ditch was constructed in 1865 by a corporation incorporated in 1864 under the general incorporation law of the then territory of Colorado; that the complainants were lessees of the said ditch company, possessing as such lessees the right to the use of the said water in operating the two

flouring mills owned by the said Mullens and Davis respectively; that the grinding capacity of said Mullen mill is one thousand one hundred and fifty bushels of wheat, and that of the Davis mill about six hundred bushels each twenty-four hours; that said mills are run chiefly by water power from said ditch; that complainants had a right to the flow and use of said water for the purpose aforesaid, without interference by the defendants; that defendants had with force and violence torn out a certain flume in the said ditch and diverted the water therefrom, and were threatening to continue such diversion of the water, to the great and irremediable damage of complainants, and said complainants therefore prayed a writ of injunction to restrain the said acts of defendants, and for all proper relief in the premises.

The answer of defendants below denied severally the allegations of plaintiffs' bill and set up ownership in fee by the city of the streets and alleys therein, denied the right of plaintiffs to obstruct the same by the ditch wherever it crossed the same, and averred that the interference with the ditch was attempted and asserted only upon refusal of plaintiffs to bridge the streets at the ditch crossings so as to permit the free and convenient use of streets by the public. The defense further set out, by way of cross-complaint for affirmative relief, that the ditch in question runs through and across the following named streets in Hunt's addition to the city, to wit: Carson, Martin, Bear, Buffalo, Moose, Deer, Olive, Capitol, South Tenth, South Ninth, South Eighth, and half of Colfax avenue, together with the intervening alleys; and also the following named streets within that portion of the original limits of the city known as the Congressional grant, to wit: Champa, Curtis, Lawrence, Larimer, Holladay, Wazee, Wynkoop, Eighth, Ninth, and a portion of Colfax avenue, together with the intervening alleys; that the said ditch and the conveyance of water therein is an obstruction to the public and necessary use of the streets; that the crossings of the said ditch in the streets, where the same are not bridged, are inconvenient and dangerous to the public; that the city rightfully owns and controls said streets, with authority to control and regulate the use of the same, and prays that the said ditch be abated, the water turned off and the ditch filled up, so as to prevent the further obstruction to the public use of the streets, and for full relief, etc.

To this answer a replication was filed denying the right of the city to interfere with the said ditch so as to prevent the flow of water to the mills of the plaintiffs, and averring that the grantors of plaintiffs had a right to said ditch and the use of the water therein, prior in time and superior in law to any claim of the city in respect to the streets and alleys where the same cross said ditch; that they have been in the undisturbed exercise of such right for nearly eighteen years; that the owners of the land through which the ditch runs, as well as the said city of Denver, have authorized and licensed the plaintiffs and their grantors to use the said ditch and convey the water through the same for the purpose of operating

said flouring mills, and that therefore the plaintiffs are not bound to bridge the ditch where the streets cross the same; that the ditch is used to irrigate a large extent of farming country along its line above the mills.

In reply to the matter of the cross-complaint of the defendants, the plaintiffs admit that the ditch, together with the waste water below the mills, runs through or across the streets mentioned in defendants' answer, but aver that as to all the streets and alleys in Hunt's addition, the ditch company acquired its right of way long prior to the time when said lands became a part of the city; that the ditch was constructed and used for more than ten years prior to said lands becoming an addition to the city; that said lands became a part of the city and were accepted by the city as such addition with full knowledge of all the existing prior rights of said ditch company therein, and therefore that plaintiffs were not bound to bridge said ditch where streets crossed the same in said addition; that in respect to the streets and alleys crossing said ditch within that part of the city included in the congressional grant, plaintiffs reply that they had a vested right to said ditch and to the flow of the water therein long prior to the time when the city acquired or had any right to or authority over the said streets and alleys, or any title to the lands embraced in the said congressional grant, and have exercised such prior rights unmolested by the city, and with the leave and license of the city, for the period of more than seventeen years, and hence are not bound to bridge the streets within the limits aforesaid.

A preliminary injunction was issued in accordance with the prayer in the complaint, and afterwards, in support of the repective allegations in the pleadings, proofs were taken before a referee, and the cause coming on to be heard upon the said pleadings and proofs, the court decreed that as to the defendants, the mayor of the city and the street commissioner, they were not necessary parties to the action, and the same was therefore dismissed as to them.

The court further decreed as follows, to wit:

"And the court doth further find, order, adjudge and decree as to the defendant, the city of Denver, that the plaintiffs are lawfully and of right entitled to the full, unobstructed flow of the water through and along the Denver and Platte ditch to the mills of the said plaintiffs respectively, without any let, hindrance or obstruction of the water in said ditch, and without any interference with said ditch by said city of Denver or its agents or employees; and doth further order, adjudge and decree that the said city of Denver, its agents, attorneys and employees, be forever restrained and enjoined from cutting down, or destroying or injuring the banks or flumes of the said Denver and Platte ditch, and from filling up or obstructing the said ditch or any part thereof, and from in anywise or manner interfering with said ditch or the water therein, so as to obstruct the flow of the water to the mills of the plaintiffs aforesaid,

and from in anywise or manner diverting or turning the water from said ditch.

"And the court doth further order, adjudge and decree that inasmuch as it appears to the court that the said defendant, the city of Denver, is not entitled to any relief for any matter or thing set up or contained in the second defense of said defendants' answer, said second defense being in the nature of a cross-complaint and asking for affirmative relief, the said cross-complaint in said answer be dismissed. And it is further ordered by the court, the said defendant, the city of Denver, pay the costs of this suit."

Exceptions were taken to the overruling by the court of a motion to set aside the findings and judgment of the court, and for a new trial, and thereupon the city prosecutes its writ of error herein.

Aside from certain objections relating to the admission of testimony, which will be referred to hereafter, the assignments of error may be summed up in the two numbered seventh and eighth, to wit: That the court erred in its findings of law and facts, and in its judgment and decree for the defendants in error. Our main inquiry therefore is, whether upon all the facts and circumstances disclosed in the case, pertinent thereto, and upon the law properly applicable thereto, the judgment and decree of the court below was warranted and should stand.

The city, in its attempted interference with the ditch, evidently proceeded upon the theory that such ditch, with respect to the streets of the city which it crossed, and the public use thereof which it incommoded and obstructed, was to be deemed and treated as a nuisance, which, on behalf of the public affected thereby, the said city had authority to abate as such in the summary manner pursued. The correctness of this position is contended for by the city attorney in argument filed herein.

From the testimony and exhibits taken and filed in the cause, it appears that on the 6th of March, 1882, a written notice, signed by Robert Morris, the mayor of the city, was served the same date upon Davis, one of the defendants in error, ordering him "to remove the obstruction now in Carson street, in the city of Denver, within thirty days from the service of this notice, the said obstruction being a mill ditch crossing said street, which ditch you must remove or properly bridge so that the public convenience in the use of said street will not be interfered with by the said ditch," etc. The like notice, dated the 11th of March, was served upon John K. Mullen, one of the other defendants in error. On the 5th day of May, following, on motion adopted by the city council, "the street commissioner was ordered to turn off the water in the mill ditch, and fill it up at the crossing of Colfax avenue;" and on the 18th of May thereafter, the following motion was adopted by the said city council, viz: "On motion of Alderman Lessig, the street commissioner was again instructed to divert the water of the West Denver mill ditch into the Platte river or Cherry creek inside the city limits, as may be prescribed by the city attorney." Mr. Stallcup, the then

city attorney, testifies, that after the adoption of the foregoing second motion or resolution, Mr. Mullen called at his office, and a meeting was arranged at which the plaintiffs below and their attorneys appeared, when said plaintiffs proposed to pay half the expense of bridging Wazee and two other streets, but which proposition was refused, and nothing further was done by way of compromise, and that he, said city attorney, then instructed the street commissioner to turn the water out of the ditch at a point within the congressional grant part of the city, and to convey the same into the irrigating ditches and into Cherry creek, but that nothing was done, as the mayor was served with process in this suit on that or the following day.

It further appears in testimony that certain officers of the city, shortly after the passage of the resolutions by the council, turned the water out of the ditch by opening the side gates, and cutting the banks of the ditch near the head gates, and by breaking the flume below the head gates, throwing the planks out into the river, and effectually stopping the flow of water in the ditch; that this was at a point six or seven miles from the mills, and three or four miles beyond the limits of the city; that finding the water gone out of the ditch, Mullen and Davis went to the head of the ditch and attempted to repair the break and turn the water in again, when about midnight several persons, representing themselves to be officers of the city, interfered and prevented such repairs, showing their arms, pistols and cartridges, and stating that they were instructed to use their arms if necessary, and one of them saying, as the witness Davis testifies, that "they had instructions to blow hell out of any one attempting to turn water in the ditch."

It will scarcely be contended that this manner of proceeding was in accordance with either the resolutions of the city council, above set forth, or the instrutions of the city attorney, nor can it be contended that there was any authority for interfering with the ditch beyond the limits of the city.

The basis of authority for the action of the city in the premises, is made to rest upon certain provisions of the city charter, and certain ordinances, which are set out as exhibits in the testimony, and the following, among other of the enumerated powers conferred by the legislature upon the city, in said charter, is relied upon, viz: "To make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same."

The proper construction of this language is, that the city is clothed with authority to declare by general ordinance what shall constitute a nuisance. That is to say, the city may by such ordinance define, classify and enact what things, or classes of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might under such authority declare by ordinance that slaughter houses within the limits of the city, carcasses of dead animals left lying within the

city, goods, boxes and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination: Everett v. Council Bluffs, 40 Iowa, 66; Yates v. Milwaukee, 10 Wall. 497. No law or ordinance, under which the city council assumed to act in respect to this ditch, has been cited which defines nuisances, or within the meaning of which such ditch is comprehended.

Nor would it be sufficient if it could be said that the ditch, as an obstruction of the streets, was a public nuisance at common law, for in such case it could be proceeded against only by indictment, or by civil proceeding instituted on behalf of the public by its proper officers: Wood on Law of Nuisances, sec. 729, and cases cited; 2 Dillon Municipal Corporations, sec. 659.

It is only certain kinds of nuisances that may be removed or abated summarily by the acts of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency; such clear cases of nuisances *per se*, are well understood, and need not be further noticed here, to distinguish them from the case before us. If it were admitted that this ditch, by reason of its obstruction to the use of the public streets, at the time of the acts complained of, was a nuisance, it must also be admitted that it was not a nuisance *per se*. It was constructed for a necessary, useful and lawful purpose, was used for such purpose, and therefore in its nature was not a nuisance, as a matter of law. Nor as a matter of fact was it a nuisance while it was no hurt, detriment or offense to the public, or to any private citizen. If, then, it has become a nuisance, it is by reason of a change of circumstances brought about neither by the ditch itself, nor its use. Indeed, the sole matter complained of to warrant its being regarded as a nuisance, is the absence of bridges at street crossings. The town has become populous; its growth has extended beyond the ditch and along its line for a great distance; streets laid out across its course have come to be traveled so much, that without bridges, the ditch, as appears by the testimony, has become inconvenient, detrimental, and an obstruction to the full, safe and lawful use of such streets as highways by the public. To this extent, and from these causes outside the ditch and its use *per se*, has the ditch come to be a public nuisance, if, as a matter of fact, it is such. But whether it is such or not, is a fact which must first be ascertained by judicial determination before it can be lawfully abated, either by the public or by a private person.

As we have already said, there are certain kinds of nuisances which may be summarily removed or abated, either by the public authorities or by private individuals, but we are attempting here

only to declare the law applicable to cases of the nature and character of the one before us.

In the case of Griffith v. McCullum, 46 Barb. 561, the supreme court of New York, after considering what constitutes a nuisance, public or private, and the remedies therefor, summarizes the law touching the same, as follows:

"1st. That every encroachment upon a highway is not a nuisance. * *

"2d. That that which is exclusively a common or public nuisance, cannot lawfully be abated by the private act of individuals; the remedy is by indictment, or criminal prosecution, unless some other remedy has been provided by statute.

"3d. A private nuisance may be abated by the party aggrieved.

"4th. A nuisance may be a public and a private nuisance. In such a case the public may proceed by indictment to abate it, and punish its author; or those individuals to whom it is a private nuisance, by reason of its being especially inconvenient and annoying to them, or that they are in some particular way incommoded thereby, may, of their own act, abate it.

"5th. In the case of a private nuisance, the aggrieved party has an election of remedies; he may remove the nuisance, or he may have his action for the private damages sustained by him; he can not have both remedies."

Besides the remedy by indictment, a civil action will lie to prevent or abate a public nuisance, on behalf of the public, by its proper officers: Attorney General v. M. & E. R. R., 4 C. E. Green Eq., 387; State v. Berdotte, 73 Ind 186; Taylor v. Armstrong, 24 Ark. 102; Metropolitan City R'y v. Chicago; 96 Ill. 620; Wood's Law of Nuisances, section 729, and cases cited.

Almost every case involving the question of a nuisance in the use of property is to be determined in view of its own circumstances, and as a general rule, the relative rights of the parties control, the question being whether or not the use of the property in the manner complained of is reasonable, and in accordance with such relative rights: Wood's Law of Nuisances, sec. 12.

"As to what constitutes a nuisance is a question for the court, and not the jury to determine; whether the results of a given business are so common as to amount to a public nuisance is a question for the jury:" Ibid. sec. 22.

And the same author states the rule in such cases to be that "the question is not whether an act has been declared to be, but does it come within the idea of a nuisance; if so, it is one, though never held so before; if not, it is not one, though held so a thousand times before:" Ibid. sec. 27.

Whether a particular use that is not a nuisance *per se*, is an unreasonable use and a nuisance, is a question of fact, to be judged of from the circumstances of each case by the jury: Ibid. sec. 251, and cases cited.

In treating upon the powers of municipal authorities relating to nuisances, Mr. Wood, in his work referred to, says in respect to such things as are not nuisances *per se*, that they must be lawfully ascertained to be such; that the municipal authorities cannot arbitrarily declare a thing a nuisance, or destroy valuable property which was lawfully erected or created, without such lawful ascertainment, that even if power therefor has been expressly conferred by the legislature, it is inoperative and void unless the thing is in fact a nuisance, or was created or erected after the passage of the ordinance, and in defiance of it, and except in cases of emergency, or when the use is clearly a nuisance, the fact should be first establishd by judicial adjudication. Vide, sec. 740, and the authorities cited.

In the case of Yates v. The City of Milwaukee, 10 Wall. 497, the supreme court of the United States, per Mr. Justice Miller, say: "But the mere declaration by the city council of Milwaukee, that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character.

"It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities." The same doctrine is laid down in the case of C. R. I. & P. R. R. v. Joilet, 79 Ill. 25–44; Everett v. Council Bluffs, 48 Iowa, 66, and numerous other authorities.

It is, therefore, quite clear that the plaintiffs below were entitled to the injunction prayed for in the first instance, restraining the city from interference with the use of property which had not been lawfully ascertained and declared to be a nuisance. Upon the record, however, presenting the testimony taken upon the hearing, we are to determine whether the court below was warranted in decreeing the injunction perpetual upon the facts established by said testimony.

The fact that the construction of the ditch was begun in the fall of 1864, and completed in the spring or summer of 1865, by a company duly incorporated under and by virtue of general incorporation laws of the territtory of Colorado, is fairly established. The only question of error, based upon objection to evidence admitted, which is specifically presented for our consideration, relates to the certificate of incorporation of this ditch company. The admission of this certificate, as evidence, is objected to, and the validity of the corporation, and its rights and rights of its lessees, the defendants in error, are denied, on the ground that the certificate omits to specify what stream the water of the ditch is to

be taken from, the terminal points of the ditch, and other specifications which, by the statute, the certificate is directed to contain.

That the corporate existence and validity of the acts of a *de facto* corporation whose user is established, cannot be attacked collaterally upon the ground of an irregularity or omission of this nature in its certificate of incorporation, has been decided by this court in the case of Humpreys v. Mooney, 5 Col. 282, for the reasons and upon the authorities therein cited.

The ditch, then, must be held to have been lawfully constructed. It is shown to be six or seven miles long; that it receives its water out of the Platte river at a point on the stream four or five miles above the city; that ever since its completion in 1865, the water flowing through it has been used to irrigate several thousand acres of farming lands beyond the city limits, and for grinding wheat in the mills of defendants in error, situated within the limits of the original town site of Denver. That which is complained of, on the part of the city, to be a nuisance, does not arise out of either the nature of the ditch itself or the manner of its use by the defendants in error. The reasonableness of the use is not questioned, although the absolute necessity of such use as a motive power for the mills is denied by the plaintiff in error. Admitting, then, that the testimony shows that by reason of the increase in travel and traffic upon the streets crossing the ditch, consequent upon the growth of the city, the ditch is such an obstruction to the use of the streets as to be properly deemed a highway nuisance, we may also say that its character as a nuisance is not by such testimony established to exist in any other respect than as such obstruction to certain streets; and further, such character consists solely in the absence of bridges at the crossings, and is wholly contingent upon this circumstance.

The removal of the nuisance, therefore, whithout the destruction of the property in question or interference with its use, as heretofore enjoyed by defendants in error, can be effected by bridging the ditch properly at the street crossings.

This narrows the controversy down to the real question involved in this branch of the case, viz: which party is liable for the construction of these bridges, the defendants in error or the city? If the former, then the decree of the court below should be modified accordingly; if the latter, then the decree need not be disturbed.

The question therefore to be determined is one dependent upon the relative rights of the parties to this action respectively.

As to all the streets intersected by the ditch outside of the original limits of the city known as the congressional grant, the testimony shows that the ditch was constructed seven or eight years before these streets were laid out. The plat of Hunt's addition, which we understand to be the oldest of the additions to the city on the line of this ditch, was filed in 1872. The ditch in question was marked on the map or plat of this addition as filed, and the right of way for said ditch had been previously acquired

by the ditch company of the owners of the lands embraced in this addition.

Under this state of facts, we think it clear that the owner of this addition dedicated the streets he had laid out, intersecting this ditch subject to the pre-existing right of way of the said ditch, and it seems equally clear that the city should be held to have accepted such dedication and acquired control of these streets subject to the same pre-existing rights of the proprietors of the ditch. The city having thus acquired the fee and control of these streets, in trust for the public, under the conditions of the grant and dedication, must render them passable and keep in repair as the public necessity and convenience require, without interfering with the rightful and accustomed use of said ditch; that is to say, the use of said ditch to the same extent and for the like purposes enjoyed thereby prior to the grant and dedication of the streets to the city as aforesaid.

With respect to the streets intersected by the ditch within the Congressional grant, a different state of facts exists, and a more difficult question is presented.

The company for the construction of this ditch was incorporated October 8th, 1864. The construction was commenced thereafter, that same year, and completed the spring or summer following. The fact is conceded that long prior to the date of the incorporation of said company, and the construction of the ditch, the streets of that portion of the city included in the Congressional grant and intersected by the ditch, to wit: Champa, Curtis, Lawrence, Larimer, Holladay, Wazee, Wyncoop, Eighth and Ninth streets, were laid out and mapped the same as they now exist, and the map filed as of record in the proper office of the county records. At this time, the title to the lands included in the city of Denver, as laid out and mapped as aforesaid, was in the United States, the lands being a part of the public domain under the control of, and subject to disposal by the general government.

On the twenty-eighth of May, 1864, an act of congress, entitled "An act for the relief of the citizens of Denver, in the territory of Colorado," was appoved; which act authorized the entry of the tract known as the "congressional grant," by the probate judge of the county including such tract, in trust for the inhibitants, as a town site. This entry was made by such probate judge, and a certificate of the entry thereof was issued on May 6th, 1865, and a patent for the same was thereafter issued June 8th, 1868.

The city of Denver was incorporated by act of the legislature of the territory of Colorado, at the first session of such legislature in 1861, and by said act the municipal authorities were authorized to have and exercise general control of the streets, alleys and highways within the city.

Upon this state of facts, it is contended on behalf of the city, that at the time of the construction of the ditch, the city, by reason of the prior laying out of the streets, and the authority conferred by

the charter or act of incorporation mentioned, acquired and still possess the right to require the proprietors of the ditch to bridge the same at the street crossings when necessary, and that the construction and use of said ditch has always been subject to such right of the city.

On the other hand, it is contended on behalf of the defendants in error, that, chiefly for the reason that at the date of incorporation of the ditch company and the construction of said ditch, the title to the land in question was in the United States and not in the city, no prior valid right accrued to the city to exact of the ditch proprietors the requirements in controversy.

In further support of the contention on behalf of the city, the point is made in argument, that the title of the city to the lands acquired by the entry of May 8th, 1865, relates back to the date of the act of May 38th, 1864, authorizing the entry. We cannot assent to the correctness of this proposition. This last mentioned act is not in the nature of a grant, but is simply a provision to enable the city to acquire title to land for a town site, if it should thereafter elect to avail itself of the provisions of the act, and it is not preceived upon what principle the title subsequently acquired by the entry could relate back to the act mentioned, any more than the title acquired by entry of public lands by a private citizen, can relate back to the date of the law of Congress which authorized such entry; and in the case of such entries under the acts of congress for the disposal of the public domain, it is not questioned that the title accrues to the party making the entry at the date of such entry, and not before. The government itself does not really part with the title until the issue of the patent therefor, but upon the issue of such patent, the title conveyed by the grant is held to relate back to the date of the entry as evidenced by the certificate thereof.

Can it be said that the city acquired such a right to the streets under and by virtue of its charter in 1861 as would enable it to assert such right as superior to the rights subsequently acquired by the ditch company? We think not. The act of congress, creating the territory of Colorado, usually called the organic act, approved February 28, 1861, limited the legislative power of the territory to "all rightful subjects of legislation consistent with the constitution of the United States and the provisions of this act;" and in the same section declares that "no law shall be passed interfering with the primary disposal of the soil;" and also prohibits the passing of any law "impairing the rights of private property." While the conferring upon the municipal authorities of a town the power to control generally the streets, looking to their necessary and proper use as such by the public, is certainly a rightful subject of legislation, yet it is to be borne in mind that ditches and artificial streams of water for irrigating, milling, and other like purposes, were of such prime necessity in regions like Colorado, that the legislation of congress, as well as of the territory, has frequently declared the paramount

value of the rights springing from such necessity, and the courts have been very careful to guard such rights.

In the case of Broder v. Water Co., 11 Otto, 274, which was an action to have a certain irrigating ditch or canal declared a nuisance and abated as such, the act of congress of July 26, 1866, was involved. The ninth section of this act declares that "whenever, by priority of possession, *rights* to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed."

The Supreme Court of the United States, in construing and applying this provision of the act to the case before them, say: "It is the established doctrine of this court that rights of miners, who had taken possession of the mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations, and for purposes of agricultural irrigation in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment of a new one." Much other authority, in the decisions of courts, and in legislative acts, both of congress and of our own territory, might be cited upon this point. We are forced to conclude that the authority conferred by the act of 1861, incorporating the city of Dever, in respect to the control of the streets by the city. cannot be extended to invalidate the acquisition thereafter by the ditch proprietors of a right of way through lands which were then a part of the public domain, and prior to the acquisition of title thereto by the city, although streets had been previously laid out thereon and traveled.

Bearing upon the question of the relative rights and liabilities of the parties under discussion, it is not unimportant to notice that from the testimony it appears that the ditch proprietors and those using the water therein, have never conceded the right of the city to require them to bridge the ditch, but have always resisted such demand; and that on the other hand the city, from time to time, has bridged the streets mostly traveled where crossed by the ditch or raceway below the mills; that some of these bridges were built by the city many years ago, and have been maintained and kept in repair by the city ever since, thus apparently acquiescing in, if not acknowledging, the rights claimed by the defendants in error.

In consequence of the public interests involved, as well as the great value of the property that would be affected by the destruction of the ditch or the diversion of the water from the use of the

defendants in error, we have given this case that careful consideration which the respective rights and interests involved therein demands, and upon such consideration of the whole case we are convinced that the city is without right to require the defendants in error to bridge the ditch as demanded of them, or to interfere with the flow and use of the water in said ditch to the extent and for the purposes heretofore used and enjoyed, but that the duty and obligation to construct such bridges whenever and wherever the public necessity and convenience require, and to maintain and keep the same in repair, devolves upon the city. We are not to be understood as holding that the said ditch, or the use thereof, may not at some future time, by reason of changed circumstances, become a nuisance and liable to be abated as such. What we decide at present is, that for the reasons stated herein, we perceive no error in the judgment and decree of the court below, and the same will be affirmed accordingly.

Decree affirmed.

BARNETT ET AL. *v.* KNIGHT ET AL.

Filed April 25, 1884.

HOMESTEAD—EXISTING INDEBTEDNESS—EXEMPTION.—A debtor may declare a homestead upon his property, so as to render the same exempt from execution as against an existing indebtedness which has not been reduced to judgment nor become a statutory lien upon the exempted premises by attachment or otherwise, although the effect of allowing the exemption will be to leave the debtor insolvent.

HOMESTEAD STATUTES, CONSTRUCTION OF.—Homestead exemption is entirely a creature of statute. The statutes authorizing it are not in derogation of the common law, for at common law the creditor had no right to sell the debtor's land. Such statutes should be liberally construed.

CONVEYANCE BY DEBTOR OF HOMESTEAD IN CONSIDERATION OF FUTURE SUPPORT.—A conveyance by an insolvent debtor of his homestead, the value of which is less than that allowed by statute, is not void as against an existing general creditor, although part of the consideration for such conveyance is an agreement on the part of the grantee to aid in the future support of the grantor.

ERROR to the district court. The opinion states the facts.

Wells, Smith & Macon, for the plaintiffs in error.

Benedict & Smith, for the defendants in error.

HELM, J. The important assignment of error in this case is, "that the complaint doth not set forth facts sufficient to constitute a cause of action."

There is nothing in the record before us upon which we can predicate the conclusion that the conveyance from Mrs. Carr to defendants in error is void as to plaintiffs in error, on the ground of actual or intentional fraud. The uncontradicted averments of the complaint are our only source of information upon this subject; there is nothing in these from which we can justly draw the inference that she made the sale with intent to hinder, delay or defraud her creditors; neither is there anything to show that defendants in error, who were purchasers for a valuable consideration, had notice of

such intent even if existed· Yet both of these facts must concur before the sale can be avoided on this account.

The question of fraud in fact may therefore be eliminated from this case. Is there fraud in law of which plaintiff in error may take advantage? His counsel contend that there is; they assert, *first*, that as against the claim of plaintiffs in error, the effort of Mrs. Carr to secure the benefit of the homestead exemption act was of no avail, for his demand was contracted before she caused the word "homestead" to be entered of record in compliance with law. And they argue; *secondly*, that since part of the consideration from defendants in error to her for the property was future assistance towards her support, the transaction was tainted with fraud in law *per se* as to her existing creditors.

Other matters are discussed in the briefs, but we deem it unnecessary to extend our inquiry beyond these two questions. The first may be restated as follows: Can a debtor avail himself of the bounty offered by our homestead exemption statute as against an existing indebtedness which has not been reduced to judgment nor become a statutory lien upon the exempted premises by attachment or otherwise, where allowing the exemption will leave him insolvent?

We are not aware of any direct adjudication of this precise question under similar statutes. It is by no means free from difficulty and doubt; that strong and logical arguments can be presented on both sides is demonstrated by the briefs in this case.

Section 1631 of our general statutes reads as follows: "Every householder in Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of two thousand dollars, exempt from execution and attachment, arising from any debt, contract or civil obligation, entered into or incurred after the first of February, in the year of our Lord one thousand eight hundred and sixty-eight." And section 1632 is as follows: "To entitle any person to the benefit of this act he shall cause the word 'homestead' to be entered of record in the margin of his recorded title to the same, which marginal entry shall be signed by the owner making such entry, and attested by the clerk and recorder of the county in which the premises in question are situated, together with the date and time of day upon which such marginal entry is so made."

We do not agree with counsel for plaintiffs in error in their argument that the latter section was enacted for the purpose of giving notice and securing protection to those dealing with the householder and extending credit to him. If we did, the conclusion arrived at by them would inevitably follow; for if the legislature prescribed the recording for the purpose of protecting parties with whom the claimant deals, the deduction is irresistible that it would not avail as to prior debts; more ingenuity than we possess would be required to demonstrate how the creditor is benfitted by a notice of this kind given him after he has extended the credit.

The key to a solution of the problem presented is found in the purposes and language of the entire act itself. Two governing principles underlie all homestead legislation. First, the beneficent design of protecting the citizen householder and his family from the dangers and miseries of destitution consequent upon business reverses, or against calamities arising from other causes; and, second, the sound public policy of securing the permanent habitation of the family, and cultivating the local interest, pride and affection of the individual, so essential to the stability and prosperity of a government.

Homestead exemption is entirely the creature of statute, but the statute is not in derogation of the common law, for at common law the creditor had no right to sell the debtor's land: Thompson's Homesteads and Exemptions, sec. 2 and note. And the rule is fully established that the statutory provisions are to be liberally construed for the purpose of giving effect to the principles above named.

Many of the states have extended this bounty to the householder without restriction or qualification, save that of visible occupancy and use; a few like our own have seen fit, for excellent reasons, to require of him in addition to occupancy an election as to whether he will accept the favor offered.

Section 1631, above mentioned, makes no reference to general indebtedness, except that its operation is confined to executions and attachments upon such liabilities as accrue after a certain date; it bestows upon the debtor the privilege of holding his homestead to the extent of two thousand dollars in value "exempt from *execution and attachment*."

Section 1632 substantially declares that until he records his acceptance of the bounty, his home, like his other realty, shall be subject to "execution and attachment." There is nothing in either or in any other provision of the act which, in our judgment, justifies the conclusion that the legislature intended to declare that he must make this election before incurring the debt. That body simply says to him, "prompted by a desire to protect and benefit you and your family, and also to advance the public welfare, we offer this bounty to you, but we do not force you to accept it; and if you do not record your acceptance before an attachment or execution lien is secured in favor of some creditor, such lien shall have preference." By saying to him that he must record his notice of acceptance, the legislature did not intend to discriminate against the premises upon which he resides; they did not intend to give his creditor a right, lien or claim against the same prior to such notice of acceptance, which did not extend to his other realty; he may, notwithstanding his debts, incumber, sell and dispose of his home in the same manner as any other lands to which he holds title; the *bona fide* purchaser or incumbrancer, for valuable consideration, takes the home or residence entirely free from claim or objection on the part of a mere general creditor; and this is true even if such

purchaser is aware when he makes the purchase of the vendors indebtedness and of his insolvent condition.

We think that under our statute the householder is in ample time if he records this election before a lien attaches in favor of his creditor.

It is very true that an act of the legislature confirming the privilege of a homestead exemption as against debts incurred prior to its passage is absolutely void, such an act is in clear violation of the inhibition of both federal and state constitutions against impairing the obligation of contracts. The right of the creditor, under the statutes in that behalf existing, to look to all of the debtor's realty for payment, is said to be a part of his remedy; the remedy prevailing "when and where the contract is made, and is to be performed, is a part of its obligation, and any subsequent law of the state which so affects the remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void": Edwards v. Kearzey, 6 Otto 607; Gunn v. Barry, 15 Wallace 610

But that is a very different question from the one now under consideration. This precise constitutional objection appears to have been in the legislative mind when our homestead law was adopted; for although it was approved on the tenth day of January, 1868, the exemption was confined to "debts, contracts, or civil obligations entered into or incurred after the first of February" following.

Our conclusion above stated does not work injustice to the creditor, he knows of the homestead statute when he gives the credit, he is aware that the debtor is offered the privilege of indicating his election to claim the exemption at any time, and that if this is done before he procures a lien thereon the homestead to the extent of two thousand dollars in value will be beyond his reach; he is no more warranted in relying upon his debtors declining to avail himself of this privilege, than upon his refraining from selling or incumbering his property. Under these circumstances it cannot be said that he is wronged if, after the credit is given, his debtor records his election to claim the exemption; nor can the position be maintained that the obligation of his contract is in any way impaired thereby.

We pass from this subject to a consideration of counsel's second proposition, viz: Is the conveyance to defendants in error void as to plaintiffs in error, because part of the consideration therefor was an agreement to aid in the future support of their grantor? We are not disposed to question the correctness of the general legal doctrine upon which counsel rely; it appears to be sound, and is supported by a strong array of authority. It has been formulated as follows: "An agreement to support the debtor or his family is a valuable consideration, but is not sufficient to support the transfer when the grantor is insolvent:" Bump on Fraud't Conv, 216 and cases cited.

The same author declares that: "The gist of the objection consists, not in the amount to be paid in future support, but in the fact

that the promise of future support forms part of the consideration as an inducement for the transfer:" *Ibid*, 217.

It is not perfectly clear, under the authorities, that this doctrine is applicable to all cases where the purchaser acts in good faith, has *no knowledge of the vendor's existing debts*, and the agreement for future support forms but a small part of the consideration, the balance thereof being valuable and being actually paid at the time of the transfer; and more doubt is cast upon the application of the doctrine to such cases in this state by the peculiar wording of our statute of frauds. It is, however, unnecessary for us to determine this question, though counsel invite our attention thereto.

A sale such as the one disclosed by this record is good except when challenged by a person upon whose rights it operates injuriously. A creditor who has not been wronged cannot be heard to complain; the wrong and injury are the reason and foundation of the rule, and if these do not exist, the rule itself is inapplicable. Therefore it is held that if the *bona fide* grantee pays full value for the property otherwise, the additional consideration of future support does not concern creditors: Bump on Fraudt. Conv. 217; Slater v. Dudley, 18 Pick. 373; Alber v. Webster, 16 N. H. 362.

So, also, if the grantor retain enough property to pay all his debts, a few of the cases hold that the creditor cannot complain of a provision in the sale for a future support: Bump. 218, and cases cited.

In the foregoing discussion we concluded that the homestead exemption right held by Mrs. Carr was good as against the demand of plaintiff in error, though his assignor was an existing general creditor when she recorded her notice claiming the same. There is nothing in the record advising us of any act on her part forfeiting this exemption privilege. At the time she sold to defendants in error, neither plaintiff in error nor his assignor could have taken the property under execution or attachment. The entire value being less than half the amount of the homestead allowance the whole property was beyond the reach of an existing creditor; such a creditor had no interest therein, and having no interest, it cannot be said that he was wronged or injured by her sale. If the premises were beyond the reach of plaintiff in error in satisfaction of his debt, what mattered it to him whether she retained the title or sold or incumbered the property.

Upon similar reasoning to this it is held that "as to exempt property there are, within the meaning of the statute of frauds, *no creditor*." The exemption law and statute of frauds "are *in pari materia*, and must be construed together." The former controls the latter as to the property specified; and in the disposition of exempted property there can be no fraud upon creditors: Thompson on Homesteads and Exemptions, secs. 411, 412, and cases cited; Bump. on Fraudt. Conv., p. 242 and cases cited, also pp. 211 and 215.

Of course, where the value of the property exceeds the exemption allowance the creditor is interested; yet in such a case, it, by no means follows that if a conveyance were set aside for

fraud at the suit of creditors the debtor would be estopped from still claiming and holding the exemption privilege acquired before the fraudulent transfer: Thompson on H. & E. sec. 408 and cases cited.

Examination thereof demonstrates that the spirit as well as the letter of our entire homestead act is in harmony with the views we have adopted upon both of the foregoing questions. Section 1634 gives the benefit of the homestead to a surviving widow, husband or minor children; section 1637 provides for cases where the premises exceed in value the exemption allowance of two thousand dollars; the creditor may sell the same under his execution, but he is required to pay the debtor this amount from the proceeds; he is only entitled to apply to the discharge of his demand, the surplus after paying all costs and two thousand dollars to the exemption claimant; if there be not enough proceeds to do this, he must make up the deficiency from his private funds: Section 1638 authorizes the debtor to sell his homestead and invest the proceeds therefrom in another; the new homestead so acquired is exempt from execution or attachment for debts existing before the sale; the *bona fide* purchaser for valuable consideration of the old homestead premises takes the same entirely free from liens on account of judgments or other claims against his grantor existing at the time of the sale.

This section does away with every doubt as to the debtor's right to dispose of his homestead; the last clause thereof puts at rest all uncertainty as to the effect of a judgment lien upon a homestead. On this subject, counsel cite two lines of decisions which have been rendered in the absence of such statutory provision: *First*—Those holding that no judgment lien attaches to the homestead; and, *Second*, those which declare that such lien does attach, but is simply held in abeyance till sale of the premises, or forfeiture of the right. Important consequences flow from the distinction which it is not *necessary* in view of our statutes, for us to state or consider. But the former view is sustained by the weight of authority and the better reason; and it has been expressly recognized by legislature in at least two of the states where the latter was first announced by the supreme court: See Thompson on H. & E., sec. 390, *et seq.* and cases cited.

We think plaintiff in error is not in position to claim in this case the benefit of the general doctrine declaring a conveyance fraudulent and void as to creditors, which is made partially in consideration of future support to the insolvent grantor.

The complaint states facts sufficient to constitute a cause of action. The judgment will be affirmed.

PEOPLE EX REL. BERNARD ET AL *v.* CHEESEMAN ET AL.

Filed May 2, 1884.

RAILROADS, WHAT IS—UNION DEPOT.—A corporation organized for the purpose "of locating, building, owning and maintaining a union depot for railroads in the city of Denver, and for the location, building, owning and maintaining of as many lines of railroad from said depot to the exterior boundaries of said city, as may be necessary for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," is not an ordinary railroad company within the meaning of the general statutes.

CREATION OF PRIVATE CORPORATION UNDER GENERAL LAW.—A substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and a failure to comply therewith in any material particular is ground for the impeachment of corporate existence in an appropriate proceeding prosecuted by the proper authority.

THE SAME—STATEMENT OF TERM OF CORPORATE EXISTENCE.—The statement in the articles of incorporation of a private corporation that the same is to exist for fifty years, is not fatal to the creation of the corporation, although the general law under which it was organized limits the existence of such corporation to twenty years.

CERTIFICATE OF ACKNOWLEDGMENT OF INCORPORATION.—Failure of the officer who took the acknowledgment of the articles of incorporation of a company to state in his certificate thereof, that the individuals who acknowledged the same were personally known to him, or proven to him to be the persons who executed the same, does not vitiate such certificate.

ERROR to the district court of Arapahoe county. The opinion states the facts.

W. A. Hardenbrook and *J. A. J. Page*, for the plaintiff in error.

G. M. Dunn, Teller & Orahood, B. M. Hughes and *C. J. Hughes*, for the defendants in error.

HELM, J. Relators, in the name of The People, seek by an action in the nature of *quo warranto*, to directly challenge the corporate existence of "The Union Depot and Railroad Company." Their theory is that respondents under that name wrongfully usurped the privileges and franchises of a corporation; that respondents' attempted organization of the company was void *ab initio* by reason of a failure to comply with the precedent requirements of our general incorporation act.

The action is brought under chapter twenty-eight of the code (of '83).

It is somewhat doubtful if relators are in position to maintain the same in the name of The People or otherwise, giving the code provisions the interpretation most favorable to them. But we prefer to base our determination of this proceeding in error upon other grounds.

Some doubt seems to exist in the minds of counsel as to the purposes for which the corporation was attempted to be organized; this uncertainity grows out of the language used in the articles of incorporation. Respondents therein declare their intention to create a company "for the purpose of locating, building, owning and maintaining a union depot for railroads in the city of Denver, Arapahoe county, in said state; and for the location, building, owning and maintaining as many different lines of railroad from said depot to the exterior boundaries of the city of Denver as may be necessary for the accommodation and use of the different railroad

companies making said city a point of delivery for freight and passengers."

Does this language indicate an attempt to create an ordinary railroad company under our laws? sec. 333, *et seq.*, Generat Statutes. We think not. The primary and principal design evidently was to build and maintain a union depot. Various lines of railroad extended to the city; they came in from different directions and discharged freight and passengers at different points. To successfully "maintain" a union depot and thereby accomplish the purpose of the enterprise, it was of course necessary to connect the same with the several termini of the roads within the city; incidental, therefore, to the main adventure was the construction and keeping in repair of lines of track to make these connections.

Had the articles of incorporation announced a purpose to build and maintain a union depot and connect the same by lines of track with the different railroads centering in Denver, the same intention would, in our judgment, have been expressed, and the same end attained. The language of the articles expressly exclude the idea that the union depot company intended to *operate* the "lines of railroad" they constructed, for these lines were to be built and maintained for the accommodation and use of the different railroads, etc. It is safe to say that the legislature in the portion of the incorporation act above mentioned were not providing for such incidental aids to another enterprise as this; and it is also a fair conclusion from the language used and the evident purpose expressed in the articles of incorporation that respondents had no intention of engaging in the business of constituting or operating a railroad under said statutes.

It is true that the word "railroad" is used in the corporate name and the term of existence is fixed at fifty years; it is also true that by the substituted articles of incorporation the number of incorporators was increased from four to five. These facts would cast some doubt upon the subject, if there was room for uncertainty; but as above indicated we think there is no ground for reasonable doubt as to what respondents' purposes really were, and it is unnecessary for us to speculate upon their reasons for preparing the articles of incorporation in the manner they did.

The conclusion that they were not attempting to engage in a railroad enterprise disposes of many of the objections presented by relators; it also greatly simplifies our consideration of the remaining questions.

An attempt was made by respondents to organize an ordinary private corporation for a lawful purpose under our statutes authorizing the same; did they succeed?

As already suggested, the grounds of attack relied upon in this case are errors in the attempt to comply with the specific requirements of the statute in creating the corporations. No effort is made to have a forfeiture of its franchises declared on account of acts or omissions occurring *subsequent* to its organization.

We have no doubt but that in this state a *substantial* compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and that a failure to comply therewith in any material particular, is ground for the impeachment of corporate existence, in an appropriate proceeding prosecuted by the proper authority.

Twelve different alleged defects are named and discussed at length in the briefs; many of these, however, are already disposed of, and we only deem it important to consider two of the remainder.

First. Was the fact that the articles of incorporation provide for an existence of fifty years fatal?

Section 238 of the general statutes requires that these articles shall state, among other things, "the term of existence not to exceed twenty years."

The defect here suggested is not an omission to insert something required; respondents comply with the statutes by declaring the term of existence; as to the length of this term, they ask more than the law allows; in the face of a restriction to twenty years, they assume the right to act for fifty. This statutory provision as to time may, we think, properly be regarded as a limitation, and we are of opinion that the irregularity is not such a non-compliance with law as operated to prevent the corporation from coming into existence. It cannot, without renewal, live for fifty years; but, so far as this objection is concerned, it may exercise the rights and privileges of a corporation in carrying on the business intended, for the period of twenty years.

Second. Was there a fatal defect in the certificate of acknowledgment of the articles of incorporation?

This certificate is as follows:

"STATE OF COLORADO, } ss.
" Arapahoe County, }

"I, William B. Tebbets, a notary public within and for the county of Arapahoe and state of Colorado, do hereby certify that on the 24th day of November, A. D. 1879, personally appeared before me the persons whose names are signed to the foregoing articles of association, namely: Walter T. Cheeseman, Bela M. Hughes, D. C. Dodge, A. A. Egbert, and J. F. Welborn, and they, each of them acknowledged that they had signed the foregoing articles of association for the purposes therein set forth. In testimony whereof I have hereunto set my hand and affixed my official seal, this the day and year aforesaid.

"[SEAL] "WILLIAM B. TEBBETS,
" Notary Public."

The specific objection to this certificate is that it is not stated therein that "the individuals who acknowledged the same were personally known to the officer who took the acknowledgment or proven to him to be the persons who executed the certificate."

Were this omission in the certificate of an acknowledgment to a deed conveying real estate, we might be constrained to hold such

certificate defective; such is the conclusion reached under a statute identical with our section 212, which provides for the acknowledgment of instruments relating to realty: Shepherd v. Corriel, 19 Ill. 319.

But the statute under which the certificate of acknowledgment to these articles of incorporation was made, contains no such specific requirement as said section 212, it simply declares that the acknowledgment shall be "before some officer authorized to take the acknowledgment of deeds," the declaration that the same officer shall officiate does not necessarily imply that he must certify to precisely the same matters in both instances. The provision requiring the officer to state that the individual subscribing and the one acknowledging are personally known by him to be identical, was inserted for the purpose of preventing one individual from personating another in the execution of instruments relating to real estate.

As will be observed, the notary public certifies that the persons whose names are signed to the articles of incorporation under consideration, personally appeared before him; in early times this would have been ample in the certificate to an acknowledgment of a deed to realty, and we are satisfied that it is a sufficient compliance with the incorporation statute upon the subject.

The judgment of the district court will be affirmed.

RANKIN v. THOMPSON ET AL.

Filed May 2, 1884.

FINDINGS—CONFLICT OF EVIDENCE.—If the record discloses a substantial conflict of testimony upon a material issue, the appellate court will not interfere with the finding of the jury thereon, although they accepted the testimony of one witness as against those of two. Where, however, such finding is unsupported by the testimony of any witness, the judgment will be reversed.

APPEAL from the district court of Fremont county. The opinion states the facts.

Thatcher & Gast, for the appellant.

J. W. Meldrum and *J. D. Freeman*, for the appellees.

HELM, J. Appellees were sub-contractors under appellant in grading a portion of the Gunnison extension of the Denver and Rio Grande Railway; no particular amount of grading was stipulated to be done by them, they were to do as much as they could; the construction work on this extension was divided into sections, one mile each in length; appellees commenced grading upon section two hundred and seventy-four, which they finished; then proceeding to two hundred and seventy-five, they did about one quarter of the work and passed to two hundred and seventy-six; leaving the latter in an unfinished condition, they advanced their force to two hundred and seventy-seven; after doing a small part of the work on two

hundred and seventy-seven, they returned to two hundred and seventy-six and ultimately completed the grading of that section. In the meantime the track-layers were approaching, and the extension company had given orders to appellant to have the gaps left by appellees upon these sections immediately filled up; appellant gave notice to appellees in accordance with these orders; the latter failing to comply as quickly as the urgency of the case required, appellant put forces of men to work and completed the sections.

There is practically no dispute as to the actual amount of grading done by appellees, or the sum paid them therefor and the balance remaining due; but appellant contended that appellees were bound to finish each section before leaving it; that their failure to do so was a violation of their contract with him; that by reason of such failure the necessity arose for his filling the gaps left himself; that in the sudden removal of camps, the transfer of large bodies of men, the performance of the labor, and otherwise in doing this work he was compelled, necessarily, to incur great expense, and that such necessary and reasonable expense added to the amount already advanced to appellees exceeded what he would have paid them under the contract for grading the four sections, in the sum of one thousand one hundred and seventy-seven dollars and seventy cents. For this amount appellant in his answer demanded judgment by way of counter-claim.

The contract was verbal, and appellees deny that they were bound thereby to complete each section before passing to the next, leaving no gaps unfinished.

The main question of fact presented to the jury related to the terms of the agreement in this respect. Under the evidence in the record it appears that the jury must have resolved this question of fact against appellant.

If the record disclosed a substantial conflict of testimony upon this feature of the contract, we would not presume to interfere with the finding of the jury thereon, though they accepted the sworn declarations of one witness as against those of two. Appellant swore positively that under the agreement appellees were to finish the work on each section before they passed to another, and were to leave no gaps; his statements are corroborated by the testimony of Clark, and also in our judgment by that of Thompson himself; for Thompson says that he did not understand that appellees were permitted to work here and there leaving gaps between; the rest of Thompson's testimony upon this subject in no way conflicts with appellant's view of the contract. The facts that no certain amount of work was contracted for, and that appellees were to begin and do what they could with their "outfit," are not inconsistent with the proposition that they were bound to complete each section before leaving it; neither is his denial that a certain conversation took place relative thereto, a declaration that the contract did not contain this provision.

Here then was a question of fact constituting a material issue, upon which there is no substantial conflict in the testimony, as to which, on the contrary, the testimony of both sides is in harmony. We think the jury must have misunderstood this evidence or misapprehended its scope and effect.

The record discloses nothing which can fairly be construed as a waiver on the part of appellant of a breach of the contract in this respect. Upon a re-trial of the cause it may be made to appear that such a waiver took place; or under amended pleadings, if amendment thereof be allowed, matters in avoidance may perhaps be presented. But we are satisfied that for the erroneous finding of the jury, this judgment should be reversed.

It is unnecessary to consider the remaining assignments of error.

The judgment will be reversed and the cause remanded for a new trial. Reversed.

SUPREME COURT OF CALIFORNIA.

No. 8,016

IN RE ESTATE OF PARSONS, Deceased.

Department Two. Filed April 14, 1884.

ATTORNEYS FEES PAID BY AN ADMINISTRATOR IN CONTESTING THE PROBATE of the alleged will of his deceased intestate cannot be charged against the estate.

IN SETTLING THE ACCOUNT OF AN ADMINISTRATOR the court may adjudicate upon certain items, such as clerk's fees, in anticipation of payment.

SETTLEMENT OF ADMINISTRATOR'S ACCOUNT.—Items not found in the account of an administrator, nor in the report accompanying the same, cannot be settled by the court.

APPEAL from an order of the superior court for Santa Cruz county, settling the account of an administrator. The opinion states the facts.

Younger and *Lesser*, for the appellant.

McCann and *Skirm*, for the respondent.

MYRICK, J. This is an appeal from an order settling an account of an administrator.

1. J. W. Parsons was appointed administrator, and subsequently thereto a document was offered for probate as the will of deceased. Said J. W. Parsons contested the probate of the document, and the court adjudged it not to be the will of said deceased. In and about such contest, said J. W. Parsons employed attorneys (the same who were acting for him as administrator), and for their services in the contest they charged $1,000. This item is not a charge against the estate; it was the affair of the heirs, as such, to contest (if they wished) the probate of the document—not of the administrator. The latter is an officer to administer the estate for the benefit of those interested, leaving interested parties to settle their own differences.

2. Objection is made that the court erred in adjudicating upon certain items, clerk's fees and the like, in anticipation of payment. We see no error in this prejudicial to the interests of the estate.

3. The court found that $122 was due one Thurber for money paid for redemption of real estate from tax sale. There is nothing in the account, or the report accompanying the same, or in any of the proceedings, upon which to base this finding; therefore it had no proper place in the order of settlement.

4. In the order settling the account the court, referring to the above items and certain others not paid, adjudged that they "are a lien and charge upon the property of said estate." This may not be technically accurate, but as it works no injury to any one, we do not think it necessary to observe further upon it.

The cause is remanded with instructions to decree a settlement of the account not inconsistent with this opinion. In other respects the order is affirmed, with costs to appellants.

SHARPSTEIN, J., and THORNTON, J., concurred.

No. 9,423.

IN RE GUARDIANSHIP OF ALLGIER ET AL.

Department One. Filed May 10, 1884.

THE PROBATE JURISDICTION OF THE SUPERIOR COURT IS SEPARATE AND DISTINCT from the jurisdiction of such court in ordinary civil actions.

GUARDIAN AND WARD—SETTLEMENT OF ACCOUNTS.—When a ward attains its majority, the office of guardian ceases, and it is the duty of the latter to exhibit to the probate court and settle his account with the ward. Such accounting should only include transactions during the ward's minority. Transactions subsequent thereto must be settled in an action at law.

ACCOUNTING BY EXECUTORS OF DECEASED GUARDIAN.—The executors of a deceased guardian have no authority to present such guardian's account with his ward to the probate court for settlement, nor has the court authority to receive or act upon it. Such settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and other necessary parties.

APPEAL from a judgment of the superior court for the city and county of San Francisco. The opinion states the facts.

Cowdery & McCutchen, for the appellants.

Heyneman and *Wise*, for the respondents.

MCKEE, J. In November, 1867, Henry Brickwedel was appointed by the probate court of Sutter county, guardian of the persons and estate of Delia and Augusta Allgier, then the infant heirs at law of Nicholas Allgier, deceased. The appointee qualified, took charge and control of his wards and of their estate, and continued in office until the day of his death. He died in the month of April, 1883, without having made a final settlement with the court of his guardianship.

After his death his executors presented to the superior court of Sutter county a report in writing of the condition of the estate, accompanied by a final account which the court settled and allowed. The account was addressed to the probate jurisdiction of the

superior court—a jurisdiction which is separate and distinct from the jurisdiction of the court in ordinary civil actions.

A final account presented by a guardian is properly addressed to the probate court that has jurisdiction of the estate of the ward. But in this instance the account was not presented by the guardian, for he had died before its presentation, and, at the time of its presentation, he was not in office. Besides, the office had terminated long before his death, for one of his wards attained the age of majority in November, 1870, and the other in August, 1876.

When a ward attains the age of majority, the office of guardian comes to an end, and it is *then* the duty of the guardian, and one of the obligations of his bond, to exhibit a final account of his guardianship to the probate court, make a settlement with the probate judge, or with the ward, and deliver all the property in his hands belonging to the ward: Section 1754, C. C. P. Failure to do this constitutes a breach of his bond for which he and his sureties are liable after settlement of the guardianship.

Settlement of the final account of a guardian only includes transactions during the minority of the ward; it does not include transactions occurring after the ward has attained its majority. When that event happens, the ward is *sui juris*; and the legal liability which attaches to him, for any services rendered to him by his guardian, arises not out of the relation of former guardian and ward, but out of the contractual relation established by the transactions between them as contracting parties. Such a liability is not enforceable within the jurisdiction of a probate court; the remedy upon it lies, not in a probate proceeding, but in an action at law.

Of the charges in the account presented by the executors of the deceased guardian against the appellants, as his former wards, for transactions between him and them after they had attained their majority, the court had no jurisdiction. Nor had it jurisdiction of the account itself, for after the death of the guardian, without settlement of his guardianship in the probate court, his executors had no authority to present his final account to the probate court for settlement, for charges made by him against the wards either during or after their non-age; and the court had no authority to receive or in any way to act upon it.

Presentation of such an account is no part of the duties involved in the administration of the estate of the testator; for although the property, which was under the control of their testator as guardian, may have come into the hands of the executors, yet the guardianship was a personal trust which did not pass to them on the death of the testator, and the property held by him as guardian did not become assets in their hands to be administered; they merely held it for its preservation until the persons whose estate it is, and for whose benefit it is held, can obtain a settlement of the trust, terminated by the death of the trustee, in the proper forum, where the rights of all parties to the trust may be definitely determined. This

settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and other necessary parties: Lathrop v. Bampton, 31 Cal. 17; Chaquet v. Ortet, 60 *id.* 600; Theller v. Such, 57 *id.* 447; Peck v. Braman, 2 Blackf. 141. But the executors had no authority to institute such a proceeding for settlement in the probate court; and the probate court had no authority to exercise jurisdiction over it: Wetzler v. Fitch, 52 Cal. 639; Bush v. Lindsey, 44 Cal. 121.

Judgment and order reversed and cause remanded.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,351.

PARKER *v.* CITY AND COUNTY OF SAN FRANCISCO.

In Bank. Filed May 10, 1884.

ACCEPTANCE OF STREETS—SIDEWALKS—ROADWAY.—Judgment affirmed on authority of Bonnet v. City and County of San Francisco, *ante*, page 832.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The facts in the case are similar to those in Bonnet v. City and County of San Francisco, *ante*.

William Craig, for the appellant.

C. H. Parker, for the respondent.

THE COURT. On the authority of Bonnet v. City and County of San Francisco, No. 8,350, *ante*, page 832, judgment this day pronounced, the judgment and order are affirmed.

No. 10,926.

PEOPLE *v.* KEEFER.

Department One. Filed May 12, 1884.

ACCESSORY AFTER THE FACT—CONCEALMENT OF DEAD BODY.—If a defendant has done no act which would make him responsible for a murder, the fact that he aided in concealing the dead body would render him liable only as an accessory after the fact. For such offense he could not be found guilty under an indictment for murder.

INSTRUCTIONS—TESTIMONY OF DEFENDANT.—However incredible the testimony of a defendant in a criminal prosecution may be, he is entitled to an instruction based upon the hypothesis that his testimony is true.

TO CONSTITUTE ROBBERY OR LARCENY THE GOODS MUST HAVE BEEN TAKEN *animo furandi*.

CONSPIRACY TO COMMIT MISDEMEANOR—MURDER.—One who simply encourages another to commit a misdemeanor upon the body of a third person, which did not and could not cause death, or any serious injury, is not liable for the murder of such third person by his co-conspirator, when such killing was neither aided, advised nor encouraged by him, nor involved in nor incidental to any act by him aided, advised or encouraged.

ONCE IN JEOPARDY—NEW TRIAL—MURDER.—A defendant having been once tried upon an indictment for murder, and found guilty of murder of the second degree, who afterwards, on his own motion, has the verdict set aside and a new trial granted him for errors in the admission of evidence, may on such new trial be convicted of murder of the first degree.

APPEAL from a judgment of the superior court for Butte county, entered upon a verdict convicting the defendant of murder, and from an order denying him a new trial. The opinion states the facts.

F. C. Lusk, for the appellant.

Attorney General, for the respondent.

MCKINSTRY, J. Counsel for defendant asked the court to charge the jury:

"If you believe from the evidence that the defendant, James Keefer, was not present when the Chinaman, *Lee Yuen*, was killed by *Chapman*, and did not aid and abet in the killing, and that defendant, at the time or prior to the killing had not conspired with *Chapman* to commit the act, and that he had not advised and encouraged *Chapman* therein, and that the killing was not done in pursuance of any conspiracy between this defendant and *Chapman* to rob said Chinaman, and that this defendant only assisted in throwing the dead body of the Chinaman into the creek, then you are instructed that, under the indictment, you must find the defendant not guilty."

It is to be regretted that the foregoing instruction was not given to the jury. Of course, if defendant had done no act which made him responsible for the murder, the mere fact that he aided in concealing the dead body would render him liable only as an accessory after the fact—an offense of which he could not be found guilty under an indictment for murder. However incredible the testimony of defendant, he was undoubtedly entitled to an instruction based upon the hypothesis that his testimony was entirely true.

Assuming the testimony of defendant to be true, there was evidence tending to show that no robbery was committed or attempted. In robbery, as in larceny, it must appear that the goods were taken *animo furandi;* and there was evidence tending to prove that his property was not taken from deceased *lucri causa*, or with intent to deprive him of it permanently. So also there was evidence tending to prove that defendant was not personally present at the killing, and that the killing was not done in pursuance of any agreement or understanding to which defendant was a party, but that it was done by Chapman without the knowledge, assent or connivance of the defendant.

The testimony of defendant was to the effect that he did not advise or encourage Chapman to follow and *tie* the deceased. But even if we could be supposed to be justified in deciding the *fact;* in holding that his conduct conclusively proved—notwithstanding his testimony to the contrary—that he did encourage Chapman in his purpose to follow and tie the deceased, such encouragement would not, of itself, make him accessory to the killing. An accessory before the fact to a robbery (or any other of the felonies mentioned in section 198 of the penal code), although not present when the felony is perpetrated or attempted, is guilty of a murder committed

in the perpetration or attempt to perpetrate the felony: People *v.* Majors, April 1, 1884. This is by reason of the statute, and because the law super-adds the intent to kill to the original felonious intent: People *v.* Doyell, 48 Cal. 94. One who has only advised or encouraged a misdemeavor, however, is not *necessarily* responsible for a murder committed by his co-conspirator, not in furtherance, but independent of the common design: 1 Wharton Cr. Law, section 229 and note.

In the case at bar, if defendant simply encouraged the *tying* of the deceased—a misdemeanor which did not and probably could not cause death or any serious injury—as the killing by Chapman was neither necessarily nor probably involved in the battery or false imprisonment, nor incidental to it, but was an independent and malicious act with which deefendant had no connection, the jury were not authorized to find defendant guilty of the murder or of manslaughter. If the deceased had been strangled by the cords with which he had been carelessly or recklessly bound by Chapman, or had died in consequence of exposure to the elements while tied, defendant might have been held liable. But, if the testimony of defendant was true—and as we have said he was entitled to an instruction based upon the assumption that the facts were as he stated them to be—the killing of deceased was an independant act of Chapman, neither aided, advised nor encouraged by him, and not involved in nor incidental to any act by him aided, advised or encouraged. The court erred in refusing the instruction.

Notwithstanding defendant's objection, the court permitted the district attorney to ask a witness, the surgeon who had examined the wounds of deceased, "In regard to that cut on the neck—if the Chinaman was struggling, could such a cut have been made?" Conceding, as claimed, it was error to allow the question, the error could not have injured defendant. As stated by counsel for appellant, the contention of the prosecution was that Chapman inflicted the fatal wound while the deceased was perfectly still, and of the defense that it was while Chapman and the deceased were struggling. The answer of the witness to the question was: "It is a wound that might have been made in a scuffle."

The transcript contains no copy of the minutes of defendant's pleas: Penal Code, 1207. It contains, however, a stipulation signed by counsel which refers to a plea of former acquittal. The stipulation also recites that defendant had been tried upon the same indictment in April, 1883, and convicted of murder of the second degree; that on his motion the verdict, guilty of murder in the second degree, was vacated and a new trial granted, because of error at the trial in admitting certain evidence. At the second trial, counsel for defendant requested the court below to charge the jury: "Defendant having been previously tried on this indictment and found guilty of murder of the second degree, he cannot now be convicted of murder in the first degree."

It is urged by appellant that the refusal of the court to give the foregoing instruction was error which would require the reversal of the judgment and order appealed from.

At the second trial defendant was found guilty of murder of the second degree. It is obvious, therefore, that the mere refusal of an instruction that he could not be convicted of murder of the first degree did not prejudice him. Inasmuch, however, as there must be a retrial of this action, it is proper to add that the conviction of murder of the second degree would not have been a bar to a conviction of murder of the first degree. The indictment charges the crime of *murder*, and the defendant was not acquitted of murder by the first verdict.

In dividing the crime of murder into two degrees the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case whether the crime deserved the extreme penalty of the law or a less severe punishment: People v. Haun, 44 Cal. 98; People v. Doyell, *supra*.

After the act of 1856, which divided the crime into murder of the first and second degrees, *murder* remained, and it still remains, the unlawful killing of a human being with malice aforethought: Penal Code, 187, 188. The malice may be expressed or implied; the express intent to kill or to commit one of the named felonies, may be affirmatively established, or the killing being proved, the malice may be implied, but in either case the crime is murder. The fact that a severer penalty is to be imposed in one case than the other, does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial, subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree.

Judgment and order reversed and cause remanded for a new trial.

ROSS, J., concurring. As there was testimony tending to show that defendant was not personally present at the killing, and that the killing was not done in pursuance of any agreement or undertaking to which defendant was a party, I agree that the court below erred in refusing to give the instruction first set out in the opinion of Mr. Justice McKinstry, and therefore concur in the judgment. I also agree with what is said in the opinion upon the last point discussed.

MCKEE, J., concurred.

8,453.

MOFFATT v. COOK.

Department Two. Filed May 13, 1884.

THE TIME FOR PREPARING AND FILING A BILL OF EXCEPTIONS MAY BE EXTENDED by the court thirty days in addition to the ten days allowed by section 659 of the code of civil procedure.

MOTION to dismiss an appeal from the superior court for the city and county of San Francisco. The opinion states the facts.

Mastick, Belcher & Mastick, for the appellant.

John C. Burch, for the respondent.

THE COURT (Thornton, Sharpstein and Myrick, J. J., concurring.) Motion to dismiss appeal of defendant from an order denying his motion for a new trial.

The court did not exceed the power given to it by section 1,054, C. C. P., in extending the time of defendant to prepare and serve the bill of exceptions filed in his case, thirty days in addition to the ten days for preparing and serving such bill allowed by section 650 of same code: See also section 650 C. C. P.

Motion denied.

No. 9,274.

MORGAN v. MENZIES ET AL.

In Bank. Filed May 14, 1884.

DEMAND, WHEN MUST BE MADE AND AVERRED. Where a demand is necessary to fix the liability of sureties on an undertaking, it is parcel of the contract, and must be made before the commencement of an action for the breach of the undertaking, and in the action itself it must be averred and proved. It cannot be made after the commencement of the action, except as the basis of a new action.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants. The facts are stated in the former opinion, reported in 60 Cal. 341.

W. H. Sharp, for the appellant.

Burnett and *Haft*, for the respondents.

MCKEE, J. On a former appeal in this case we held that no recovery could be had in the action out of which the case arises, because there was no averment and no proof that the claim of the plaintiff had been presented to the board of supervisors of the city and county of San Francisco, as required by the statute of 1863-4, pp. 152-3, and payment demanded; and because the undertaking itself, upon which the action was founded, was in contravention of law and void; therefore, the judgment appealed from was reversed and the cause remanded: 60 Cal. 341.

When the remittitur went down and was filed in the lower court, the plaintiff amended his complaint, and, subsequently, filed a supplemental complaint containing the averments, that he had presented

his claim to the board of supervisors of the city and county and demanded payment thereof on the 10th of July, 1882, two years and six months after the commencement of the action. Upon these pleadings the action was again tried and judgment was given for the defendants, and from which the plaintiff appeals.

Where a demand is necessary to fix the liability of sureties to an undertaking, it is parcel of the contract; and it must be made before the commencement of an action for the breach of the undertaking; and in the action itself it must be averred and proved. It cannot be made after the commencement of the action, except as the basis of a new action.

With the exception of the averments of a demand in the supplemental complaint, the pleadings upon which the case was tried are, substantially, what they were on the former appeal, and the questions at issue are the same; the decision then rendered must therefore be accepted as the law of the case.

Judgment affirmed.

MCKINSTRY, J., ROSS, J., MYRICK, J., SHARPSTEIN, J., and THORNTON, J., concurred.

No. 7,846.

CITY OF SAN JOSE v. REED ET AL.

Department Two. Filed May 14, 1884.

CONDEMNATION OF LAND—PLEADING—EVIDENCE.—In an action to condemn a parcel of land for a public street, when the complaint alleges that the defendants are the owners of the land sought to be condemned, the plaintiff cannot give evidence that the defendants had already dedicated such land as a street, for the purpose of affecting the question of damages.

APPEAL from a judgment of the superior court for Santa Clara county, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

George F. Baker, for the appellants.

D. W. Herrington, for the respondent.

MYRICK, J. This is an action to condemn a parcel of land to the use of plaintiff as a public street. The complaint contains an averment "that said defendants are the only owners or claimants of the premises hereinafter described and sought to be condemned." On the trial the court permitted the plaintiff to give evidence tending to show that the defendant, E. P. Reed, had dedicated the land to the public as a street, as affecting the question of damages or compensation. This was error. No question of dedication was involved in the pleadings for any purpose. If there had been a dedication, and defendants had unlawfully obstructed the street, an action of another character could have been maintained. Either the land had been dedicated and was a public street, or the defendants were the owners. The plaintiff alleged the latter to be the fact. For the purposes of this action then, it must stand on the allegation, and we must regard them as such. The jury gave the defendants a verdict of one dollar

for the lands taken. By the testimony the lowest estimate of value was $2,700; the highest $5,400. The verdict was not sustained by the evidence; it was evidently based on the idea of a former dedication.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 9,217.

ELLIS v. BENNET ET AL.

Department One. Filed May 14, 1884.

AN APPEAL IS INEFFECTUAL WHEN THE NOTICE THEREOF IS NOT SIGNED by the attorneys of record or by the counsel for the appellant, or when the transcript contains no proof that such notice was served upon the respondents.

MOTION to dismiss an appeal from an order of the superior court of the city and county of San Francisco. The opinion states the facts.

Cobb and *Platt* for the appellant.

Stanley, Stoney & Hayes, for the respondent.

MCKEE, J. This is an attempted appeal from an order made and entered May 29, 1883, restoring respondents to possession of a tract of land from which they had been dispossessed by the sheriff by the execution of a writ of possession, which had been issued upon a judgment in favor of the plaintiff (who is the appellant) against one Thomas J. Currey, for the recovery of said land, and costs.

In the transcript which has been filed there is a copy of notice of appeal, which is signed by attorneys, who, as appears by recitals in the order appealed from, were not the attorneys of record, or of counsel, for the appellant; and it contains no proof of service of the notice upon the respondents or either of them.

Besides, it contains no copy of an undertaking on appeal; no showing that such an undertaking was filed at any time, or that instead thereof a deposit in money had been made: Secs. 940–41, C. C. P.

Moreover, it contains no bill of exceptions, and no showing what papers were used on the hearing of the order to show cause, upon which the order appealed from was made: Sec. 951, id.

Furthermore, it is not certified by the clerk of the court or the attorneys in the case, as required by section 953, id.

Upon such a record the order appealed from cannot be reviewed. The certificates of the presiding judge and clerk, made after the service and filing of notice of motion to dismiss the appeal, did not supply the defects in the transcript. The appeal in itself was ineffectual because of the defective notice of appeal, and because the transcript contains no proof of its service. The motion to dismiss must be sustained.

Appeal dismissed.

ROSS, J. and MCKINSTRY, J., concurred.

No. 7,838.

WETMORE v PEOPLE.

Department One. Filed May 14, 1884.

ACTION FOR CLAIM AND DELIVERY—JUDGMENT. Under the code, a defendant who recovers judgment in an action for the claim and delivery of personal property where the same has been delivered to the plaintiff, is entitled to a judgment for a return of the property; and if all the property cannot be returned, then to a judgment for the value of the whole. In such action, the wrong-doer cannot acquire the privilege of restoring to the owner a particular article of the property wrongfully detained, or of paying instead its value as found by the jury, nor can he complain that the alternative judgment is for less than the value of the property.

A FINDING THAT AN ACTION WAS COMMENCED AND THAT JUDGMENT therein was "duly given and made," includes a finding of facts necessary to give the court jurisdiction.

APPEAL from a judgment of the superior court for Sonoma county, entered in favor of the defendant. The opinion states the facts.

Porter & Rutledge and *Frame*, for the appellant.

George A. Johnson, for the respondent.

THE COURT. 1. The court below found there was not an immediate delivery and actual and continued change of possession to and in plaintiff of the goods demanded in this action, and this is not contradicted by the other findings.

2. Appellant contends the judgment should be reversed, because neither it nor any finding determines the value of each article sued for separately. In support of this contention appellant cites Wallace *v.* Hilliard, 7 Wise, 627; Farmers' Loan *v.* Commercial Bank, 15 *id.*, 425; Whitfield *v.* Whitfield, 40 Miss., 369; and Hoeser *v.* Kraeka, 29 Texas, 455. The first of these cases only decides that the verdict should find the value of the property sued for, and the second that defendant may waive a return of the property and take a judgment for its value alone. In California it has been held that defendant may waive his right to the alternative judgment for value, and may rely on his judgment for the return of the property: Waldman *v.* Broder, 10 Cal., 379. Whitfield *v.* Whitfield, cited from the Mississippi reports, decided that a judgment in favor of a *plaintiff*, which did not follow a verdict, specifying the value of each article, but which required the defendant to deliver all the articles of property, or pay their aggregate value, was erroneous. Hoeser *v.* Kraeka —the Texas case—seems to uphold the view of the appellant. There the court held erroneous a verdict which did not find a separate value of each article recovered, saying: "The defendant should have the privilege of returning any one or more of the articles recovered, instead of paying its value, and *vice versa;* but this would be denied him unless the separate value of each article were found."

We do not agree that the wrong-doer, may, through his wrongdoing, acquire a privilege of restoring to its owner a particular article, or paying instead its value, as found by a jury. Under our code the judgment is primarily for the return of all the property wrongfully taken or withheld, and the judgment for its value comes into operation only "in case a return cannot be had" C. C. P., 667

So by section 627, the jury are to find the value of any specific portion of the property only, "if so instructed." Error can therefore only arise in a case where such instruction would be pertinent and proper, and the instruction was asked and refused. In De Thomas v. Witherby 61 Cal. 92, this court held that where a plaintiff replevied goods from a defendant, and a judgment was rendered against him for a return of the property or its value, the plaintiff could not be excused from satisfying the judgment upon a plea that the property had been lost in his hands, even by act of God. In De Thomas v. Witherby, the language of the superior court of New York, in Suydam v. Jenkins, Sandf. 614, is cited with approval. "The undertaking of the plaintiff in the replevin bond, we conceive is absolute to return the goods, or pay their value at the time of the execution of the bonds. We do not think that a wrongdoer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner." It cannot be doubted that a plaintiff, who without right has seized the property of a defendant under a writ, is a wrong doer.

Under our code the defendant who recovers a judgment in an action like the present, where the property has been delivered to the plaintiff, is entitled to a judgment for a return of the property, and if the property—all of it—cannot be returned, then to a judgment for the value of the whole.

In the case at bar, the court found the value of the property to be $400, but ordered an alternative judgment for $155 45-100. Appellant cannot complain that the judgment was for less than the value of the property.

3. The answer alleges that defendant was a constable, and that in the action Glenn v. Ward, in the justice's court, an attachment issued upon an affidavit and undertaking—the contents whereof, showing conformity to the code, are set forth—and that defendant as constable under the attachment levied on the property, it being in the possession of Ward. That in the action Glenn v. Ward a judgment was afterwards duly given, upon which execution issued to defendant, who levied the same on the attached property, etc. The findings are as full as the pleading, the finding with respect to the judgment being that it was "duly given and made." The facts constituted a defense for the constable: Thornburg v. Hand, 7 Cal 554. It is urged that there is no finding there was anything due from Ward to Glenn at the commencement of the attachment suit. But there is a statement in the answer that the suit was commenced on "an obligation incurred in Santa Rosa, said county," and if this was an imperfect averment of indebtedness, plaintiff did not demur generally or specifically. The court found: "All the other issues than those hereinbefore specifically mentioned are found in favor of defendant."

4. It is said by appellant that the judgment in the attachment suit is void, because Ward was not served with summons. This must mean that it does not affirmatively appear he was served in

the finding herein. But the finding is that the action was commenced in the justices court, etc., judgment "duly given and made." This includes a finding of the facts necessary to give the court jurisdiction.

Judgment affirmed.

No. 10,859.

PEOPLE v. BIGGINS.

Department One. Filed May 15, 1884.

FILING INFORMATION—CONFESSION OF DEMURRER.—After a plea of not guilty has been entered in a prosecution for murder, upon which the case is set for trial, the court may set aside an order overruling a demurrer to the information, and allow the counsel for the people to confess the demurrer and to file a new information; and an order entered allowing such confession of the demurrer, and directing a new information to be filed, is equivalent to an order allowing the demurrer.

AN INFORMATION WHICH SUBSTANTIALLY complies with the provisions of the penal code, is sufficient on demurrer.

INVOLUNTARY MANSLAUGHTER.—The testimony of the defendant showed that he knocked down the deceased for assaulting him while the latter was drunk. That after so doing, and while the deceased lay prone and helpless, he jumped with both feet upon his face, and that death ensued from such act. *Held*, that such killing was felonious, that it had none of the elements of involuntary manslaughter, and that the court could so instruct the jury.

INSTRUCTIONS GIVEN AT THE REQUEST OF A PARTY cannot be afterwards complained of by him.

INSTRUCTIONS TO A JURY SHOULD BE GIVEN WITH REFERENCE TO THE IMMINENT FACTS in a case. If the facts are controverted, the instructions upon them should be hypothetical. If uncontroverted, the court may assume them.

WHEN THE CHARGE AS A WHOLE STATES THE LAW CORRECTLY, the verdict will not be disturbed, although some part of the charge, standing alone, may contain some inaccuracy of expression which would be subject to criticism.

APPEAL from a judgment of the superior court of Fresno county, entered upon a verdict convicting the defendant of murder of the second degree, and from an order denying him a new trial. The opinion states the facts.

W. D. Tupper, for the appellant.

Attorney General, for the respondent.

MCKEE, J. On August 28, 1882, an information was filed in the superior court of Fresno county against Patrick Biggins, charging him with having committed the crime of murder. Upon demurrer it was held to be defective, and, by direction of the court, a new information was filed, to which a demurrer was interposed which was overruled, and the defendant then entered a plea of not guilty. But upon the day fixed for trial counsel for the people moved the court to set aside the order overruling the demurrer to the information, and to allow him to confess the same. The court granted the motion and entered an order setting aside the overruling of the demurrer, and, thereupon, as was recited in the order, counsel for the people confessed the demurrer and the court directed another information to be filed.

Upon the filing of the third information the defendant, after a demurrer to it had been overruled, entered two pleas, one not guilty

and the other a former acquittal. Upon these he was tried and convicted of murder of the second degree.

In the course of the preliminary proceedings it was objected, and on appeal it is now objected: First—That, after a plea of not guilty had been entered to the second information, upon which the case was set down for trial, it was error for the court to set aside its order overruling the demurrer, which had been filed to the information, and to allow counsel for the people to confess the demurrer and to file a new information. Secondly—After the order overruling the demurrer had been set aside, and the demurrer was confessed, the court erred in not rendering or entering judgment upon the demurrer, and Thirdly—That the court erred in overruling the demurrer to the third information.

1. The court had jurisdiction to set aside the order, and to allow counsel to confess the demurrer and to direct the filing of a new information: Sec. 128, C. C. P.; sec. 1,008, Pen. Code.

2. When the order was set aside it would have been more formal to have entered an order allowing the demurrer: Sec. 1,007 Pen. C. But the order entered allowing the confession of the demurrer and directing a new information to be filed, was the equivalent of an order allowing the demurrer. In legal effect the confession involved and decided the validity of the information, and left the defendant in the position of a person accused of crime against whom no valid information had yet been filed. The proceedings, therefore, by which the information filed against him was invalidated did not effect any substantial right of the defendant; and there was no prejudicial error in invalidating it, and in directing another to be filed.

3. The information upon which the defendant was tried and convicted, substantially complied with the requirements of sections 950–51 Pen. C., and the court did not err in overruling the demurrer to it.

Next it is contended that the court erred in refusing to instruct the jury upon the subject of involuntary manslaughter.

There was no refusal to instruct upon the subject of manslaughter. On the contrary, the presiding judge gave the definition of voluntary and involuntary manslaughter contained in the penal code, and defendant's counsel asked for no additional instruction upon the subject. But the court, in connection with its charge, told the jury that the law of involuntary manslaughter was inapplicable to the case before them, and this is complained of as error.

The case as made out by the evidence contained in the record was this: On the afternoon of July 30, 1882, Alexander, the deceased, and Biggins, the defendant, were drinking liquor, playing cards and singing songs in the bar-room of the Berenda hotel, in Fresno county. They continued at that until about five o'clock in the evening. At that hour "Alexander was very drunk"—"so drunk he could just keep from falling"; defendant had only drunk about half a dozen glasses of beer. In that condition of the two men the proprietor of the hotel left them alone in the bar-room while he went

to the railroad station, about eighty yards from the hotel, to put the Berenda mail bag on board the train, which had just arrived at the station. After he left the bar-room for that purpose the two men came out on the front porch of the hotel—Alexander standing about five or six feet from the door. Suddenly he was seen to fall backward inside the door of the bar-room, his feet sticking up outside the door. In that position the defendant as suddenly jumped with both feet upon the upturned face of the fallen man, completely mashing it—"his nose was mashed flat, his eyes were mashed out, and the jaws were mashed down, his blood oozed on the floor and was spattered on the walls." A witness of the act shouted at the defendant, who immediately ran to the railroad station, where he tried to board the train; but before he succeeded in his purpose he was arrested. Alexander was immediately lifted up and carried into the bar-room, where on being laid down upon a mattrass he died.

As to these facts there was no conflict of evidence. The record contains no other testimony given for the defendant than his own. As a witness in his own behalf, he testified that he struck Alexander a blow with his right fist which knocked him through the door of the bar-room, down upon the floor; that in giving the blow he fell with Alexander, striking his own head so violently against the floor that he remembered nothing afterwards until he was arrested; that he knocked Alexander down because he had followed him out on to the porch where, having grabbed him by the left shoulder, he, Alexander, struck him on the right shoulder and one of his arms, wounding him, with a knife, having a blade three inches long on which he saw blood.

But it was proved that Alexander was left-handed, that he was not in the habit of carrying any weapons whatever, and that no knife was found near or on his person, when he was taken up and carried into the bar-room where he died, but the next day a closed pocket-knife was taken from one of his pockets. It was also proved that, some years before, there had been an old grudge between Alexander and the defendant in which the latter had threatened to get even some day.

According to the testimony of the defendant himself the case was not one of involuntary manslaughter.

Assuming his testimony to be true, that he knocked down a drunken man for assaulting him, yet the facts remained uncontroverted that he did, after knocking him down, and while he lay prone and helpless, jump with both feet on his face, and that death ensued from the act. Such an act is felonious: Secs. 203–4, 245, Penal Code. In no condition of society, civilized or uncivilized, can it be considered lawful to stamp out the life of a man under such circumstances. The act was, therefore, unlawful and felonious. Being such, there was in it none of the elements of involuntary manslaughter and the charge of the court to that effect was correct: People v. King, 27 Cal. 507.

Where death ensues from an act committed under circumstances showing no considerable provocation to have existed, or an abandoned and malignant heart, or that the defendant did not intend the fatal blow to produce death, yet intended the blow, it is murder in the second degree: People v. Foren, 25 Cal. 361.

The act, in connection with the circumstances in which it was committed, made the defendant guilty of either murder of the first or second degree, or of voluntary manslaughter, or he was guiltless of any crime; and the questions arising out of the case for the determination of the jury were, whether the act, which resulted in the death of Alexander, was the result of malice or passion, or of a necessity, real or apparent, which justified it, or, whether it was committed by the defendant while unconscious of what he was doing. Upon all these questions— murder of both degrees, voluntary manslaughter, justifiable and excusable homicide, and irresponsibility in law for acts committed in mental unconsciousness—the court explained the law to the jury by instructions, given at the request of the people and the defendant, which in their combination and entirety, were correct.

Upon some of them criticisms of more or less force have been made. But, so far as appears from the record, most if not all of the challenged instructions were given on the part of defendant himself; and it is a well-settled rule that a party will not be heard to complain of instructions given at his own instance.

The main assignment of error, however, is that the court, in its charge, assumed as facts the death of Alexander, that the means adopted by the defendant caused his death, and that the manner of his death was brutal. In assuming these things as facts, it is contended that the court trenched upon the province of the jury.

The alleged assumption that the manner of Alexander's death was brutal is predicated on the following instructions to the jury:

"The means adopted by the defendant which caused the death of deceased may properly be looked to in ascertaining whether the killing was malicious. If a deadly weapon was used, or means calculated to produce death, or the killing was done in a brutal and inhuman manner, and the killing not done in self-defense, or in sudden heat of passion, the jury will be at liberty to find that the slayer was actuated by malice, and the killing will be murder."

* * * "If the jury believe from the evidence that the defendant, without receiving any considerable provocation, resented acts or words of the deceased in a brutal manner indicating malice, and an abandoned heart, defendant is guilty of murder."

Both instructions were predicated upon a supposed state of facts which the evidence tended to prove. Whether they were proved was a question of fact, and whether, if found, they established malice in the act committed by the defendant was one of the questions which they had to decide. The instructions were therefore properly given to aid the jury in coming to a correct conclusion upon the question whether the killing was malicious.

As to the assumption that Alexander was killed, and that his death ensued from the act of the defendant, neither of these things were denied. Neither his death nor the means causative of his death, nor the time and manner of his death were called in question; they were, therefore, uncontroverted facts. Such facts may be assumed as the basis of an explanation of the law regarding them.

Instructions to a jury should be given with reference to the imminent facts in a case. These may be either controverted or uncontroverted. Whether one or the other they constitute the basis of instructions. If controverted, instructions upon them should be hypothetical, leaving the supposed facts which the evidence tends to prove to the consideration of the jury. If uncontroverted the court may assume them; for when the evidence to the fact is positive and not disputed or questioned, it is to be taken as an established fact, and the charge of the court should proceed on that basis. It is only where there may be doubt that the jury are required to weigh the evidence; and it is then only that the rule applies that the court shall not charge the jury upon the weight of evidence: Wintz v. Morrison, 17 Tex., 372-87; Hughes v. Monty, 24 Iowa, 499; Harrison v. Roy, 39 Miss., 397.

There was no error in the ninth instruction.

Considered and construed as a whole the charge stated the law of the case correctly; and the case was presented fairly to the jury. We find no portion of it calculated to mislead the jury to an erroneous conclusion; and that being the case, their verdict should not be disturbed, even although some part of the charge, standing alone, may contain some inaccuracy of expression which would be the subject of criticism: Phillips v. The Ocmulgee Mills, 55 Georgia, 633; The W. & W. R. Co. v. Ingraham, 77 Ill., 309.

Judgment and order affirmed.

ROSS, J. I concur in the judgment.

MCKINSTRY, J. I concur in the judgment. The court below correctly charged that the law of involuntary manslaughter was inapplicable to the case. The defendant was entitled to an instruction based upon the hypothesis that his testimony was true. But, if his testimony was true, his act in striking the deceased—who held in his hand a bloody knife, three inches long, with which he had stabbed defendant at least twice—was not unlawful, but an act of necessary self-defense. Involuntary manslaughter is the unlawful killing of a human being, without malice, in the commission of an unlawful act, not amounting to a felony, or in the commission of a lawful act, which might produce death, in an unlawful manner, or without due caution or circumspection: Penal Code, 192. Conceding the facts to be as stated by defendant, and the death to have been the result of a blow with his fist, the killing was justifiable. It was done in resisting an attempt to murder, or to do great bodily injury: Penal Code, 197. It follows the court properly told the jury the law of involuntary manslaughter was not applicable to any phase of the evidence.

The court charged: "Insulting words, gestures or actions will not reduce an unlawful killing from murder to manslaughter, unless the gestures or actions are such as to reasonably induce the belief of danger to life, or of great bodily harm, in the mind of the party against whom they are used."

This was plainly error. But, inasmuch as the testimony of defendant (the only witness examined on his behalf) tended to prove, and if credible, did prove the killing to have been done in necessary self-defense, while the evidence on the part of the prosecution tended to prove a murder, an erroneous charge with respect to manslaughter could not have prejudiced the defendant. The killing by defendant being proved, the only other issue made by the evidence for or against him, and which the jury had to determine, was: Was the killing murderous or justifiable? Under these circumstances a verdict guilty of manslaughter could not have been a proper verdict, and defendant cannot complain of an instruction which may have induced the jury not to find such verdict. The court properly instructed them as to the law of self-defense.

No. 8,468.

SERE *v.* MCGOVERN ET AL.

Department One. Filed May 15, 1884.

DISMISSAL OF PARTY—JUDGMENT.—The entry of an order dismissing an action as to a certain defendant, ousts the court of jurisdiction of such person, and a judgment subsequently entered against him, without vacating such order, is void.

A CONDITIONAL SALE, DEPENDENT UPON AN ACT to be done, such as the payment of the consideration within a certain time, which is not done, does not pass the title to the vendee.

APPEALS from the superior court for the city and county of San Francisco. The opinion states the facts.

Harding and *Wood*, for the appellant.

A. D. Spivalo, for the respondents.

MCKEE, J. Two appeals have been taken in this case: One by the defendant Afflebach from the judgment and order denying a motion to amend the findings and judgment; and the other by the plaintiff Seré from the judgment and order denying his motion for a new trial.

The judgment was rendered in an action for the settlement of a partnership which had existed between the plaintiff Seré and the defendant McGovern, under the firm name of McGovern & Seré, for nineteen months until the fourteenth of February, 1880, when it was dissolved by mutual consent and the partnership property was left in the hands of the defendant McGovern. Afflebach was named in the complaint as a party defendant, because, as alleged in the complaint, he claimed an interest in the property.

The existence of the partnership for the time stated in the complaint, was not denied by the answer of either of the defendants. Afflebach, in his answer, averred he was the absolute owner of part

of the property by purchase from McGovern, after the dissolution of the partnership, and McGovern, in his answer, set up that, soon after the commencement of the action, he was adjudged an insolvent debtor, and the entire property in controversy passed into the hands of the assignee in insolvency.

By a supplemental complaint the assignee was brought in as a party to the action. In his answer he claimed that on the day of the dissolution of the partnership, the plaintiff, Seré, transferred by a bill of sale all his estate and interest in the property to the defendant, McGovern, who thereby became, and continued to be, the absolute owner of the same, until the day he was adjudged an insolvent debtor.

On the trial of the issues raised by the pleadings, the court, on September 1, 1881, "after the parties had rested their case," ordered that the action be dismissed as to the defendant Afflebach; but afterwards, on January 13, 1882, the court, without vacating the order of dismissal, filed a decision in favor of the assignee in insolvency and gave judgment thereon against the plaintiff, Seré, and the defendant, Afflebach, for recovery of the possession of the property and costs.

The judgment against Afflebach was void. The entry of the order of dismissal ousted the court of jurisdiction of the person of Afflebach; and, thereafter, jurisdiction over him could not be resumed and exercised, without vacating the order. Upon the entry of the order the defendant ceased to be a party to the action, and was not bound by any of the subsequent proceedings therein. The judgment entered against him was therefore irregular and void.

And the judgment against Seré was erroneous, because the fact upon which it was rendered was not sustained by the evidence.

Without conflict, the evidence showed that the alleged sale of the partnership property by Seré to McGovern was not an absolute sale; it was a sale conditional upon payment of $1,500 gold coin, payable in two installments, one-third thereof on February 14, 1881, and the remainder on the 14th of June thereafter, "time to be considered of the essence of the agreement;" and if payment was not made within the time specified, the moneys paid under the agreement to be forfeited, and the vendor had the right to the possession of the property.

When the first installment matured payment was demanded and refused, and when the plaintiff commenced the action in hand, McGovern resorted to his proceedings in insolvency. The court found that no part of the $1,500 had been paid, according to the terms of the agreement, although payment had been demanded. Yet, although the conditions had not been performed, and the defendant absolutely refused to perform them, the court decided that title passed by the executory agreement to McGovern, and he became the absolute owner of the property. This was erroneous. It is well settled that a conditional sale, dependent upon an act to be done, which is not done, does not pass title: Whitney v. Eaton,

15 Gray, 225; Stone *v.* Perry, 60 Maine, 48; Paul *v.* Deed, 52 N. H., 136; Russell *v.* Minor, 22 Wend., 659.

Judgment and order reversed, and cause remanded for a new trial.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,124.

PEOPLE *v.* VEUVE.

In Bank. Filed May 17, 1884.

THERE IS NO SUCH OFFICE AS POLICE JUSTICE OF THE CITY OF SAN JOSE, and consequently the same can not be usurped, intruded into, or unlawfully held or exercised.

JUSTICE OF THE PEACE—EXERCISE OF UNAUTHORIZED JURISDICTION.—The exercise by a justice of the peace of a jurisdiction unauthorized by the constitution, is not the exercise of an office. The result of such attempted jurisdiction is to render the acts done in the exercise thereof void.

APPEAL from a judgment of the superior court of Santa Clara county, entered in favor of the defendant. The opinion states the facts.

Attorney-General and *W. B. Hardy*, for the appellant.

D. W. Harrington, for the respondent.

THE COURT. There is no such office as "police justice of the city of San Jose," therefore the defendant could not have usurped, intruded into or unlawfully held or exercised that office. Conceding the act to be unconstitutional, which in terms confers jurisdiction on justices of the peace in cities of more than ten thousand inhabitants which other justices of the peace do not possess, the exercise of such additional jurisdiction would not be the exercise of an office, but the exercise of jurisdiction outside of the office of justice of the peace. The result of which would be to render acts done outside of such jurisdiction void.

Judgment affirmed.

No. 7,923.

MARTIN v. HILL ET AL.

Department Two. Filed May 17, 1884.

JUDGMENT AND ORDER REVERSED AND CAUSE REMANDED for error of the court below in its construction of the contract sued on.

APPEAL from a judgment of the superior court for Marin county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

E. S. Lippitt, for the appellant.

A. W. Thompson, for the respondents.

THE COURT. The substantial point in this controversy is thus stated by appellant in his points: "Did the defendants agree with plaintiff to make title to the land in him, and have they performed their agreement, and if not, should they be compelled to do so?" The court below, in its opinion, used the following language: "To hold in the case at bar that the plaintiff may purchase from the parties to this contract lands in his possession, the same being a part of the racho Laguna de San Antonio, is, in substance, saying that he must be allowed to take his undivided interest in the rancho Laguna de San Antonio from the remainded of said rancho, and such is not the meaning of the contract under consideration, nor was it in any single sense the intention of the parties to such contract."

We think the principal object of the contract was to enable the parties to it to acquire title to the lands in their possession respectively, and that the court erred in its construction of the contract. That being the case, and as the defendants have not performed their agreement in that regard, and as they should be compelled to do so, plaintiff is entitled to judgment.

In our opinion, the claim that plaintiff urges against Walker is entirely outside of this case, and we see no reason why his urging such claim against Walker should deprive him of the judgment to which he would otherwise be entitled. Whatever claim he makes against Walker must depend upon some contract between Walker and himself. If, under such contract, his claim is valid, he should be allowed to enforce it. If invalid, it is not to be supposed that he can enforce it. But in no view can it be held that plaintiff, having complied with the contract counted on in this case, is not entitled to the relief which he asks, by reason of the fact that he has brought a suit against Walker, based on some other claim which he may or may not succeed in sustaining. If the relief obtained by plaintiff here, is a defense to Walker, in the suit against him, Walker will have abundant opportunity for setting it up in that case.

Judgment and order reversed and cause remanded, with instructions to render judgment for plaintiff in accordance with the prayer of his complaint.

"Prescription" is not a term strictly applicable to a right acquired by the public by the use of a way for any period of time. The law allows prescriptions only to supply the place of *grants*, and inasmuch as the public cannot take by grant, the term prescription, in its strict sense, has no application to highways. The true doctrine would seem to be that immemorial use by the public is evidence of a *dedication*, just as such use by an individual is evidence of a grant to him: Angell on Highway, sec. 131. But where there is a statute that roads shall be deemed public highways which have been used as such for a named period, the right of the public to continue to use them as public roads is fixed and established. Whether such statutes may be considered as creating or recognizing a rule of evidence, and to declare that the public use for the named time shall be conclusive evidence of dedication, or rest on some other principle their validity has not been doubted.

The court below found that for more than twenty-five years prior to commencement of this action, the road mentioned in the answer was used and traveled by the public as a public road. Also that for more than six years the road had been used and traveled as a public road, and there was evidence to sustain the finding. Section 2,619 of the political code provides: "All roads used as such for a period of more than five years are highways." This is more than a declaratory law to the effect that the fact of use of a road as a public road for more than five years shall be evidence, *prima facie* or conclusive, of dedication by the owners of the lands through which it runs. It is in the nature of a statute of limitations, which gives to the public the right to use the road as a highway, in case it has been so used. We know of no constitutional inhibition of such legislation. In New York there is a statutory provision to the effect that all roads not recorded which have been or shall have been used as public highways for twenty years or more, shall be deemed public highways: 1 R. S., 521, §100; 3d Ed., 696, §120. Our attention has not been called to any decision in that state which questions the power of the legislature to adopt such enactment. Similar provisions of statutes have passed unchallenged in other states. The fact, as found, that in the fall of 1877 the plaintiff placed gates at the points where the road entered upon and emerged from this land, which did not prevent the passage across it, does not overcome the effect of the finding that the road was used as a public road. Nor does the fact that plaintiff "a short time" before he commenced this action notified the defendant that it was not a public road.

Judgment and order affirmed

No. 9,485.

SCHUYLER v. BOUGHTON, Sheriff, etc.

Department One. Filed May 20, 1884.

INJUNCTION AGAINST EXECUTION OF SHERIFF'S DEED.—A complaint in an action to enjoin a sheriff from executing to the purchaser a deed to certain real property, alleged to belong to the plaintiff and to have been sold as the property of a third person, under an execution against him, is fatally defective, unless the existence of the judgment under which such execution issued be averred.

APPEAL from a judgment of the superior court for Santa Barbara county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

B. F. Thomas, for the appellant.

W. O. Stratton, for the respondent.

THE COURT. The action is to enjoin defendant from executing to the purchaser a deed of certain real property, alleged to belong to plaintiff and to have been sold by defendant as property of plaintiff's husband. The defendant's demurrer to the complaint should have been sustained. The allegation that the deed, if executed, will be a cloud upon plaintiff's title, is merely a legal conclusion. There is an allegation "that the defendant levied upon said real property under and by virtue of a writ of execution, issued out of the superior court of the county of Santa Clara, in an action of Henry Miller, plaintiff, and W. H. Schuyler, defendant." There is no averment that any judgment was ever rendered or entered in the action Miller v. Schuyler.

A plaintiff asking a decree to enjoin the execution of a deed, must allege facts showing that in an action of ejectment founded on the deed, he would be required to offer evidence to overcome the effect of the deed: Pixley v. Higgins, 15 Cal., 127; England v. Lewis, 25 id. 337.

A sheriff has no general authority, as such, to sell any person's property. And although an execution, issued out of a court of competent jurisdiction, may protect him in an action of trespass brought by the judgment debtor against whom the execution runs for taking personal property, it will not protect him in an action brought by a third person, nor will it suffice to deraign title to real estate to the purchaser at the execution sale. A party in ejectment relying on a sheriff's deed must introduce not only the deed, but the judgment and execution by virtue of which the property was sold: Quirk v. Falk, 47 Cal. 453. The sheriff's deed is not admissible in evidence without first introducing the judgment which is the authority for the sheriff to sell: Vassault v. Austin, 32 Cal. 597. An execution, without a judgment, gives the sheriff no authority to sell: Jackson v. Hasbrouck, 12 John. 213; Smith v. Moreman, 1 Mon. Ky. 154.

If the defendant here should execute the deed, the execution of which plaintiff seeks to enjoin, and an ejectment should be brought upon it, the deed and execution would not, in the absence of a judgment, compel the plaintiff to introduce any evidence.

It follows, therefore, that the omission to aver in the complaint the existence of a judgment is a fatal defect.

Judgment and order reversed and cause remanded, with directions to the court below to sustain the demurrer to the complaint.

No. 9,428.

SAWYER ET AL. *v.* SARGENT.

Department One. Filed May 20, 1884.

NEW TRIAL—JUDGMENT—DECISION.—A motion for a new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, or that the judgment is against law. Such motion should be directed at the decision, which consists of the findings of facts and conclusions of law.

STATEMENT ON NEW TRIAL—CERTIFICATION OF.—A statement on motion for a new trial will not be considered by the appellate court, when it is neither signed nor certified by the judge of the lower court.

APPEAL from an order of the superior court of San Diego county, granting the defendant a new trial. The opinion states the facts.

William M. Smith, for the appellant

Works & Titus, for the respondent.

THE COURT. The *decision* may be set aside and a new trial granted for certain causes: C. C. P., 656, 657.

The "decision" consists of findings of fact and conclusions of law: C. C. P,, 632, 633.

In the transcript before us the notice of intention to move for a new trial is "the attorney for the plaintiff will take notice that the defendant intends to move the court to vacate and set aside the *judgment*, and to ask for a new trial, upon the following grounds: 1. Insufficiency of the evidence to justify the *judgment*, and that the judgment is against law. 2. Errors in law occurring at the trial," etc.

Insufficiency of the evidence to justify the judgment is not a statutory cause on which to base a motion for a new trial, nor can such motion be based on the ground that the *judgment* is against law. The motion should be directed at the decision: Martin v. Matfield, 49 Cal. 42. As the proceedings leading to an application for a new trial are initiated only by a motion to set aside the *decision*, it follows that they cannot be commenced by notice of motion to vacate and set aside the judgment.

The statement on motion for new trial (so-called) in the transcript cannot be considered by this court. It is not signed nor certified by the judge of the court below: C. C. P., 659, 660; Smith v. Davis, 55 Cal. 26.

The order granting a new trial must be reversed because there was no notice or statement such as authorized the court below to act upon the motion.

The order was not made by the court on its own motion. It does not purport to be such an order, but was made on the application of the defendant.

Order reversed.

No. 7,743.

SAN JOAQUIN VALLEY BANK v. BOURS.

Department One. Filed May 20, 1884.

CASHIER'S LIABILITY FOR MISAPPROPRIATION OF FUNDS.—A cashier of a bank, empowered to transact its business, subject to the direction of the board of trustees, who loans large sums of moneys to a single individual without taking any security therefor, and without entering the same upon the books of the bank; and who, in order to conceal such loan from the knowledge of the bank officials, falsely reports to them the amount of cash on hand, is liable for the amount of such loan lost to the bank, although the trustees neglected their duty in not regularly examining the cash as required by the by-laws.

ACQUIESCENCE BY THE TRUSTEES OF A BANK FOR A PERIOD OF SEVEN YEARS in the charges regularly made by their cashier, on account of his salary, is equivalent to an agreement that such amount constituted his salary.

APPEAL from a judgment of the superior court for San Joaquin county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Terry, McKinne & Terry, for the appellant.

Dudley & Hall, for the respondent.

ROSS, J. The plaintiff is a banking corporation and the defendant, from the 30th day of March, 1868, to March 17, 1877, was its cashier. By the by-laws of the bank the president and cashier were each empowered "to discount bills, notes or other evidences of debt, to buy and sell bills of exchange, to make loans with or without security, * * * and generally to transact and carry on the business of the bank, subject to the direction of the board of trustees, expressed through the by-laws, or such express resolution as may, from time to time, be passed; and they shall each report to the board of trustees when required, each and everything by them, or either of them, transacted." The evidence shows, and the findings of the court below are to the effect, that the defendant was the active manager of the bank. Between the first day of January, 1871, and the first day of October, 1874, he loaned personally and through the assistant cashier, to one De Blainville, divers sums of the plaintiff's money—in the aggregate thirty-six thousand five hundred and ninety-nine dollars, or thereabouts. Those loans were made without any security being taken therefor, and no entry or memorandum thereof was made in the books of the bank. Nor was any note or memorandum of any kind whatever made or kept by defendant of the transactions with De Blainville save and except memoranda upon slips of paper, called in the record "tags," and kept in the bank on a wire, which tags showed the amounts loaned to and paid by De Blainville, and the balance due by him from time to time. On the 12th day of March, 1877, there remained and ever since has remained unpaid, of the moneys so loaned to De Blainville by defendant, the sum of

nine thousand two hundred and forty-seven dollars and forty-nine cents.

The by-laws required that the board of trustees should every month examine into the affairs of the bank, count its cash and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining the condition of the bank, and whether the books were correctly kept. The duty thus imposed upon the board, seems, from the record, to have been grossly neglected; for prior to the month of March, 1877, the cash does not appear ever to have been counted by it, and none but the most superficial examination made into the affairs of the bank. The board, however, met monthly, and to it at each meeting the defendant presented as his report a book of general balances, which, among other things, purported to represent the amount of cash on hand. These representations—so far at least as the item of cash was concerned—were untrue; for the amount of cash represented by the book of general balances, was more than the amount of cash in the vaults of the bank by the amount represented by the "tags" already alluded to. The defendant thus represented to the board of directors that certain money of the bank was in the vaults, whereas in truth he had loaned it to a man not only without security and without taking from him the slightest evidence of indebtedness, but, so far as appears, without interest, and from whom he never made the slightest effort to collect it. And there is testimony going to show that when, in March, 1877, the board of directors concluded to count the cash, defendant, on being informed of that intention instructed the assistant cashier to put the "tags" away, immediately left the bank, and a few days afterward resigned his position. To hold that one intrusted with the care and management, for profit, of funds of another, can dispose of those funds as did the defendant, without liability to himself, would be, as we conceive, to do violence to the most obvious principles of law and justice. It is no justification of the defendant to say that the directors of the bank did not do their duty; that if they had counted the cash they would have found it short, and their attention would thus have been attracted to the "tags," and so to the fact of the loans to De Blainville. The defendant stood in a position of trust and confidence, and he was at least bound to act in good faith in respect to the property intrusted to him.

If it be admitted that he was not bound to report the condition of the affairs of the bank to the board of directors, unless such report was by the board required, still he was bound in law and conscience to make such such report as he did make speak the truth. Defendant was rightly held liable by the court below for the amount of the De Blainville indebtedness. But upon another question in the case the judgment and order must be reversed and the cause remanded for a new trial. The defendant was first appointed cashier by the board of trustees of the plaintiff on the 30th day of March, 1868, for the period of three months. On the first Wednesday of July,

1868, he was reappointed for the period of twelve months. After that there was an annual election or employment of him as cashier by the board of trustees, pursuant to the by-laws of the bank. Defendant's compensation as cashier was never fixed by any resolution of the board of trustees, but it appears that when first appointed there was a verbal understanding between himself and the trustees that he was to draw a salary of two hundred dollars per month; and this salary he did draw and charge himself with from the time of his entry upon the duties of his office to the first day of April, 1870, From the date last mentioned defendant drew the sum of three hundred dollars per month as his salary as cashier. This sum he caused to be charged against himself in the books of the bank, and he so returned it in the book of general balances presented to the board of trustees at their monthly meetings. The board must therefore be held to have had knowledge of the fact that defendant was charging and drawing for his services as cashier the sum of three hundred dollars per month, and with this knowledge they continued to reappoint him cashier for seven successive years. Under such circumstances the board of trustees must be held to have agreed to the charge made by the defendant for his services as cashier.

Judgment and order reversed and cause remanded for a new trial.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 7,759,

REGO v. VAN PELT.

Department One. Filed May 20, 1884.

TITLE FROM COMMON GRANTOR—EJECTMENT.—In an action of ejectment, where both plaintiff and defendant deraign title from a common grantor, such grantor's right of possession cannot be denied by either.

QUIT-CLAIM DEED—EFFECT OF.—A quit-claim deed, even prior to the act of February 22, 1854,, operates as a conveyance in California, although there was no precedent estate or interest in the grantee, and enables him to maintain ejectment if his grantor could have done so.

EJECTMENT BY TENANT IN COMMON—PLEADING OUSTER.—The complaint in an action of ejectment by a tenant in common against his co-tenant, which avers that the latter is in possession of the common property, and the whole thereof, withholds the possession of the whole thereof from plaintiff and excludes him from the same, sufficiently alleges an ouster.

APPEAL from a judgment of the superior court for Santa Clara county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Houghton & Reynolds, for the appellant.

Moore, Laine & Johnson, for the respondents.

THE COURT. Appellant says plaintiff and the grantor of defendant were not *tenants in common* because their grantor—Evans—had no estate or interest in the premises, founded upon title, or rightful possession. But Evans had actual possession and delivered such possession to his grantees. In ejectment neither is plaintiff called on to show a right of possession in a person from whom both he

and defendant deraign, nor can defendant assail the title of the common grantor. The unity of possession where both derive from the same source cannot be denied by either.

The deed from Evans and wife to plaintiff and Hammond (grantor of defendant) was executed February 22, 1854, prior to the passage of the act which, it is claimed, first-made *quit-claim* deeds operative as conveyances, without any precedent, estate or interest in the grantee. But, as was said in Graff v. Middleton, 43 Cal. 344, "In this state, from the earliest times, quit-claim deeds have been in everyday use for the purpose of transferring title to land, and have been considered as effectual for that purpose as deeds of bargain and sale." In Sullivan v. Davis, 4 Cal. 291, decided at the October term, 1854, it was held that a quit-claim conveyed all the right and title of the grantor or releasor. And in Frey v. Clifford, 44 Cal. 343, the supreme court said that under the registry law a quit-claim deed received in good faith, and for a valuable consideration, which is first recorded, will prevail over an older deed subsequently recorded. So in Lawrence v, Ballou, 37 Cal. 521, it was held that a quit-claim deed passed the title. No reference is made to the statute of 1855. Without making the rule in any respect dependent upon the statute, Downer v. Smith, 24 Cal. 123, and Carpentier v. Williamson, 25 Cal. 154, concur in construing Sullivan v. Davis, *supra*, as holding that an ordinary quit-claim deed in this state is sufficient to pass any estate the grantor had, and to enable the grantee to maintain ejectment if his grantor could have done so. As we have seen, the defendant here cannot dispute the title of Evans, the grantor of plaintiff and Hammond.

The complaint (certainly in the absence of a special demurrer) sufficiently alleges an ouster by defendants: Payne v. Treadwell, 16 Cal. 244. It avers: "Defendants are in possession of said lands and premises and the whole thereof, withhold the possession of the whole thereof from plaintiff, and exclude plaintiff from the same."

Judgment affirmed.

No. 10,928.

PEOPLE v. BENNETT.

Department One. Filed May 20, 1884.

RECEIVING A VERDICT IN THE ABSENCE OF COUNSEL FOR THE PRISONER.—If the jury in a criminal prosecution come into court with their verdict, in the absence of the counsel for the prisoner, the court may, after notifying such counsel, and waiting a reasonable length of time for him to come into court, if he had been so disposed, receive the verdict, poll the jury and discharge it.

ERROR IN REGARD TO THE ADMISSION OF EVIDENCE, which could not have prejudiced the prisoner, is not grounds for reversal.

APPEAL from a judgment of the superior court for Solano county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

McKenna and *Lumont*, for the appellant.

Attorney General, for the respondent.

SHARPSTEIN, J. Whether the deceased "usually walked with his hands in his pockets," would not have been of the slightest importance, and would, therefore, have been an immaterial circumstance, if the defendant had not after the admission of evidence as to the habit of deceased in that respect, attempted to prove that when deceased was shot, he had his hand in his pocket with the intention, as defendant supposed, of drawing a deadly weapon therefrom, with which to attack him. When the question objected to was asked, it was simply immaterial, and evidence that deceased usually walked with his hands in his pockets could not have prejudiced the defendant any more than evidence that the deceased usually walked with his hands outside of his pockets, would.

Such evidence in no way tended to strengthen the case of the prosecution. The only effect it could have had was to weaken that of the defendant. And whether introduced before or after the defendant had developed his defense, the effect would have been the same. So that the only question is whether it would have been admissible at any stage of the trial. The insistence of defendant's counsel is that it would not "unless the knowledge of such habit" could be "brought home to the defendant." Precisely how this should have been done is not stated. If the deceased usually walked with his hands in his pockets, the defendant might or might not have observed it. The probability of his having done so would depend largely on the opportunities he had had for observing it. So that the weight of such testimony would depend on the circumstance, which it was proper for the jury to consider. But there is another ground on which such evidence was, in our opinion, clearly admissible. The defendant testified that when he shot the deceased the latter had his hand in his right pantaloon's pocket. Several witnesses for the prosecution testified that he was walking with both hands in the front pockets of his pantaloons. Under such circumstances evidence that he usually walked with them there, tended to corroborate the evidence of the witnesses who testified that when shot he was walking with them there.

It would have been better to have waited until the defendant had introduced evidence on this point before introducing the evidence objected to, and then to have introduced it in rebuttal. But, as before suggested, it would then have been no less prejudicial to the defendant. At most, it was error without injury.

When the jury came into court with a verdict, and the defendant's attorney was informed of the fact, we think the court, after waiting a sufficient length of time for said attorney to come into court, if he had been so disposed, was justified in receiving the verdict, polling the jury and discharging it, as was done. It is impossible to see, and no attempt is made to show, how the defendant could have been prejudiced, in any degree, by the action of the court.

Judgment and order affirmed.

MYRICK, J., and THORNTON, J., concurred.

ROSS, J., concurring: I do not agree that the court below was right in admitting testimony as to the custom of deceased in walking with his hands in his pockets; but in view of the whole case, I do not think it was such an error as calls for a reversal. I concur in the judgment.

[*End of Volume II.*]

circumstances attending the making of the previous agreement, so as to require the lumber delivered to be of good quality. *Cary* v. *McIntyre*. *Col.* 117.

2. A CONDITION OF SUCH ACCORD AGREEMENT MAY BE WAIVED by the party in whose favor such condition was made, to the extent, at least, of preventing the party waiving from rescinding the agreement and declaring it a nullity. *Id.*

3. AN ACCORD AGREEMENT IS BINDING upon the party who signs the same, although it is not signed by the other party. *Id.*

4. FAILURE TO PERFORM AN AGREEMENT FOR AN ACCORD cannot be taken advantage of by the party through whose fault such failure was occasioned. *Tucker* v. *Edwards*. *Col.* 400.

See PLEADING AND PRACTICE, 10, 11.

ACCOUNT STATED.

1. ACCOUNT STATED, WHAT CONSTITUTES.—In an action on an account stated against the three defendants as partners, in which the defendant H. alone appeared and answered, it appeared on the trial, after evidence showing that the defendants B. and M. originally composed the firm, under the name of B. and M., and that the defendant H. subsequently became a partner, and the firm name was, therefore, changed to B., M. & Co.; that the plaintiff sent by mail, from Stockton, his place of residence, a copy of an account, inclosed in an envelope and properly directed to the defendant H. at Frisco, his residence and post-office address. This account was headed "B. & M., in acct. with L. Benites," and contained a large number of items running through several years, only one of which was charged to the firm of B., M. & Co., and showed a balance of $1,663.70 due to the plaintiff. No letter or other writing accompanied it explaining it, or why it was sent to the defendant H., nor demanding payment. There was no evidence whatever showing the distance between Stockton and Frisco, nor the time required for transportation of the mail between those places, nor the number or frequency of mail communication between them, nor the length of time which had elapsed after the mailing of said account to the defendant H. before the commencement of this action; nor did it appear when this action was commenced. There was evidence that the defendant H. received the account. *Held*, that no account stated between the parties was shown, and a ruling on the trial refusing to admit a copy of such account in evidence against the defendants was not error. *Benites* v. *Bicknell et al.* *Utah*, 359.

2. THE SAME—EFFECT OF AN ACCOUNT STATED.—When the parties to an account have examined it, and have expressly agreed upon a certain sum of money as the balance justly due thereon from one party to the other, then such account has become an account stated, and an action upon it is not founded upon the original items, but upon the balance ascertained by the mutual accounting of the parties. *Id.*

3. THE SAME—ACCOUNT STATED BY IMPLICATION.—An account stated may be implied from circumstances. If an account be presented for payment by one party thereto, and the other party, upon an examination of it, and after a reasonable time has elapsed, makes no objection to it, it may be legitimately presumed that he was satisfied with it as presented, and the presumption is so strong that a suit can be maintained upon the account as an account stated without proof other than that the account was presented, with a demand for payment, and that reasonable time and opportunity have passed since its presentation, for a proper examination of it, and to make objections to it, if there be any. Such presentation may be by mail. *Id.*

4. THE SAME—BURDEN OF PROOF. The effect of an account stated being to establish *prima facie* the accuracy of the balance found due, the burden of proving that an account is stated or settled rests upon the party making such allegations. *Id.*

ACCOUNTING.

1. ACCOUNTING BETWEEN PARTNERS—PRESENTATION OF CLAIM.—In an action of accounting between a surviving partner and the administratrix of his deceased partner, the surviving partner is entitled to an allowance for sums drawn by the deceased partner from the partnership during his lifetime, notwithstanding the claim for the sum so drawn has never been presented to the administratrix of the deceased partner for allowance and approval. *Manuel, Admr'x,* v. *Escolle.* *Cal.* 375.

2. IN AN EQUITABLE ACTION TO REOPEN A SETTLEMENT AND SALE MADE BETWEEN PARTNERS, and for an accounting of the partnership affairs, on the ground of fraud alleged to have been practiced by the defendant, the court cannot, without setting aside such sale and making an accounting, render judgment for the plaintiff for a specific amount, on the ground that the defendant was guilty of a breach of warranty or of deceit. *Black et al* v. *Merrill.* *Cal.* 137.

See ESTATES OF DECEASED PERSONS, 4-7; FRAUD, 3; GUARDIAN AND WARD.

ACQUIESCENCE.

See BANKS, 2; OREGON DONATION ACT, 2.

ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATOR.

ADMIRALTY.

1. OFFER OF PILOT SERVICE BY SIGNAL.—The Pilot Commissioners of Oregon, under the Pilot Act of 1882, are authorized and required to declare by rule what shall constitute a valid offer of pilot service on the Columbia River bar pilot grounds, by a signal addressed to the eye, and in so doing may prescribe the distance within which such signal must be made from the vessel signaled.—*The Uiloak, Swistoolawah, Claimant* (*U. S. Dist. Ct.*), *Or.* 10.

2. SIGNAL FOR AN OFFER OF PILOT SERVICE.—The statute of the United States does not prescribe any signal to be used on a pilot boat in making an offer of pilot service, and the light required by Section 4233 of the Revised Statutes to be carried by a sailing pilot vessel at night is only used to prevent collision, and incidentally to give notice of the character of such craft; but the usual signal by which an offer of pilot service is made is the jack set at the main truck in the day-time, and "flare-ups" at night, and this jack is usually the ensign of the country in which the service is offered. In the United States it is a blue flag charged with a star for every State then in the Union, and called the "union jack."—*Id.*

3. THE TERM "STATE" CONSTRUED TO INCLUDE A "TERRITORY."—The term "State," in the Act of March 2, 1837, 5 Stat. 153, R. S., Sec. 4236, regulating the taking of pilots on a water forming the boundary between two States, construed to include an organized "Territory" of the United States.—*Id.*

4. SALVAGE BY PILOT.—Under the Oregon Pilot Act of 1882 (Sec. L. 15), a pilot is bound to render aid to a vessel "in stress of weather or in case of disaster," and he is not entitled to salvage for such service unless he is thereby involved in "extraordinary danger and risk."—*The C. D. Bryant* (*U. S. Dist. Ct.*), *Or.* 291.

5. CASE IN JUDGMENT.—The libelant, in a smooth sea and calm weather, boarded the Bryant in a thick fog, while she lay aground at low tide on the outer edge of the middle sand of the Columbia River, and at the next flood sailed her over into deep

water in the south channel, and after drifting out to sea in the night, brought her into port the next morning. *Held*, that the service of the libelant did not involve any "extraordinary danger and risk," and that he was only entitled to a pilot's compensation therefor.—*Id.*

6. DAMAGES RESULTING FROM A COLLISION between two vessels, when each is guilty of contributory fault, must be equally divided between them.—*Puget Sound Commercial Co.* v. *The Barkentine C. L. Taylor. The Barkentine C. L. Taylor* v. *Puget Sound Commercial Co. Wash.* 787.

7. THE CERTIFICATE OF THE CLERK TO THE RECORD IN AN APPEAL IN ADMIRALTY should distinctly state that the matter sent up included all the pleadings, proofs, stipulations, decrees, and also everything filed or done by way of effecting an appeal. *Steamer Zephyr* v. *Brown et al. Wash.* 51.

8. THE MANNER OF TAKING AN APPEAL IN ADMIRALTY IS GOVERNED BY THE RULES of the civil law. *Id.*

9. AN APPEAL FROM THE DISTRICT COURT IN A CASE IN ADMIRALTY will not be considered by the Supreme Court unless the same was allowed by the District Judge. Such appeal must be taken during the term in which the decree appealed from was rendered, and must be made to the next term of the Supreme Court. *Id.*

10. APPEAL IN ADMIRALTY, PETITION FOR.—A petition for an appeal in Admiralty from a definite sentence, or for apostles, is not required to be in writing. *Waddell et al.* v. *The Steamer Daisy. Wash.* 557.

11. LETTERS DISMISSORY OF ADMIRALTY CAUSE.—The allowance of an appeal in admiralty, and the granting of time by the lower court in which to perfect the same, is a sufficient letters dismissory of the cause. *Id.*

12. THE FILING OF AN APPELLATORY LIBEL IS UNNECESSARY in this country on an appeal in admiralty. *Id.*

13. AN APPEAL IN ADMIRALTY IS SUFFICIENT IN POINT OF TIME when the same was taken and allowed at the time of sentence, and perfected within the time fixed by the court.

14. NO MONITION FROM THE APPELLATE COURT is necessary to the perfection of an appeal in admiralty, when the same is allowed by the lower court without the intervention of such monition.

15. MARITIME CONTRACT, COMPLETED VESSEL.—Whether a contract for putting machinery into a steamer is a maritime one, so as to be enforceable in admiralty by a proceeding *in rem*, depends upon the fact whether the putting in of said machinery was a necessary part of the construction of said steamer as a completed vessel, consideration being had to the purposes for which she was intended. If the machinery were used in such construction, the contract was not a maritime one. *Id.*

16. THE SAME.—A contract to furnish machinery to a steamer, which exists merely as an inchoate hull upon the ways, is not a maritime one. *Id.*

17. PROCEEDINGS IN REM AGAINST VESSEL, POWER OF LEGISLATURE TO AUTHORIZE.—Whether the territorial Legislature has power to authorize a proceeding *in rem* against a vessel for materials used in its construction, *quære*. However this may be, it has never sufficiently exercised such power so as to warrant a Court in upholding such a proceeding. *Id.*

18. SUB-CONTRACTOR, LIEN OF ON VESSEL.—Under the lien law of this territory, a sub-contractor has no lien upon a vessel for materials furnished by him to the contractor, and used in the construction of the vessel. *Id.*

19. FEES IN ADMIRALTY CASES.—Section 823 *et sequitur* of the Revised Statutes of the United States, providing what the *per foliam* fee shall be in admiralty cases in the Circuit and District Courts of the United States, apply to such cases in the Territorial Courts. The Territorial Legislature has no power to regulate such fees. *Id.*

ADVERSE POSSESSION.

1. TITLE BY ADVERSE POSSESSION CAN NOT BE ACQUIRED by occasionally cutting up dead timber, felling trees and removing wood from the land. *Kimball* v. *Stormer. Cal.* 371.

2. ADVERSE POSSESSION—COLOR OF TITLE—POSSESSION.—A plaintiff who claims, under color of title, a larger tract, which includes the land to which the plaintiff has shown title in fee, cannot establish an adverse possession as to the plaintiff's land, which has remained vacant and unoccupied, by proving an actual possession of a portion of the larger tract, when such possession does not extend to any of the land claimed by the plaintiff. Especially is this the case when it appears that the defendant had not asserted an absolute and unqualified right to such plaintiff's land for the time required by the statute of limitations. *Id.*

3. FINDING AS TO ADVERSE POSSESSION—EJECTMENT.—In an action of ejectment, where the plaintiff alleges title in himself, and the defendant relies upon a title obtained by adverse possession, a finding that the defendant has such title, if sustained by the evidence, is sufficient, without finding upon the question whether the plaintiff had or had not title originally. *Id.*

See TENANTS IN COMMON, 2.

AFFIDAVIT.

See APPEAL, 19, 21.

AMENDMENT.

1. STRIKING OUT PORTIONS OF COMPLAINT AND ANSWER.—Plaintiff brought this action to recover possession of certain grain and hogs, on the ground, as alleged in his verified complaint, that the same were his property. The defendant, as Sheriff, denied the ownership by the plaintiff, and justified his possession under certain writs of attachment. He alleged that the said property had been taken from him by the plaintiff, after his levy, under a writ of replevin, and asked a return thereof to him, to be held subject to such attachment. An the trial the Court, against defendant's objection, on the oral statement of plaintiff's counsel, that the defendant had not levied upon the hogs, permitted the plaintiff to strike out from the complaint all reference to the hogs, and struck out all allegations in regard to the same in defendant's answer. *Held*, that such action of the Court was erroneous; for if the averments of the answer were true, the effect of the amendment would be to take the hogs from the defendant's possession and transfer them to the plaintiff without affording the former an opportunity to try the question of his right to their return. *Howell* v. *Foster, Sheriff, etc. Cal.* 743.
2. REFUSAL, DURING THE TRIAL, OF AN AMENDMENT TO AN ANSWER setting up a new defense is not error when the defendant fails to affirmatively show that he did not know of such defense before. *Hallack* v. *Bresnahan. Wy.* 60.

See DEPOSITIONS, 1; FINDINGS, 17; FRAUD, 3; REMOVAL OF CAUSES, 2; SUPPLEMENTARY PROCEEDINGS, 2; TENANTS IN COMMON, 3.

ANSWER.

See PLEADING AND PRACTICE.

APPEAL AND WRIT OF ERROR.

1. AN APPEAL WILL NOT LIE FROM A JUDGMENT OF THE DISTRICT COURT IN COMMON-LAW ACTIONS or proceedings, unless it is expressly allowed by statute. *Van Camp* v. *Commissioners of Custer County. Idaho*, 18.
2. NO ONE CAN SUE OUT AND MAINTAIN A WRIT OF ERROR UNLESS HE IS A PARTY or privy to the record, or is prejudiced by the judgment. *Id.*
3. AN APPEAL IS NOT THE COMMENCEMENT OF A NEW ACTION or proceeding, but a continuation of the same case, action or proceeding, being only a transfer from one court, tribunal or body to another, for final trial and judgment. *Id.*
4. COURTS WILL LOOK BEYOND THE MERE TITLE OF AN ACTION or proceeding for the purpose of determining who are interested and affected as parties. *Id.*
5. ERRORS APPEARING UPON THE FACE OF THE JUDGMENT ROLL may be taken advantage of upon a writ of error, without a bill of exceptions or statement of the case. *Id.*
6. THE RIGHT TO APPEAL is statutory and unknown to the common law; it can not be extended to cases not within the statute. *General Custer Mining Company* v. *Van Camp. Idaho*, 174.
7. THE BOARD OF COUNTY COMMISSIONERS AND THE BOARD OF EQUALIZATION, although composed of the same persons, are separate and distinct bodies, with different duties and powers. *Id.*
8. THE RIGHT OF APPEAL GIVEN BY STATUTE FROM ORDERS OF THE BOARD OF COMMISSIONERS does not imply the right of appeal from orders of the board of equalization. *Id.*
9. AN APPEAL FROM AN ORDER OF THE BOARD OF COUNTY COMMISSIONERS, declaring the result of an election for a county seat, may be taken to the district court of said county, and when so taken, the action is commenced when the notice of appeal is

filed with the clerk of the board of county commissioners. *Rupert* v. *County Commissioners of Alturas County. Idaho*, 15.

10. THE BOARD OF COUNTY COMMISSIONERS IS NOT A COURT; it has no judicial functions or power, and can not be vested therewith. *Id.*

11. MATTERS DECIDED BY THE DISTRICT COURT ON APPEAL FROM THE ORDERS OF THE BOARD OF COUNTY COMMISSIONERS can only be brought to the supreme court for review by writ of error. *Id.*

12. NO APPEAL LIES FROM AN ORDER IN A CRIMINAL ACTION DISMISSING THE SAME for want of prosecution. Such attempted appeal may be either dismissed or stricken from the calendar. *People* v. *Hollis. Cal.* 71.

13. NO APPEAL LIES, IN A PROSECUTION FOR MURDER, FROM AN ORDER DENYING A MOTION in arrest of judgment, or from a judgment entered upon a plea of former conviction. *People* v. *Majors. Cal.* 287.

14. MOTION FOR NEW TRIAL—APPEAL FROM ORDER DENYING.—A motion for a new trial can not be made in a prosecution for murder after a verdict in favor of the people rendered upon a plea of former conviction, and consequently no appeal lies from an order denying the same. *Id.*

15. THE SUPREME COURT HAS NO JURISDICTION OF AN APPEAL FROM A JUDGMENT of the Superior Court affirming a judgment of the Police Court adjudging the defendant guilty of a misdemeanor, and imposing on it a fine of fifty dollars. *People, etc.*, v. *Meiggs Wharf Company. Cal.* 287.

16. APPEAL FROM JUSTICE'S COURT—EFFECT OF DISMISSAL—DAMAGES FOR FRIVOLOUS APPEALS.—The dismissal of an appeal from the Justice's Court divests the District Court of authority to proceed further, except to include costs on the dismissal. It cannot impose damages for frivolous appeals, nor directly, and without trial, reverse or affirm judgments brought by appeal from the Justice's Court. *State ex rel. Barnett* v. *Fifth District Court. Nev.* 630.

17. APPEAL FROM JUSTICE'S COURT, DISMISSAL OF.—An appeal from a Justice's Court to the District Court is perfected by the appellant's filing and serving his notice of appeal, filing the necessary undertaking, and making payment of the costs in the Justice's Court, and the cost of the transcript on appeal. The payment of a deposit for costs in the District Court is not required by statute, and cannot be required by a rule of the District Court. The dismissal of such an appeal for failure to make such deposit is error. *Wescoat* v. *Eccles. Utah*, 446.

18. APPEAL FROM JUSTICE'S COURT—JURISDICTION OF.—The Supreme Court has no jurisdiction of an appeal from a judgment of the Superior Court, affirming a judgment of the Justice's Court, in an action brought to recover one hundred and eighty dollars, with interest and costs. *Hackley* v. *Craig. Cal.* 375.

19. DISMISSING APPEAL—AFFIDAVIT OF SERVICE OF NOTICE OF APPEAL.—On a motion in the Supreme Court to dismiss an appeal on the ground that no notice of appeal has been served, an affidavit of service, filed by the appellants in the District Court on the same day the notice of motion to dismiss was filed in the Supreme Court, may be considered on the argument of the motion to dismiss, whenever the Supreme Court would, upon application, have allowed the appellants to furnish such proof. *Elder* v. *Frevert. Nev.* 414.

20. THE SAME—CONTENTS OF SUCH AFFIDAVIT.—The affidavit so presented alleged a service of the notice upon respondent's attorney, at a time when he was absent from his office and had no clerk therein, or other person in charge upon whom service could be made, "by leaving a copy thereof in a conspicuous place in the office of said attorney, between the hours of 8 A. M. and 6 P. M." *Held*, that an affidavit of service thus repeating the exact language of the statute is insufficient; that whether the place where the notice is left is conspicuous is a fact to be judicially determined by the court, and not by the affiant. The affidavit should set forth the probative facts touching the place where the paper was left, so that the ultimate fact, whether such place was conspicuous, may be inferred therefrom by the court. *Id.*

21. THE SAME—LEAVE TO AMEND.—As this question had never before been decided by the court, and as the service might be a surprise upon the appellants, and might possibly deprive them of a substantial right, leave to amend the affidavit of service should be given them. *Id.*

22. AN APPEAL BY THE PEOPLE FROM A JUDGMENT OR ORDER SUSTAINING A DEMURRER to an indictment will be dismissed where there is a prior appeal by the people from the same judgment or order. *People* v. *Jordan. Cal.* 133.

23. WRIT OF ERROR MAY BE DISMISSED WHERE NO ABSTRACT OF THE RECORD IS FILED as required by the rules of the Supreme Court. *Hallack et al.* v. *Bremahen. Wy.* 69.

24. WHEN THE TRANSCRIPT DOES NOT SHOW THAT THE NOTIC
upon the respondent's attorney, the appeal will not be
from the certificate of the Clerk of the Court below tha
Nissen v. *Bendixsen*. *Cal.* 290.
25. AN APPEAL FROM A JUDGMENT RENDERED IN FAVOR OF
not be perfected without service of notice upon the Un
should be made upon the United States Attorney; servic
sufficient. *Bennett* v. *United States*. *Wash.* 213.
26. AN APPEAL WILL NOT BE DISMISSED FOR FORMAL D
APPEAL in regard to the title of the court and cause and
of the judgment appealed from; when the provisions of th
complied with in such respects. *Parker et al*, v. *Denny*.
27. A NOTICE OF APPEAL SHOULD CONTAIN A PARTICUL
ruling, order, decree, or decision whereby the appellant
that it is essential for the appellant to say in such n
aggrieved by the following orders, rulings and decisions,
severally by descriptions sufficient to identify each. *Id.*
28. FAILURE TO FILE TRANSCRIPT—DISMISSAL OF APPEAL.—
appeal was filed less than fifteen days before the comm
appeal will be dismissed unless the appellant shows hims
laches in not having filed the transcript sooner. *Crawfor*
210.
29. AN APPEAL FROM AN ORDER DENYING A NEW TRIAL,
days after the entry thereof.—*Brown et al.* v. *Greene et a*
30. SERVICE OF NOTICE OF APPEAL—FILING UNDERTAKING.—
must be filed within five days after service of the noti
service is by mail. the undertaking must be filed within
of a copy of the notice in the post-office. Section 1013 of th
extending the time in which acts may be done, in certa
to such case.—*Id.*
31. THE SAME—THE TRANSCRIPT MUST CONTAIN PROOF of
appeal upon the opposite party or his attorney.—*Id.*
32. AN APPEAL IS INEFFECTUAL WHEN THE NOTICE THEREO
torneys of record or by the counsel for the appellant, or
no proof that such notice was served upon the responde
Cal. 884.
33. SERVICE OF NOTICE OF APPEAL, PROOF OF.—The certif
District Court acknowledging due service of appeal is
service to confer jurisdiction upon the Supreme Court.
the proof of such service may be shown by affidavit, whe
ment is attacked in a collateral action.—*Blinn* v. *Crosby*
34. AN UNDERTAKING ON APPEAL MUST BE FILED WITHIN
the service of the notice of appeal. If filed on the eleve
dismissed.—*Northern Pacific Terminal Co.* v. *Lowenberg*
35. THE ASSIGNMENT OF ERRORS IN A NOTICE OF APPEAL
sufficient to state generally, that the errors relied on c
cluding testimony as shown by the bill of exceptions.—
36. ASSIGNMENTS OF ERROR.—The Court will not review p
not clearly covered by the assignments of error on the re
Col. 320.
37. PRACTICE OF ASSIGNING MORE ERRORS than are neces
relied on, strongly condemned.—*Brewster, Receiver, etc.*,
38. AN OBJECTION TO A JUDGMENT, that it is inconsistent
considered by the appellate Court without producing
Walla Walla R. R. Co. v. *Ah Kowe et al.* *Wash.* 53.
39. APPELLATE COURT WILL NOT REVIEW THE FACTS OF
determining whether the findings are supported by th
are brought up on a statement of the case after a moti
Truckee Lodge No. 14. *Nev.* 40.
40. REVIEW OF EVIDENCE ON APPEAL.—On an appeal fro
Court cannot inquire whether the verdict is supported
done only upon an appeal from the order denying a new
Pierson. *Idaho*, 809.
41. ON APPEAL FROM A JUDGMENT, WITHOUT A STATEMENT
nothing belongs to the record except the judgment roll,

side the roll can be considered. The mode of presenting questions not arising on the judgment roll for review on appeal is by statement or bill of exceptions. *Jones* v. *St. John Irrigating Company*. *Idaho*, 183.

42. ON APPEAL THIS COURT CAN ONLY NOTICE THE ERRORS COMMITTED AGAINST THE APPELLANT, not those committed against the successful party. *Id.*

43. ERRORS IN THE ADMISSION OR REJECTION OF TESTIMONY, or in the giving or refusal of instructions, can not be considered on appeal, when no exceptions were taken during the trial. *Ralph et al.* v. *Weary et al.* *Col.* 324.

44. AFTER AN APPEAL HAS BEEN PERFECTED THE DISTRICT COURT HAS JURISDICTION to settle and allow the statement on appeal filed in the Court below within the time required by statute. *James* v. *Leport*. *Nev.* 44.

45. CERTIFICATE AS TO THE EVIDENCE INTRODUCED AT THE TRIAL.—Where a trial was partly had in the district court, with the aid of the official reporter, and then discontinued on account of the retirement of the judge, and upon a rehearing by his successor the notes of the reporter were used as correctly presenting the evidence, the only certification as to the evidence introduced at the trial required, so as to bring the cause before the supreme court, is the certificate of the judge who tried the cause.—*Seattle T. W. W. R. R. Co.* v. *Ah Kowe*. *Wash.* 53.

46. WAIVER OF APPEAL.—Matters may occur subsequent to the judgment which operate to waive the right of a party to have the judgment reviewed on appeal or writ of error. When such matters appear of record, the objection to the appeal may be raised by a motion to dismiss; but where they do not so appear, the objection must be raised by a plea in bar of the proceedings in error. The supreme court has jurisdiction to institute the necessary inquiry whether the matters alleged to constitute the waiver have in fact occurred. *Atkinson* v. *Tabor*. *Cal.* 105.

47. A PARTY WHO HAS VOLUNTARILY TAKEN ADVANTAGE OF A JUDGMENT rendered at *nisi prius* can not afterwards prosecute proceedings to reverse it. *Id.*

48. WRIT OF ERROR AND APPEAL.—Whether an error of the county court in denying an appeal can be reviewed on a writ of error to the original judgment, *quare*. *Brandenburg* v. *Reithman*. *Col.* 774.

See ADMIRALTY, 7–14; BILL OF PARTICULARS, 1, 2; COURTS, 1, 2, 4, 5; CRIMINAL LAW AND PRACTICE, 6, 10, 14, 18; FORCIBLE ENTRY AND DETAINER, 1; FUGITIVES FROM JUSTICE—JUDGMENT, 2, 12; JURY AND JUROR, 7; REMOVAL OF CAUSES, 4; SUPPLEMENTARY PROCEEDINGS, 5.

APPROPRIATION OF WATER.

See WATER RIGHTS, 9, 10, 12, 13, 15–18.

ARBITRATION AND AWARD.

1. THE ASSIGNEES OF PORTIONS OF AN AWARD MAY MAINTAIN A SUIT IN EQUITY to recover the amount of their respective assignments from the person against whom the award was made. *Bett et als.* v. *Poppleton*. *Or.* 191.

2. AN AWARD WILL NOT BE SET ASIDE BECAUSE CERTAIN ITEMS WERE CONSIDERED by the arbitrators which were not included within the terms of the written submission, when the party against whom the award was made consented to such action on the part of the arbitrators, especially if he subsequently promised to perform the award. *Id.*

3. AN AWARD WHICH DOES NOT DETERMINE EVERY MATTER SUBMITTED is not binding. But a subsequent ratification takes away all objection on this ground, and a promise to perform the award is such ratification. *Id.*

ASSAULT (note). 696.

ASSESSMENT.

See CORPORATIONS, 5, 9; TAXATION.

ASSIGNMENT.

See INSURANCE; JUDGMENT, 9; MORTGAGE, 8; NEGOTIABLE INSTRUMENTS, 5; PARTIES, 3.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. AN ASSIGNEE FOR THE BENEFIT OF CREDITORS ACQUIRES ONLY SUCH RIGHTS in the property assigned as his assignor had at the date of the assignment. *Gammons* v. *Holman*. *Or.* 822.
2. A PAROL TRANSFER OF GOODS TO ARRIVE, AS SECURITY FOR A PRE-EXISTING INDEBTEDNESS and for advances subsequently to be made, is valid as against the assignee for the benefit of the creditors of the transferor, although actual possession of such goods is not obtained by the pledgee until after the assignment for the benefit of creditors. *Gammons, Assignee, etc.*, v. *Holman et al. Or.* 822.
3. THE SURVIVING PARTNER OF AN INSOLVENT FIRM CAN NOT ASSIGN THE PARTNERSHIP assets for the benefit of preferred partnership creditors. If he does so, the validity of such assignment may be questioned in a legal action by a firm creditor without first resorting to an equitable action to cancel and set aside the same. *Salisbury* v. *Ellison*. *Col.* 102, 612.

ATTACHMENT.

1. ATTACHMENT LAW—AMENDMENT OF 1881.—The fourteenth subdivision of section one of the Attachment Act, as amended in 1881, providing that "in all actions brought upon overdue promissory notes, bills of exchange, other written instruments for the direct payment of money, and upon book accounts, the creditor may have a writ of attachment issue upon complying with the provisions of this section," creates a new and distinct ground of attachment, additional to the twelve others enumerated in such act. *Simmons* v. *California Powder Company*. *Col.* 517; *Kellerman* v. *Crescent Milling, etc., Co. Col.* 520.
2. SHERIFF'S FEES FOR KEEPING ATTACHED PROPERTY, ALLOWANCE OF.—Where property has been attached by a Sheriff, at the instance of the plaintiff, in an action which is afterward dismissed, the Sheriff is entitled to a reasonable compensation as fees for his expenses in maintaining a keeper in charge of the property attached. Such fees may be taxed as costs against the plaintiff. To determine the amount of his fees, there being no statute regulating the same, the Sheriff should present his bill to the court or judge, and procure an order allowing the same, or so much thereof as may be proper. The party against whom such allowance is made may, upon motion to retax, procure a rehearing and re-examination. The clerk has no power to make such allowance. If, however, he does so, and his action is affirmed by the court on a motion to retax, such irregularity furnishes no ground for a reversal. *City Bank of Leadville* v. *Tucker, Sheriff, etc. Col.* 402.
3. ATTACHMENT—EXEMPTION, CLAIM OF HOW MADE.—No form is prescribed for making a claim of exemption by a defendant whose property has been attached in an action in the Justice's Court. He may make the same orally, and without notice to the plaintiff. The notice referred to in Section 12 of the Attachment Act of 1879 applies to the cases of claimants to the property attached, other than the defendant. *Bassett* v. *Inman*. *Col.* 534.
4. THE SAME—WAIVER OF EXEMPTION.—A defendant does not waive the right of claiming property as exempt from attachment, by first traversing the attachment upon other grounds. *Id.*
5. THE SAME—COUNTY COURT—JURISDICTION TO DISSOLVE AN ATTACHMENT.—Upon an appeal from the Justice's Court, the County Court has jurisdiction to dissolve an attachment on the ground that the property attached is exempt. *Id.*
6. THE SAME—REVIEW OF ORDER DISSOLVING ATTACHMENT.—The appellate court will not review an order dissolving an attachment for a ground not raised in the court below. *Id.*
7. ATTACHMENT PROCEEDINGS, TRIAL OF ISSUES ON.—Under the Statutes of this Territory attachment proceedings are auxiliary to actions at law, but each is characterized by separate pleadings and a distinct practice. If on the trial of the issues alleged in the affidavit for an attachment a verdict is rendered for the defendant, the attachment is dissolved, but the action at law proceeds to final judgment, when the same is founded upon a matured demand. Where, however, the statute authorizes an attachment on demands not due, but fails to describe the mode of procedure to be followed in such cases, this Court has authority to provide by rule what the practice shall be, so as to give effect to such attachment. *Staab et al.* v. *Hersch*. *N. M.* 425.
8. IN ATTACHMENT PROCEEDINGS ON DEMANDS NOT DUE, the only consistent mode of procedure is to treat such proceedings as separate and distinct from the action at law, and to go no further than to create an attachment lien in advance of the com-

mencement of such action. The writ of attachment should contain a citation to the defendant to appear and answer the affidavit. The issues thus raised should be tried and the attachment lien dissolved or continued, according to the verdict of the jury. If sustained, the attachment would remain a subsisting lien on the property of the debtor, and upon the maturity of the demand a declaration might be filed and the defendant cited to plead thereto. If the plaintiff recovered judgment, then a writ of *venditione exponas* might be issued for the sale of the property attached, and the proceeds thereof applied to the satisfaction of the judgment. *Id.*

9. A DEFENDANT WHO APPEARS IN AN ATTACHMENT SUIT AND MAKES NO OBJECTION to the writ, can not, after judgment has been given against him, question the sufficiency or character of the writ. *Wagner* v. *Romero*. *N. M.* 269.
10. FAILURE TO HAVE THE SURETIES ON AN ATTACHMENT BOND justify is a mere irregularity which can be cured, and, therefore, such failure does not render the attachment void. *Baxter* v. *Smith*. *Wash.* 794.
11. A SUBSEQUENT ATTACHING CREDITOR, WITHOUT NOTICE, takes priority over a prior mortgagee under an unrecorded chattel mortgage. *Id.*
12. JUDGMENT ON A FORTHCOMING BOND.—In an action on a forthcoming bond given under section 13 of that portion of the Kearney code relating to attachments, an order which directs that the property attached shall be "forthwith delivered to the Sheriff of San Miguel County, and that the same be sold and the proceeds of said sale be applied to the satisfaction of the judgment," is sufficiently definite both as to the time and place of delivery. If it were not so, the Court has authority to amend such order at the same term by designating more definitely the time and place of delivery. *Wagner* v. *Romero*. *N. M.* 269.

ATTACHMENT.

See CORPORATIONS, 11; EXECUTORS AND ADMINISTRATORS, 2; LANDLORD AND TENANT, 1; MASTER AND SERVANT, 1.

ATTORNEYS.

1. ATTORNEY-AT-LAW — MALCONDUCT IN HIS OFFICE — REMOVAL FROM THE BAR.— It appearing that an attorney-at-law stopped a judge of a court as he was driving through the public street in company with his daughter, a young lady, and thereupon addressed abusive, insulting and threatening language to such judge concerning his judicial action in a certain cause, previously and then pending and undetermined in the court of which he was a judge, wherein the said attorney was counsel for one of the parties; and that he accused said judge of tyrrany and oppression in said cause, and having secured its submission to a prejudiced judge for trial; and that he assailed said judge with vile epithets, and threatened to expose him by publishing the said accusations in the newspapers; and it further appearing that the said attorney refuses to retract, apologize for, withdraw or modify these accusations, but on the contrary still justifies his conduct and insists that he has not violated any professional duty; and it further appearing that upon an opportunity given him to substantiate his said charge by evidence, he has entirely failed to prove their truth. *Held*, that such acts constitute "malconduct in his office" for which the attorney should be removed from the bar, under the statute which provides "that the justices of the supreme court shall have power, at their discretion, to strike the name of any attorney or counsellor-at-law from the roll for malconduct in his office." *People ex rel. Elliott* v. *Green*. *Col.* 311, 521.
2. THE SAME—JURISDICTION OF THE COURT TO PUNISH ATTORNEYS-AT-LAW FOR THEIR MALCONDUCT IN OFFICE.—It is not necessary, in such a case, that the indignity or insult to the judge should occur in open court, nor that it should constitute a statutory contempt of court, in order to confer on the supreme court jurisdiction to disbar therefor. *Id.*
3. DISBARMENT OF ATTORNEY.—Evidence held insufficient to justify the defendant's removal or suspension from the bar. *In re Lowenthal*. *Cal.* 733.
4. LIABILITY OF ATTORNEY ON EXAMINATION OF TITLE TO REAL PROPERTY. — A applied to a money lender for a loan of three thousand dollars and offered his note therefor, secured by a mortgage on certain real property; B, the attorney of the money lender, examined the title to the real property, and furnished the latter a certificate to the effect that A's title was good and the property unincumbered, and thereupon the loan was made on the terms proposed; subsequently and before the maturity of the note it was assigned to the plaintiff, who foreclosed the mort-

gage and sold the property, when it was found that it was encumbered by a prior mortgage, so that the plaintiff did not realize the amount of his debt by four thousand, seven hundred and ninety-four dollars and thirty-five cents. *Held*, that there was no privity of contract between B and the plaintiff, and that he was not liable to the latter for the loss. *Dundee Mortgage and Trust Investment Co.* v. *Hughes* (*U. S. Cir. Ct.*). *Or.* 708.

See ESTATES OF DECEASED PERSONS, 5; PLEADING AND PRACTICE, 3.

AWARD.

See ARBITRATION AND AWARD.

BAIL.

See FUGITIVES FROM JUSTICE, 2.

BAILMENT.

See EMBEZZLEMENT, 1.

BANKS.

1. CASHIER'S LIABILITY FOR MISAPPROPRIATION OF FUNDS.—A cashier of a bank, empowered to transact its business, subject to the direction of the Board of Trustees, who loans large sums of moneys to a single individual without taking any security therefor, and without entering the same upon the books of the bank; and who, in order to conceal such loan from the knowledge of the bank officials, falsely reports to them the amount of cash on hand, is liable for the amount of such loan lost to the bank, although the trustees neglected their duty in not regularly examining the cash, as required by the by-laws.—*San Joaquin Valley Bank* v. *Bours*. *Cal.* 901.
2. ACQUIESCENCE BY THE TRUSTEES OF A BANK for a period of seven years in the charges regularly made by their cashier, on account of his salary, is equivalent to an agreement that such amount constituted his salary.—*Id.*

BATTERY.

See CRIMINAL LAW AND PRACTICE, 12.

BILL OF EXCEPTIONS.

1. FAILURE TO NAME AN HOUR IN A NOTICE FOR THE SETTLEMENT OF A BILL OF EXCEPTIONS, when the day for the same has been agreed to by stipulation, is a fault imputable to both parties, and cannot be taken advantage of.—*City of Seattle* v. *Busby*. *Wash.* 45.
2. BILL OF EXCEPTIONS NEED ONLY CONTAIN SO MUCH OF THE EVIDENCE as is necessary to explain it. What is necessary will depend upon the peculiar circumstances of each case.—*Id.*
3. THE TIME FOR PREPARING AND FILING A BILL OF EXCEPTIONS may be extended by the court thirty days in addition to the ten days allowed by Section 659 of the Code of Civil Procedure.—*Moffatt* v. *Cook*. *Cal.* 882.

See APPEAL, 5.

BILL OF PARTICULARS.

1. PROVISIONS OF THE STATUTE IN REFERENCE TO FURNISHING A BILL OF PARTICULARS are applicable to proceedings in the county court on appeal from a judgment of the justice's court. *De Lappe* v. *Sullivan*. *Col.* 107, 108.
2. DENIAL OF A MOTION FOR A MORE SPECIFIC BILL OF PARTICULARS, if erroneous, will not warrant a reversal of a judgment when the defeated party was not prejudiced thereby. *Id.*

BILL OF REVIEW.

1. BILL OF REVIEW.—An application to file a bill of review, without the performance of the decree, ought to be made to the court by petition and on notice to the adverse party, and if it appears that the performance of the decree would destroy the subject

of the litigation, it ought to be allowed. *Willamet Iron Bridge Co.* v. *Hatch et al.* (*U. S. Cir. Ct.*) *Or.* 220.

2. IDEM.—On the hearing of a bill of review, the court can only consider the errors of law apparent on the face of the record, and a fact found or determined by the decree is presumed to have been sufficiently proved by the evidence. *Id.*

BONA FIDE PURCHASERS.

1. DEFENSE OF BONA FIDE PURCHASER.—The defense of a *bona fide* purchaser is in the nature of a new case founded on a right as to title to real property operating, if made out, to bar and avoid the plaintiff's equity, which otherwise must prevail. To entitle a party to protection as such a purchaser he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment. If he had notice, actual or constructive, at any moment before the payment of the money, he is not a *bona fide* purchaser. *Everedon* v. *Mayhew.* *Cal.* 726.
2. PROBATE PROCEEDINGS AS NOTICE OF TITLE.—Proceedings in the probate court to have certain premises set apart to a widow and children as a homestead are not notice sufficient to put a subsequent *bona fide* purchaser from the person holding the legal title upon inquiry as to the equities of such children. *Stockton Building and Loan Association* v. *Chalmers et al.* *Cal.* 148. *Chalmers* v. *Chalmers.* *Cal.* 150.
3. PRE-EXISTING DEBT—VALUABLE CONSIDERATION—BONA FIDE PURCHASER.—The cancellation of a pre-existing indebtedness may be a sufficient consideration to constitute a vendee a purchaser in good faith and for a valuable consideration. *Schluter* v. *Harvey et al.* *Cal.* 730.
4. THE SAME—PLEADING BONA FIDE PURCHASE.—Insufficiency in pleading the facts showing a *bona fide* purchase for a valuable consideration cannot be taken advantage of in the appellate court, where there was an attempt to plead them, when no objection was raised by demurrer or otherwise in the court below, nor objection made to the evidence tending to prove such facts. *Id.*

See BONDS, 1; CONVERSION, 1; JUDGMENT, 9; PLEDGE, 1.

BONDS.

1. RAILROAD BONDS—OVER ISSUE.—Where a railroad company had contracted that it would not issue its first-mortgage bonds in excess of ten thousand dollars per mile of completed road, but subsequent to the sale of its first mortgage to that extent, it did issue its bonds in excess of such an amount; *Held*, that such over-issue was void as against the holders of the bonds regularly issued to the extent limited, none of the holders of such over-issue being innocent purchasers for value. *Union Trust Company of New York* v. *Nevada and Oregon Railroad Company.—Moran et al.* v. *McMurray et al.* (*U. S. Cir. Ct.*), *Nev.* 701
2. JUDGMENT REVERSED on the authority of *Meyer* v. *Porter*, 1 *West Coast Rep*, 874. *Hammeister v. Porter.* *Cal.* 144.
3. NO ACTION MAINTAINABLE ON THE MUNICIPAL BONDS OF SACRAMENTO ISSUED UNDER CHARTER OF 1858.—The City of Sacramento being largely indebted, its charter of 1858 provided for the funding of such indebtedness by the issue of bonds, bearing interest at six per cent., to the creditors who should surrender their former evidences of indebtedness and accept these bonds in place thereof. This charter provided, among other things, that "none of the claims herein specified shall be liquidated or paid except in the manner herein specified;" also, that "the city shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final." It further provided that the city government should levy an annual tax of one per cent. on taxable property for municipal purposes, and that of the tax thus levied and of other revenues specified there should be annually set apart and appropriated "fifty-five per cent. to an interest and sinking fund, which shall be applied to the payment of the annual interest and the final redemption of the bonds issued for the city indebtedness, in accordance with the provisions of this act;" with a further provision that the interest and principal of these bonds should be paid from this interest and sinking fund. In 1863 this charter of 1858 was repealed, and another charter was adopted, which re-enacts all of the provisions above recited without any material change. The plaintiff is the holder of bonds of the city issued in pur-

suance of the charter of 1858, and he brings a suit against the city to recover the amount of the unpaid and overdue interest coupons of such bonds. *Held*, That the parties who surrendered their prior evidences of indebtedness and took these bonds took them under the provisions of the charter of 1858, which was a contract made between the city and them, to the effect that the bonds should be collected and paid only in the particular manner therein specified, and in no other, and that the city should not be liable to be sued; and that such contract was made upon a valuable consideration of advantage moving to both parties, and was valid and binding; and therefore no action can be maintained by the holders of said bonds, against the city, to recover the amounts unpaid and overdue thereon. If the provision of the State constitution, making all corporations liable to be sued like natural persons, has any application to municipal corporations, it had been waived by the bondholders. *Kennedy* v. *City of Sacramento* (*U. S. Cir. Ct.*), *Cal.* 223.

4. MANDAMUS THE REMEDY.—It seems the proper and only remedy of the bondholders is by *mandamus* against the City Treasurer, to compel him to pay the interest out of the fund in his hands; or, if there is no such fund, then by *mandamus* against the city government to compel them to raise and appropriate the fund by taxation, as directed by the original charter of 1858. The provision of that charter being a part of the contract between the city and the bondholder, for his benefit, its repeal by the Legislature would be nugatory. *Id.*

BOOK REVIEWS.

Boone on Real Property, 677.
Desty's Federal Procedure, 677.
Hawes on Parties to Actions, 677.
Hayne on New Trial and Appeal, 293.
High on Extraordinary Legal Remedies, 802.
Jones on Pledges, 292.
Stewart on Marriage and Divorce, 679.

BRIBERY.

See ELECTION, 3.

BRIDGES.

See WATER RIGHTS, 3–4, 6–8.

BURGLARY.

1. BURGLARY—WHAT IS.—In section 59, crimes and punishments, revised laws, page 332, wherein it is provided that "every person who shall, in the night-time, * * * break and enter any dwelling-house or tent with intent to commit murder, robbery, mayhem, larceny, or other felony," the term "larceny" applies alike to grand and petit larcenies. In an indictment for burglary drawn upon that statute, it is not necessary to allege the value of the property intended to have been stolen. *People etc.*, v. *Stapleton*. *Idaho*, 176.

2 BURGLARY—INTENT—INSTRUCTIONS.—The information charged the defendant with burglary in feloniously entering the ticket office of a railroad with intent to commit larceny. *Held*, that an instruction that the defendant could not be convicted unless he entered the building with the intent to commit "some felony," was properly refused, since the information charged an intent to commit larceny. *People* v. *Young*. *Cal.* 830.

3. THE SAME.—One who enters, with burglarious intent, a room of a house, enters the house with such intent. Where such room was known as a ticket office, it may be properly described as "a building, to wit: the ticket office." *Id.*

4. BURGLARY MAY BE DEFINED IN THE LANGUAGE of the penal code. *Id.*

5. A ROOM MAY BE CONSTRUCTED WITHOUT A PARTITION reaching to the ceiling, and the court may so instruct the jury. *Id.*

6. CERTAIN INSTRUCTIONS REVIEWED AND HELD CORRECT. *Id.*

See CRIMINAL LAW AND PRACTICE.

CANCELLATION.

1. FRAUDULENT MARRIAGE CONTRACT—EQUITABLE JURISDICTION TO CANCEL.—Equity has jurisdiction to declare null and void and to cancel an instrument which is claimed to be a marriage contract, executed in conformity with section 75 of the civil code of California, when the same is a forgery or was obtained by fraud. *Sharon* v. *Hill. (U. S. Cir. Ct.) Cal.* 164.

2. CANCELLATION OF DEED PROCURED BY FRAUD.—Every person who signs, executes and acknowledges a deed is presumed to know the contents and legal effect thereof. But where a deed is executed by reason of false and fraudulent representations as to its contents, and where it is falsely read to the grantor, and by reason of such false and fraudulent representations, and in ignorance of its contents, the grantor executes the same, such deed may be annulled and canceled, and parol evidence is admissible to show such facts. *Tufts, Administrator, etc.*, v. *Tufts. Utah*, 459.

3. FINDING THAT A CERTAIN DEED WAS OBTAINED BY REASON OF FALSE and fraudulent representations on the part of the grantee, *held*, supported by the evidence. *Id.*

4. ACTION FOR CANCELLATION—NECESSARY PARTIES.—In an action for the cancellation of a deed, alleged to have been fraudulently obtained by the grantee during his lifetime, the heirs and devisees of the deceased grantee are necessary parties. *Snyder* v. *Voorhies, Executrix, etc. Col.* 616.

5. EJECTMENT—EVIDENCE—CANCELLATION OF CERTIFICATE OF PURCHASE.—In an action of ejectment, where the plaintiff relies on a certificate of the receiver of public moneys, evidence tending to show a cancellation of such certificate, and the reasons therefor, are admissible on the part of the defendant. *Hays* v. *Parker. Wash.* 801.

CERTIORARI.

1. REVIEW UPON CERTIORARI IS CONFINED to questions of jurisdiction. *State ex rel. Barnett* v. *Fifth District Court. Nev.*, 630.

2. CERTIORARI TO REVIEW ACTION OF SUPERVISORS—RECLAMATION OF SWAMP LAND.—An order of a board of supervisors creating a district for the reclamation of swamp land is an act of legislation in the exercise of the taxing or police power of the State, and is not reviewable upon *certiorari. Williams* v. *Board of Supervisors. Cal.* 732.

See CONTEMPT, 1; INJUNCTIONS, 1, 4.

CHATTEL MORTGAGE.

See MORTGAGE, 7.

CHINESE RESTRICTION ACT.

1. RESTRICTION ACT, WHEN TOOK EFFECT.—The Act of Congress of May 6, 1882, commonly called the Chinese Restriction Act, does not state when it was to go into operation, and, consequently, it took effect immediately upon its approval by the President. *In re Leong Yick Dew. (U. S. Cir. Ct.), Cal.* 83.

2. CHINESE LABORERS — EVIDENCE OF FORMER RESIDENCE.—A Chinese laborer who was a resident of the United States on the seventeenth day of November, 1880, the date of the treaty with China, but who left the same after the taking effect of the Restriction Act, and after having an opportunity to obtain the certificate required by Section 4 thereof, cannot re-enter the United States, either by land or sea, or having re-entered remain therein, unless he proves the fact of his former residence by such certificate. No other evidence of such fact is admissible. *Id.*

3. THE SAME.—Chinese laborers who were in the United States on November 17, 1880, the date of the treaty with China, and who left before the passage of the Restriction Act on May 6, 1882, and those who came into the United States and departed therefrom between such dates, or afterwards before June 6, 1882, the date on which the Collector of the Port of San Francisco was prepared to issue the certificates provided for in Section 4 of such Act, in the form prescribed by the Secretary of the Treasury, are entitled to re-enter the United States upon satisfactory evidence of their former residence other than that furnished by such certificate. *Id.*

CLAIM AND DELIVERY.

See REPLEVIN.

CLOUD ON TITLE.

See TAXATION, 8-11.

CODES, States and countries using (note), 648.

COMMUNITY PROPERTY.

See HOMESTEAD, 1; HUSBAND AND WIFE, 1.

COMPLAINT.

See PLEADING AND PRACTICE.

CONDITIONAL SALE.

See SALES, 8.

CONSIDERATION.

SEE BONA FIDE PURCHASER, 1-3; CONTRACTS, 4; DEED, 6-8; HOMESTEAD, 6; PUBLIC LANDS, 5-9.

CONSPIRACY.

See EVIDENCE, 4; MURDER AND MANSLAUGHTER, 14.

CONSTITUTIONAL LAW.

1. CONTROVERSY, WHEN ARISES UNDER ACT OF CONGRESS.—A controversy which turns upon the existence, effect and operation of an act of Congress, is an action arising under such act, and a suit brought to determine such controversy is properly commenced in the district court of the Territory, sitting to hear and determine causes arising under the constitution and laws of the United States; and especially is this the case when the action is brought by or against a corporation chartered by an act of Congress. *Northern Pacific Railroad Co.* v. *Garland, Treasurer, Etc. Mont.* 326.
2. WHEN RIGHTS HAVE BECOME VESTED UNDER A VALID CONTRACT, legislative authority cannot invalidate such contract or disturb such rights. *Id.*
3. THE FOURTEENTH AMENDMENT TO THE CONSTITUTION IS NOT A LIMITATION UPON THE POWER OF CONGRESS in the disposal of the property of the United States. *Id.*
4. STATE STATUTE INVOLVING FEDERAL QUESTION.—In construing or determining the validity of a state statute involving a federal question, the national courts are not bound by the decision of the state court. *Dundee Mortgage, Etc., Co.* v. *School District* (*U. S. Cir. Ct.*). *Or.* 241.
5. THE ACT OF APRIL 6, 1877, entitled "An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereof, into one act, and to revise and amend the same," is not unconstitutional as being in contravention of the provisions of the constitution respecting special legislation. *Brown* v. *City of Denver et al. Col.* 618.
6. SPECIAL LEGISLATION — LEGISLATIVE DISCRETION.—Where the constitution, after enumerating certain subjects on which special legislation is prohibited, provides that "in all other cases where a general law can be made applicable no special law shall be enacted," the question whether a subject not enumerated can be provided for by a general law is one of legislative discretion, and not for the courts. *Id.*
7. DUE PROCESS OF LAW—NOTICE.—Whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of taking it, the owner must have notice of the proceeding and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise, at some stage of it and before the property is taken, or the charge becomes absolute against either the owner or his property, an opportunity to be heard must be given; otherwise such proceeding is without due process of law. *Id.*
8. THE SAME—SIDEWALK ORDINANCE OF DENVER.—Tested by the above rules, the sidewalk ordinance passed by the City Council of Denver, on March 17, 1881, is void, as furnishing the owner no notice of the assessment and no opportunity to be heard thereon. *Id.*

CONSTITUTIONAL LAW.

1. POWER OF STATE TO AMEND CORPORATE CHARTER (Note), 151.

See COUNTY GOVERNMENT, REMOVAL OF COUNTY SEAT, 1; STATUTES, 1–4; STREETS AND HIGHWAYS, 7; TAXATION, 13–17, 19–22; WATER RIGHTS, 1–8.

CONTEMPT.

1. CORPORATIONS, OTHER THAN MUNICIPAL, MAY BE PUNISHED FOR CONTEMPT, for violation of an injunction. *Golden Gate C. Hy. M. Co.* v. *Superior Court. Cal.*, 736.
2. CONTEMPT—AFFIDAVITS ON PROCEEDINGS FOR.—The jurisdiction of a court to adjudge a contempt, committed out of its presence, does not depend upon the form of the affidavit which sets the proceeding in motion, although the facts constituting the contempt are stated therein on information and belief. The finding that the alleged contempt was committed, after a hearing on an order to show cause issued on such affidavits, will not be reviewed on *certiorari*. *Id.*
3. ORDER TO SHOW CAUSE ON CONTEMPT PROCEEDINGS—SERVICE OF, ON ATTORNEY, WHEN SUFFICIENT.—An order to show cause why a corporation should not be punished for contempt should ordinarily be served upon the president, or other head of the corporation, secretary, cashier or managing agent thereof. But where it appears that diligent efforts have been made to serve an officer or managing agent, and that they had attempted to resign their offices, and had concealed themselves to avoid service of the order, the court may order service to be made upon one or more of its attorneys. Service upon an attorney who had repeatedly appeared for the corporation is sufficient, although he did not appear as such attorney on the record. *Id.*

See ATTORNEYS, 2.

CONTRACT.

1. CONTRACT FOR THE SALE OF SPIRITUOUS LIQUORS, at a certain place, in quantities greater than one gallon, cannot be enforced by the vendor, when he has neglected to take out a license for the place at which such sale is to be made.—*Bach, Messe & Co.* v. *Smith. Wash.* 779.
2. BUILDING CONTRACT—LIABILITY OF CONTRACTOR UNDER.—When a party contracts to build a house of suitable materials and in a workmanlike manner, and violates his contract, the party injured may either refuse to pay the contract price of the building to the amount to which he is damaged, or he may pay for and take possession of the building, and then sue and recover of the builder the amount of his damages. Such recovery may be had whether the breach of the contract was known at the time of payment or not.—*Hallack* v. *Bresnahen. Wy.* 60.
3. SUCH PAYMENT IS NOT A WAIVER of the right of action for failure to perform the contract so as to discharge the contractor or his sureties.—*Id.*
4. THERE IS A CONSIDERATION FOR THE CONTRACT contained in the charter incorporating the Northern Pacific Railroad Company, which consideration is found in the public benefits to be derived to the whole people of the United States by reason of the construction of such road.—*N. P. R. R. Co.* v. *Carland. Mont.* 326.
5. OBLIGATION, MEANING OF.—The word "obligation," as used in Section 1834 of the General Statutes, providing that "all joint obligations and covenants shall hereafter be taken and held to be joint and several obligations and covenants"; and in Section 14 of the Code of Civil Procedure, providing that "all persons jointly or severally liable upon the same obligation or instrument, * * * may all or any of them be included in the same action," is confined to contracts in writing, and does not include oral contracts.—*Exchange Bank of Denver* v. *Ford. Col.* 624.

See ACCORD AND SATISFACTION; ADMIRALTY, 15, 16; ATTORNEYS, 4; BANKS, 2; BONDS, 3; CONSTITUTIONAL LAW, 3.

CONVERSION.

1. CONVERSION OF HORSE—STATUTE OF LIMITATIONS.—Where a horse is wrongfully converted from its owner and afterward sold to a *bona fide* purchaser, who uses it in an open and notorious manner, without attempting to conceal it, the Statute of Limitations commences to run in favor of such purchaser and against the owner from the time of the purchase, and not from the time when the owner discovers the whereabouts of the horse.—*Dee* v. *Hyland et al., Utah*, 469.

CONVEYANCE.

See DEED.

CORPORATIONS.

1. NOTES OF CORPORATION, POWER OF DIRECTORS TO AUTHORIZE.—The board of directors of a corporation has power to appoint two of its members a committee for the purpose of making and delivering the notes of the corporation to such stockholders as have debts against the company. If such committee, in executing the trust imposed upon them, exceed their authority, the corporation is not bound by their unauthorized acts. *Leavitt* v. *Oxford etc. Mining Company. Utah*, 462.
2. MEETING OF DIRECTORS—NOTICE OF—PRESUMPTION.—In the absence of any law on the subject, a meeting of the directors of a corporation is presumed to have been held after due and sufficient notice thereof to all the directors, unless the contrary affirmatively appears. *Id.*
3. WHAT CONSTITUTES A QUORUM.—At common law the major part of a board of directors constitutes a quorum, a majority of which may decide any question upon which they have power to act. *Id.*
4. NOTE GIVEN TO DIRECTOR, VALIDITY OF.—A promissory note of a corporation given to one of its directors, in pursuance of the unanimous vote at a meeting of the directors, is not invalid because such director was present and voted for the same, if without counting his vote the same was authorized by a majority of a quorum of the directors. *Id.*
5. NOTES OF CORPORATION—ITEMS INCLUDED IN—STATUTE OF LIMITATIONS.—A resolution of a board of directors empowering its committee "to make and deliver to the several stockholders who have loaned money to this company, and for the liabilities of this company, the company's notes for such loans and liabilities," does not authorize the committee to include, in a note so given, money paid by a stockholder, prior to the incorporation of the company, for the purpose of developing property which afterwards is conveyed to the corporation, and for which he receives certain shares of stock; nor money paid by the stockholder, in pursuance of a resolution of the company calling for a voluntary assessment, for the purpose of developing the company's property. Such resolution does not prohibit the giving of a note for an indebtedness barred by the statute of limitations. *Id.*
6. FORFEITURE OF CORPORATE FRANCHISE.—The franchise and charter of a banking corporation will be adjudged forfeited, and the corporation ousted of the same, when the corporation continues to carry on its business beyond the time limited by a condition in its charter, although such business is carried on solely for the purpose of closing up the affairs of the bank, in anticipation of a voluntary dissolution.—*People, ex rel. Attorney General*, v. *City Bank of Leadville. Col.* 308.
7. EQUITY WILL INTERPOSE TO PREVENT THE DESTRUCTION OF A FRANCHISE.—*N. P. R. R.* v. *Carland. Mont.* 326.
8. A FRANCHISE IS PROPERTY, and in the case of a continuing injury to the same, courts of equity will prevent a repetition of the injury and protect the franchise.—*Id.*
9. ASSESSMENT ON FULLY PAID-UP STOCK.—Corporations organized and existing under the laws of this State have authority to levy and collect assessments upon stock for which the subscription price has been fully paid. *Santa Cruz Railroad Co.* v. *Spreckles. Cal.* 752, 833.
10. ADVANCE BY DIRECTOR—LIABILITY OF CORPORATION FOR.—A corporation is liable for moneys advanced to it by a director which it receives and uses at a time when it was out of money and in debt and unable to obtain money from any other source. *Id.*
11. STOCKHOLDER'S LIABILITY AS GARNISHEE.—A stockholder in a company incorporated under the general corporation law of Nevada can not be held as a garnishee for the debts of the corporation, to the extent of his unpaid and uncalled subscription to its stock *McKelvey* v. *Crockett. Nev.* 37.
12. CERTIFICATE OF INCORPORATION—ATTACK ON.—The corporate existence and validity of the acts of a *de facto* corporation, whose user is established, can not be attacked collaterally upon the ground that its certificate of incorporation does not contain certain specifications which it was required by statute to contain. *City of Denver* v. *Mullin. Col.* 852.
13. RAILROAD, WHAT IS—UNION DEPOT.—A corporation organized for the purpose "of locating, building, owning and maintaining a union depot for railroads in the city of Denver, and for the location, building, owning and maintaining of as many lines of railroad from said depot to the exterior boundaries of said city as may be necessary

for the accommodation and use of the different railroad companies making said city a point of delivery for freight and passengers," is not an ordinary railroad company within the meaning of the general statutes. *People ex rel. Bernard et al.* v. *Cheeseman et al.* *Col.* 870.

14. CREATION OF PRIVATE CORPORATION UNDER GENERAL LAW.—A substantial compliance with the provisions of the general law is an essential prerequisite to the creation of a private corporation, and a failure to comply therewith in any material particular is ground for the impeachment of corporate existence in an appropriate proceeding prosecuted by the proper authority. *Id.*

15. THE SAME—STATEMENT OF TERM OF CORPORATE EXISTENCE.—The statement in the articles of incorporation of a private corporation, that the same is to exist for fifty years, is not fatal to the creation of the corporation, although the general law under which it was organized limits the existence of such corporation to twenty years. *Id.*

16. CERTIFICATE OF ACKNOWLEDGMENT OF INCORPORATION.—Failure of the officer who took the acknowledgment of the articles of incorporation of a company to state in his certificate thereof, that the individuals who acknowledged the same were personally known to him, or proven to him to be the persons who executed the same, does not vitiate such certificate. *Id.*

See BONDS, 3; CONTEMPT, 1; MORTGAGE, 4-5; SUMMONS, 1.

COSTS.

1. A JUDGMENT TAXING AND APPORTIONING THE COSTS OF A RECEIVER will not be disturbed when the only parties who could be affected by a re-taxation of costs are not before the appellate court. *Chapman et al.* v. *Pocock et al.* *Col.* 306.

2. COSTS ON APPEAL FROM JUSTICE'S COURT.—Properly construed, section 522 of the Civil Practice Act prohibits the District Court to render a judgment for costs in favor of the appellant on an appeal from the Justice's Court, unless he recovers a judgment substantially more favorable than that from which the appeal was taken. Whether or not, in any particular case, the amount of enhancement or reduction is sufficient to make the judgment substantially more favorable depends upon the circumstances of each case, and is left to the discretion of the district judge to determine. As a rule, a reduction or enhancement of the judgment by a few dollars would not suffice to make it more favorable, within the meaning of the statute. *Baxter* v. *Scoland.* *Wash.* 552.

3. COSTS OF PROTEST OF INLAND BILL.—The allowance of costs for the protest of inland bills of exchange is not reviewable on appeal, when no motion to retax costs was made in the lower court. *Dawson* v. *Lail.* *Ariz.* 396.

4. REPAYMENT OF REDEMPTION MONEY—COSTS AFTER DISMISSAL.—In the lower court plaintiff recovered judgment for costs. Both parties appealed. On appeal this judgment was reversed, and at the defendants' request the action was dismissed. Pending the appeal, no supersedas bond having been filed, plaintiff issued execution on his judgment for costs, and levied the same on certain mining property of the defendants, which was sold and bought in by the plaintiff. Subsequently the defendants sold said property to one Lubbock, who redeemed it from the plaintiff. After the judgment of the Supreme Court reversing and dismissing the action had been certified to the lower court, such court, on motion of defendants' counsel, taxed the defendants' costs, and ordered the plaintiff to pay back to Lubbock the amount paid by him on redeeming; *Held*, that the lower court had no power to award such costs, or to make such order, as it no longer had jurisdiction of the case after the dismissal by the Supreme Court; and even if it had jurisdiction, it could not, on such motion, order the repayment of the money paid by the redemptioner. *Wall* v. *Dodge et al.* *Ariz.* 457.

5. DIRECTION MADE AS TO COSTS ON APPEAL. *Emeric* v. *Alvarado et al.* *Cal.* 134.

See ADMIRALTY, 19; APPEAL, 16-18; ATTACHMENT, 2.

COUNTER CLAIM.

1. ACTION FOR SERVICES—COUNTER CLAIM.—In an action by an employee to recover the value of his services, a counter claim set up by the defendant, *held* unsupported by the evidence. *James* v. *Duke.* *Col.* 515.

COUNTY CLERK.

1. EXAMINATION OF RECORDS—DUTY OF COUNTY CLERK.—Section 667 of the general statutes, providing that the county clerk shall keep his office "open during the usual

business hours, * * * and that all books and papers required to be in his office shall be open for the examination of any person," gives no right to a private individual to examine and abstract the entire records of a county for the sole purpose of securing future private emolument from the sale of abstracts thus obtained, and imposes no duty upon the clerk to allow such acts to be done. *Bean, County Clerk, etc., v. People, etc. Col.* 121.

See PUBLIC OFFICERS.

COUNTY COMMISSIONERS.

See APPEAL AND WRIT OF ERROR, 7-11.

COUNTY GOVERNMENT.

1. COUNTY GOVERNMENT ACT OF MARCH, 1883—VALIDITY OF.—The act of March, 1883 entitled "An act to establish a uniform system of county and township governments," is not in violation of that provision of the constitution requiring every act to embrace but one subject, which subject shall be embraced in its title. *Lengan v. Solano County. Cal.* 493; *Cruz v. County of Los Angeles. Cal.* 760.
2. THE SAME.—The provisions of such act regulating the fees and salaries of the county officers, as classified therein, are not in violation of that provision of the constitution prohibiting the legislature from passing local or special laws affecting the fees or salary of any official. *Id.*
3. COURTS HAVE NO POWER TO DETERMINE INTO HOW MANY CLASSES the legislature shall divide the counties of the State for the purpose of carrying out the provisions of the constitution. *Id.*

COUNTY SEAT, REMOVAL OF.

See ELECTION, 1, 4, 6, 7.

CRIMINAL LAW AND PRACTICE.—IN GENERAL.

1. COMMITMENT AND EXAMINATION BY JUSTICE OF PEACE.—Where a complaint is filed before a justice of the peace, charging a defendant with a felony, and he is thereupon arrested and taken before the magistrate issuing the warrant, by whom an order of commitment for examination is made, such defendant may be examined and committed by another justice of the peace of the same township, although no warrant for the defendant's arrest is issued by such latter magistrate, and it does not appear why the defendant was taken before a magistrate other than the one issuing the warrant. *Ex parte Moan. Cal.* 760.
2. THE SAME—ORDER FOR COMMITMENT—HABEAS CORPUS.—A defendant's commitment, under Section 872 of the Penal Code, is sufficient, when the justice by whom he was examined makes the following order: "It appearing to me that the offense of manslaughter has been committed, and that there is sufficient cause to believe the within-named defendant guilty thereof, I order that he be held to answer to the same, and that he be admitted to bail in the sum of two thousand five hundred dollars." If such commitment were not sufficient, the defendant would not be entitled to his discharge on habeas corpus, after his trial and conviction, when he failed to move to have the information set aside under which he was tried. *Id.*
3. FILING INFORMATION AFTER DISMISSAL OF CHARGE BY GRAND JURY.—The district attorney has authority to file an information against a defendant, within thirty days after his commitment, notwithstanding the grand jury had previously examined the case and dismissed the bill. *Id.*
4. FILING INFORMATION—CONFESSION OF DEMURRER.—After a plea of not guilty has been entered in a prosecution for murder, upon which the case is set for trial, the court may set aside an order overruling a demurrer to the information, and allow the counsel for the people to confess the demurrer and to file a new information; and an order entered allowing such confession of the demurrer, and directing a new information to be filed, is equivalent to an order allowing the demurrer. *People v. Biggins. Cal.* 887.

AN INFORMATION WHICH SUBSTANTIALLY complies with the provisions of the Penal Code is sufficient on demurrer. *Id.*

5. INFORMATION—FILING OF.—A district attorney is authorized to proceed against a defendant by an information charging him with the crime of an assault with a deadly weapon, after an examination and commitment by a magistrate. *People* v. *Wheeler*. *Cal*. 70.

6. APPEAL FROM ORDER SUSTAINING A DEMURRER TO AN INDICTMENT.—An appeal lies on the part of the prosecution from an order sustaining a demurrer to an indictment when it is further ordered that the defendant be held in custody to await the action of the next grand jury. *People* v. *Hill*. *Utah*, 476.

7. ERRONEOUS REFERENCE IN STATUTE.—Subd. 2 of sec. 192 of the criminal practice act, providing that a defendant may demur to an indictment when it fails to comply with the requirements of sec. 152, will be construed as referring to sec. 151, when it is manifest that such was the legislative intent, and that the reference to sec. 152 was evidently a mistake. *Id*.

8. A DEMURRER TO AN INDICTMENT IS SUFFICIENT that states that the same does not substantially conform to the requirements of sec. 151 of the criminal practice act, and under such allegation specifies that two of the essentials mentioned in Sec. 151, to wit, certainty as to the offense charged and the particular circumstances are wanting. *Id*.

9. RESUBMISSION TO GRAND JURY, CONSTRUCTION OF SECTION AUTHORIZING.—Sec. 197 of the criminal practice act, authorizing a resubmission of the case "to the same or the next grand jury," after a demurrer to an indictment has been sustained, does not limit such resubmission to the same grand jury that found the indictment, nor to the one immediately succeeding. Such resubmission may be made to the first grand jury that meets after the demurrer is allowed, although one or more grand Juries have met and been discharged between then and the time when the indictment was found. *Id*.

10. DISCHARGE OF PRISONER—RESUBMISSION TO GRAND JURY—APPEAL. — Neither an order refusing to discharge a prisoner, after an order sustaining his demurrer to the indictment, nor an order resubmitting his case to the grand jury, are appealable. *Id*.

11. AN OBJECTION TO AN INDICTMENT, "THAT IT DOES NOT SUBSTANTIALLY CONFORM to sections 233 and 234 of the criminal practice act," cannot be taken advantage of upon a motion in arrest of judgment under section 426. Such objection, if made at all, must be taken by demurrer under section 285, as limited by section 293. *People* v. *Stapleton*. *Idaho*, 176.

12. BATTERY—JUDGMENT IMPOSING FINE, WITH SUBSTITUTIONAL IMPRISONMENT.—A judgment of a justice of the peace imposing a fine upon a defendant convicted of battery, and ordering a substitutional imprisonment until such fine be paid, as provided in section 1446 of the penal code, cannot direct that the defendant, while so imprisoned, perform labor on the streets, or other public works of the city of Los Angeles. Such judgment is not authorized by the act of February 20, 1872, amending the charter of said city. *Ex parte Kelly*. *Cal*. 719.

13. THE SAME—DISCHARGE ON HABEAS CORPUS.—Such judgment is a unit, and if one portion of it is without the jurisdiction of the justice, the judgment is void, and on an application for a writ of habeas corpus the defendant should be discharged. On such proceeding the supreme court cannot execind the void portion from the judgment and order what remains to be carried into execution. *Id*.

14. STAY OF EXECUTION PENDING APPEAL — CERTIFICATE OF PROBABLE CAUSE.—Where, after a conviction for battery by a justice of the peace, the defendant appeals to the superior court, although no certificate of probable cause is filed, the same effect will be given to a dismissal of the appeal, when the justice, sheriff and defendant treated the appeal as staying execution, as would be given to it had there been a certificate of probable cause. *Ex parte Whitty*. *Cal*. 732.

15. TIME FOR SENTENCE—NO EXCEPTION IS ALLOWED BY STATUTE to the order of the court fixing the time for sentence, after a defendant has been convicted of a felony. No such exception being allowed, an order fixing the time for sentence on the 27th, when the verdict convicting the defendant was rendered on the 25th of the same month, is not reviewable in the supreme court. *People* v. *Mess*. *Cal*. 758.

16. ERROR IN REGARD TO THE ADMISSION OF EVIDENCE, which could not have prejudiced the prisoner, is not grounds for reversal.—*People* v. *Bennett*. *Cal*. 905.

17. IMMATERIAL ERROR.—A judgment of conviction will not be reversed for an immaterial error.—*People* v. *Wheeler*. *Cal*. 70.

18. A WRIT OF ERROR TO REVIEW THE JUDGMENT of the District Court in criminal cases will be allowed only when the appellate court is satisfied, from an inspection of the transcript of the record, that error has been committed.—*Donovan* v. *Territory*. *Wy*. 66.

19. MISCONDUCT OF DISTRICT ATTORNEY DURING ARGUMENT. — It is not misconduct sufficient to warrant a reversal for the district attorney to address the defendant personally during his argument, advance towards and point his finger at him, saying, "You sought this trouble with him [referring to the prosecuting witness], and made a cowardly attack upon him."—*People* v. *Wheeler*. *Cal.* 70.

20. INSTRUCTIONS—TESTIMONY OF DEFENDANT.—However incredible the testimony of a defendant in a criminal prosecution may be, he is entitled to an instruction based upon the hypothesis that his testimony is true.—*People* v. *Keefer*. *Cal.* 878.

21. AN INSTRUCTION IN REGARD TO THE FLIGHT of a person accused of crime is justified, when it appears that the defendant was absent from his home soon after the commission of the crime, and that some three weeks afterwards he was arrested in another county.—*People* v. *Forsythe*. *Cal.* 288.

22. SETTING ASIDE INFORMATION—FAILURE TO FILE REPORTER'S NOTES.—An information filed by the district attorney, after a prisoner has been examined and held to answer by a committing magistrate, will not be set aside for the failure of the short-hand reporter to transcribe and file his short-hand notes.—*People, etc.*, v. *Biley*. *Cal.* 364.

23. RECEIVING A VERDICT IN THE ABSENCE OF COUNSEL FOR THE PRISONER. — If the jury in a criminal prosecution come into court with their verdict, in the absence of the counsel for the prisoner, the court may, after notifying such counsel, and waiting a reasonable length of time for him to come into court, if he had been so disposed, receive the verdict, poll the jury, and discharge it.—*People* v. *Bennett*. *Cal.* 905.

24. PRIVATE COUNSEL MAY BE PERMITTED TO ASSIST the District Attorney in the trial of a criminal prosecution.—*People* v, *Turcott*. *Cal.* 490.

25. PUBLIC TRIAL—EXCLUSION FROM COURT-ROOM.—An order in a criminal prosecution excluding all persons from the court-room, except those connected with the trial, in the absence of a showing to the contrary, will be presumed to have been assented to by the defendant. The phrase "public trial," in the constitutional provision guaranteeing to every one accused of crime the right to a public trial, is used in opposition to a secret trial. It does not mean that every person who sees fit shall in all cases be permitted to attend criminal trials —*People* v. *Swafford*. *Cal.* 927.

See APPEAL, 12-15, 22; BURGLARY; EMBEZZLEMENT; FORGERY; FORNICATION; FUGITIVE FROM JUSTICE; JURY AND JURORS, 6-13; LARCENY; MURDER AND MANSLAUGHTER; PERJURY; ROBBERY.

CROSS-COMPLAINT.

See PLEADING AND PRACTICE.

DAMAGES.

1. AMOUNT OF DAMAGES TO BE AWARDED TO AN ACTION FOR A PERSONAL INJURY is in the sound discretion of the jury, whose verdict will not be disturbed, unless it appears that they were influenced by prejudice, misapprehension, or by some corrupt or improper consideration.—*City of Denver* v. *Dunsmore*. *Col.* 841.

See ADMIRALTY, 6: JUDGEMENT, 5:

DEDICATION.

1. DEDICATION OF STREET—FINDINGS.—In an action to obtain a decree adjudging certain premises to be a public street, a finding that on a certain day such premises were dedicated by the owners as a public street is sufficient, without finding who such owners were, when it appears that neither the defendants nor their grantors have or had any interest in the premises, or any title thereto. *People ex rel. Harris* v. *Blake et al*. *Cal.* 140.

2. A FINDING THAT THE DEFENDANTS have and had no right or title to the land in controversy reviewed, and held supported by the evidence.—*Id.*

3. DEDICATION OF STREETS—RIGHTS OF DITCH OWNERS.—Where a right of way for a water ditch had been acquired over a certain tract of land, the owners of which subsequently laid it out in lots and dedicated the streets thus formed to the city of Denver, subject to the pre-existing right of way of the ditch, such city will be held to have accepted such dedication subject to such existing right of way, and must render passable such streets and keep them in repair, without interfering with the rightful and accustomed use of said ditch.

In 1864 a company was incorporated for the construction of a water ditch through the city of Denver. Such ditch was completed during the following year. Long prior to the incorporation of such company, and the construction of such ditch, certain streets intersected by it were laid out on the map of said city, which map was recorded in the proper office of the county records. At this time the title to the lands included in the city of Denver, as so mapped, was in the United States, and part of the public domain. In pursuance of the Act of Congress of May 28, 1864, such lands were entered by the Probate Judge as a town site, and a certificate of entry thereof was issued to him on May 6, 1865, and a patent for the same was issued on June 8, 1868. The city of Denver was incorporated in 1861, and authorized to exercise general control over the streets, alleys and highways within the city. *Held*, that the title of the city of Denver to the lands acquired by the entry of May 8, 1865, did not relate back to the date of the Act of May 28, 1864, authorizing such entry, as such last mentioned act was not in the nature of a grant, but simply a provision to enable the city to acquire title to land for a town site, if it should elect to avail itself of the provisions of the act; that the authority conferred by the Act of 1861, incorporating the city of Denver, in respect to controlling the streets of the city, cannot be extended to invalidate the acquisition thereafter by the ditch company of a right of way through the public domain, to which the city had not as yet acquired title, although streets had been previously laid out thereon. *City of Denver* v. *Mullin*. *Col.* 852.

See EMINENT DOMAIN, 4.

DEED.

1. CONGRESSIONAL GRANT.—A grant of public land may be made so as to vest an indefeasible and irrevocable title by an act of congress, as well as by a patent issued in pursuance of such act. *Northern Pacific R. R. Co.* v. *Majors*. *Mont.* 23.
2. ACT OF CONGRESS GRANTING LANDS TO THE NORTHERN PACIFIC RAILROAD CO.—CONSTRUCTION OF.—Section 3 of the act of congress granting lands to aid in the construction of the Northern Pacific Railroad, approved July 2, 1864, operated as a conditional grant *in præsenti* of certain sections to be afterwards located. Such locations depended upon the route of the road, and until such route was designated in the manner prescribed by the act, the title of the company did not attach to any specific tracts. After such route was settled the location became certain, and the title of the company attached to the particular sections granted as of the date of the approval of the act, as fully as if such particular sections had been designated in such act. *Id.*
3. THE PROVISIONS OF SECTIONS 5, 6, 8, 9 AND 20 OF SUCH ACT, imposing certain conditions on the company, do not affect the creation or vesting of the estate granted by the act. They are simply conditions subsequent, which render the estate liable to be defeated for default on a breach in the performance of such conditions. Upon the breach of such conditions, congress alone has power to declare or take advantage of a forfeiture. *Id.*
4. SECTION 4 OF SUCH ACT, PROVIDING THAT WHEN "SUCH COMPANY shall have twenty-five consecutive miles of any portion of said railroad completed, * * * patents of deeds shall be issued to said company, confirming to said company the right and title to said lands," and "from time to time, whenever twenty-five additional consecutive miles shall have been constructed and completed, * * * then patents shall be issued to said company, conveying the additional sections of land," does not limit or restrict the estate granted by section 3 of such act. The effect of the patent issued in pursuance of such section is simply to confirm the title of the company as fast as certain portions of the road are completed, and render it absolute and unconditional. *Id.*.
5. A GRANT OF PUBLIC LAND BY ACT OF CONGRESS IS THE HIGHEST EVIDENCE OF TITLE. It imports livery of seisin and possession, and is sufficient to sustain ejectment. *Id.*
6. CONVEYANCE—CONSIDERATION FOR.—A conveyance under seal is *prima facie* evidence of a sufficient consideration, and a mere stranger to the land can not question it. *West Portland Homestead Association* v. *Lowndale (U. S. Dist. Ct.) Or.* 166.
7. CASE IN JUDGMENT.—G. and C. were tenants in common of a tract of land which was surveyed and platted as Carter's addition to Portland, and then partitioned between tenants in common by mutual conveyances; the one to C. containing a small park for the purpose of equalizing the partition, described therein as block 67, and after-

wards changed by said survey so as to materially diminish said park; and at the same time G. surveyed a tract of land adjoining the tract held in common into lots and blocks, and together with his co-tenants platted the two tracts as one Carter's addition, and duly acknowledged and recorded the same, with a block numbered 67 in the G. tract, and the small park aforesaid, not numbered. *Held*, that the conveyance to C. of the park as block 67 did not affect the block 67 afterwards laid off in the G. tract, and that the assignee in bankruptcy of C. had no right, interest or equity therein, and should be enjoined, at the suit of G.'s grantee, from selling the same as the property of C. and thereby casting a cloud on such grantee's title thereto. *Id.*

8. A RECITAL IN A DEED THAT THE CONSIDERATION THEREFOR WAS PAID by the grantee is presumptively true. Such presumption may be overcome by parol evidence, but to have that result, the evidence must be full, clear and satisfactory. The evidence in this case, in support of a finding that the consideration for the conveyance of the property in question was not made by the grantee named in the deed, reviewed and held not to comply with these requirements. *Anthony, Adm'x, etc.*, v. *Chapman et al. Cal.* 68.

9. A FICTITIOUS GRANTEE RENDERS INOPERATIVE and void a conveyance purporting to be made to him. *Downing* v. *Bartels. Col.* 506.

See ESTOPPEL, 3: EVIDENCE, 9; FRAUD, 2; MORTGAGE, 1, 2; OREGON DONATION ACT.

DEMURRER.

1. A DEMURRER MUST BE DIRECTED TO THE WHOLE OF A PLEADING, or to a particular and separate statement of a cause of action or defense. It cannot be directed to certain lines thereof. *Locke* v. *Peters. Cal.* 725.

2. DEMURRER TO COMPLAINT—OBJECTION TO OVERRULING, WHEN NOT WAIVED.—A plaintiff does not waive his objection to a wrongful ruling of the court in sustaining a demurrer to his complaint, by filing an amended complaint, when, in consequence of such ruling, judgment is given for the defendant. *Wood* v. *Mastick. Wash.* 549.

See APPEAL, 22; CRIMINAL LAW AND PRACTICE, 7-11; DENVER TOWN SITE, 2; PLEADING AND PRACTICE.

DENVER TOWN SITE.

1. TITLE TO A LOT IN THE ORIGINAL TOWN SITE OF THE CITY OF DENVER, entered by James Hall, probate judge of Arapahoe county, on May 6, 1865, by virtue of the act of congress for the relief of the citizens of Denver, approved May 28, 1864 (13 Stats. at Large, 94), can be acquired only in the manner designated by such act and by the territorial acts carrying the same into effect.—*Downing et al.* v. *Bartels. Col.* 506.

2. THE SAME—VALIDITY OF DEED FROM PROBATE JUDGE—ATTACK ON.—The validity of a deed to a portion of such town site, executed by the successor in office of such probate judge, in pursuance of the territorial act of February 8, 1872, cannot be attacked in a strictly legal action of ejectment, by evidence showing that the preliminary steps and conditions required to a valid conveyance had not been complied with by the grantee, prior to the execution of the deed, when the deed is regular upon its face and purports to have been executed to the person found to be entitled thereto under the laws of congress and statutes of Colorado, and by the officer intrusted by the government with the legal title, and duly authorized to convey. In executing the authority vested in him by such act, the probate judge exercises judicial functions, and his voidable acts can only be impeached in direct proceedings to set them aside.—*Id.*

See DEDICATION, 3.

DEPOSITIONS.

1. DEPOSITION—ADMISSIBILITY OF, AT SUBSEQUENT TRIAL.—A deposition taken pending the action is admissible at the trial thereof, although subsequent to the taking of such deposition the complaint has been amended, provided the subject matter of the action and the issues therein have remained substantially the same. *Anthony et al.* v. *Savage. Utah*, 674.

DIRECTORS.

See CORPORATIONS.

DITCH.

See DEDICATION, 3; NUISANCE, 1.

DUELLING.

See MURDER AND MANSLAUGHTER, 4.

DUTIES.

1. GRAIN BAGS MANUFACTURED IN THE UNITED STATES, RETURN OF, FREE OF DUTY.—Under Section 9 of the Act of Congress, of February 8, 1875, grain bags manufactured in the United States, when exported filled with American products, may be returned to the United States free of duty, notwithstanding such bags were manufactured from foreign material, and at the time of exportation the manufacturers were paid a "drawback" for duties on such material.—*Balfour et al.* v. *Sullivan, Collector, etc.* (*U. S. Cir. Ct.*) *Cal.* 228.
2. THE PROVISION OF SUCH SECTION authorizing the return, "under such rules and regulations as shall be prescribed by the Secretary of the Treasury," does not authorize that officer to prohibit the return unless duties are paid.—*Id.*

DUTIES ON WEARING APPAREL (note), 679.

EASEMENTS.

1. THE OWNER OF AN EASEMENT OF WAY HAS NO RIGHT TO POSSESS THE LAND as such upon which it is imposed. He has a right merely to enjoy the way. The owner of the land burdened with the easement is, in law, in possession of the land. Consequently the mere exercise of the right of way, either by the owner thereof or his tenants, will not give him actual possession of the land upon which it is imposed. *Lackman et al.* v. *Barnett et al.* *Nev.* 259.
2. THE OWNER OF SUCH EASEMENT IS NOT JUSTIFIED IN TAKING FORCIBLE POSSESSION of the land upon which it is imposed, from the fact that the owner of such land has obstructed his right of way. *Id.*
3. RIGHT OF WAY OF THE NORTHERN PACIFIC RAILROAD THROUGH THE PUBLIC LANDS IS AN EASEMENT therein, and such an interest in the land, that personal articles attached to the soil and annexed to the easement within the boundaries of the right of way become a part of the land, and therefore partake of and are included in the exemption from taxation that belongs to the right of way, and hence a tax levied upon "twenty miles of railroad" constructed upon, over or through such right of way, in the territories of the United States, is a tax levied upon property that is exempt from taxation, and therefore void. *N. P. R. R. Co.* v. *Carland, Mont.* 326.
4. ANY ENCROACHMENT UPON THE QUIET ENJOYMENT OF AN EASEMENT, whether created by grant or prescription, will be prevented by injunction. *Id.*

EJECTMENT.

1. JUDGMENT IN AN ACTION OF EJECTMENT SHOULD BE FOR THE PLAINTIFF when the defendant has no claim to the demanded premises beyond what his naked possession gave him, and at the time of the commencement of the action the plaintiff had the legal title, and was entitled to the possession. *Shaeffer* v. *Matzen et al.* *Cal.* 129.
2. EJECTMENT—FINDINGS—EVIDENCE.—A finding for the plaintiff in an action of ejectment is supported by the evidence, when the defendant offers no evidence, and the plaintiff gives in evidence a judgment roll showing a judgment in his favor, and against the defendant, an execution duly issued thereon, a sale of the demanded premises to him; also a writ of attachment and a sheriff's return, showing a levy thereunder, which had never been released, and evidence that subsequent to the levy of the attachment, and prior to the judgment, defendant was in possession of the premises. *Royon* v. *Guillee.* *Cal.* 759.
3. EJECTMENT—FORECLOSURE DECREE, WHO BARRED BY.—In an action of ejectment by the owner of a lease-hold, after the plaintiff has proved, *prima facie*, his right to recover the demanded premises, a defendant who claims under a foreclosure decree against the owner in fee, must show affirmatively that the plaintiff, or his assignors, were barred by such decree. *Enos* v. *Cook et al.* *Cal.* 733.
4. TRESPASS FOR MESNE PROFITS—EJECTMENT—JUDGMENT.—Damages for withholding real property, or for the rents and profits thereof, cannot be recovered in an action of ejectment, unless judgment is also given for the recovery of the possession. *Locke* v. *Peters.* *Cal.* 725.

5. TITLE FROM COMMON GRANTOR—EJECTMENT.—In an action of ejectment, where both plaintiff and defendant deraign title from a common grantor, such grantor's right of possession cannot be denied by either. *Rego* v. *Van Pelt*. *Cal*. 903.
6. QUIT-CLAIM DEED—EFFECT OF.—A quit-claim deed, even prior to the Act of February 22, 1854, operates as a conveyance in California, although there was no precedent estate or interest in the grantee, and enables him to maintain ejectment if his grantor could have done so. *Id.*
7. EJECTMENT BY TENANT IN COMMON—PLEADING OUSTER.—The complaint in an action of ejectment by a tenant in common against his co-tenant, which avers that the latter is in possession of the common property, and the whole thereof, withholds the possession of the whole thereof from plaintiff and excludes him from the same, sufficiently alleges an ouster. *Id.*

See ADVERSE POSSESSION, 3; CANCELLATION, 5; DEED, 5; DENVER TOWN SITE, 2; FORCIBLE ENTRY AND DETAINER, 2; JUDGMENT, 10; TENANTS IN COMMON.

ELECTION.

1. ACT PROVIDING FOR SPECIAL ELECTION.—Where an act of the legislature providing for a special election on the question of the removal of a county-seat designates that such election shall be conducted, and the votes cast thereat shall be counted and returned, by certain officers and boards named therein, but fails to state the individuals who shall constitute the same, it will be presumed that the Legislature referred to the officers and boards of the same name existing under the general election laws. *Wells et al.* v. *Taylor et al.* *Mont.* 252.
2. DISQUALIFICATION OF ELECTION OFFICERS, EFFECT OF.—Where no question is raised as to the fairness of the vote and the honesty of the count, an election will be valid although the officers conducting the same were not duly sworn or chosen, and did not possess the qualifications requisite for their office.—*Id.*
3. BRIBERY OF VOTERS, WHAT IS.—An election to determine the removal of a county-seat will not be invalidated by the fact that prior to the election certain inhabitants of the county presented an offer to the voters, in the form of a bond, conditioned for the building of certain county buildings at a designated place, provided a majority of the votes cast were in favor of changing the county-seat to such place. Such an offer was not bribery.—*Id.*
4. REMOVAL OF COUNTY-SEAT OF JEFFERSON COUNTY.—Where a majority of the votes cast on the election to determine the question whether the county-seat of Jefferson County should be removed from Radersburg to Boulder City were in favor of such latter place, the officers of such county may make such removal, although the County Commissioners failed to make the order contemplated by Section 6 of the act of 1883, causing the books, records, papers, and effects of the county to be removed.—*Id.*
5. ADMISSION OF VOTERS—EVIDENCE OF.—In an action to determine the result of an election, the admissions of certain voters, made after the election, to the relator, touching their qualifications as electors, are not competent evidence.—*People ex rel. Dean* v. *Commissioners of Grand County*. *Col.* 113.
6. ELECTION TO DETERMINE THE REMOVAL OF COUNTY-SEAT.—In the election to determine the removal of the county-seat of Grand County from Hot Sulphur Springs to Grand Lake, the votes cast by the local voters at such latter place in favor of Grand Lake, west side, should be counted for Grand Lake.—*People ex rel. Dean* v. *Commissioners of Grand County*. *Col.* 113.
7. FINDINGS OF THE LOWER COURT in an action to determine the result of such election reviewed, and held supported by the evidence.—*Id.*

EMBEZZLEMENT.

1. INDICTMENT FOR EMBEZZLEMENT BY A BAILEE.—The sufficiency of an indictment is to be tested by the requirements of the criminal practice act, and not by the rules of the common law. Under such act an indictment for embezzlement by a bailee is sufficient, which charges that the defendant, on a day and at a place certain, "having been intrusted as bailee by one Hill with two certificates of deposit of money in a certain bank, to wit, one for the sum of five thousand dollars and the other for the sum of four thousand dollars, both payable to the order of and both being the property of said Hill; did collect and receive thereon and therefor from said bank, and as bailee, was by said bank and said Hill intrusted to carry and convey from said bank to said Hill money to the amount and value of nine thousand dollars, pro-

ceeds of said two certificates; and said defendant being so as aforesaid intrusted as bailee with said certificates and said money to said amount of nine thousand dollars, the property of said Hill, afterward on, etc., at, etc., did fraudulently and feloniously convert the same and the proceeds thereof to his own use, contrary," etc. Such indictment does not charge more than one offense, and need not specify the nature of the bailment.—*People* v. *Hill*. *Utah*, 476.

2. INFORMATION FOR EMBEZZLEMENT BY POSTMASTER.—The circuit court has jurisdiction to try offenders for misdemeanors and offenses not capital or otherwise infamous, such as embezzlement by a postmaster, under section 5483 of the revised statutes, upon informations filed by leave of the court. Whether an information presents a proper case for granting leave to the United States attorney to file it, is a question for the exercise of a sound discretion by the court.—*United States* v. *Reilley*, (*U. S. Cir. Ct.*) *Nev.* 688.

3. AN INFORMATION FILED BY LEAVE OF THE COURT WILL NOT BE STRICKEN from the files where it is verified by the direct positive affidavit of the United States attorney, and upon being arrested upon a warrant issued thereon, the prisoner has been examined and held to answer for the offense charged therein.—*Id.*

EMINENT DOMAIN.

1. CONDEMNATION OF LAND—JURISDICTION OF COUNTY COURT OVER.—When the award of the jury, in a proceeding for the condemnation of land, shows that the amount of compensation to be paid the owner exceeds the amount to which the jurisdiction of the county court is limited, the court must dismiss such proceedings at the costs of the petitioner. *Denver & Rio Grande Railway Co.* v. *Otis*. *Col.* 120.

2. ACTION FOR CONDEMNATION OF LAND—FORM OF VERDICT.—In an action for the condemnation of land for the use of a railroad, a verdict is sufficient in form which finds, in effect, that the defendants are entitled to damages in the sum named therein. *Oregon Railway Co.* v. *Bridwell et al.* *Or.* 821.

3. THE SAME—FORM OF JUDGMENT.—In such action, no judgment *in personam* against the plaintiff can be rendered. The judgment should appropriate the right of way to the plaintiff's use after payment of the damages assessed by the jury. *Id.*

4. CONDEMNATION OF LAND—PLEADING—EVIDENCE.—In an action to condemn a parcel of land for a public street, when the complaint alleges that the defendants are the owners of the land sought to be condemned, the plaintiffs cannot give evidence that the defendants had already dedicated such land as a street, for the purpose of affecting the question of damages. *City of San Jose* v. *Reed et al.* *Cal.* 883.

ENDORSEMENT.

See NEGOTIABLE INSTRUMENTS, 2, 3.

EQUITY.

1. EQUITY WILL INTERFERE TO PROTECT RIGHTS WHEN it sufficiently appears that the evidence by which such rights can be established, is liable to be lost. *N. P. R. R. Co.* v. *Carland*. *Mont.* 326.

See CANCELLATION; CORPORATIONS, 6–8.

ESTATES OF DECEASED PERSONS.

1. THE DISTRICT COURT OF A TERRITORY IS NOT A UNITED STATES DISTRICT OR CIRCUIT COURT. When the United States comes into court to enforce its rights, it must come in as any other suitor, and the proceedings in such action must be in accordance with local laws in force at the time in the state or territory where such action is pending. *United States* v. *Hailey, Administrator, etc.* *Idaho*, 324.

2. IN PROSECUTING A CLAIM AGAINST AN ADMINISTRATOR, THE PROBATE LAWS IN FORCE where the action is pending must govern and determine the method of procedure. *Id.*

3. A CLAIM IN FAVOR OF THE UNITED STATES AGAINST THE ESTATE OF A DECEASED PERSON must be presented for allowance before an action can be maintained thereon. *Id.*

4. THE CIRCUIT COURT HAS NO JURISDICTION OF AN ACTION BROUGHT BY AN ADMINISTRATOR against a former administrator of the same estate, who had been removed from his office, to obtain an accounting and a judgment for the balance of the property of such estate in the hands of the latter. Such an action is within the exclusive jurisdiction of the County Court. *Adams, Adm'r, etc.*, v. *Petrain et als.* *Or.* 198.

5. ATTORNEYS' FEES PAID BY AN ADMINISTRATOR IN CONT
alleged will of his deceased intestate cannot be charg
estate of Parsons. *Cal.* 875.
6. IN SETTLING THE ACCOUNT OF AN ADMINISTRATOR t
certain items, such as clerk's fees, in anticipation of p
7. SETTLEMENT OF ADMINISTRATOR'S ACCOUNT. Items no
administrator, nor in the report accompanying the
court. *Id.*

See ACCOUNTING, 1; EXECUTORS AND ADMINISTR

ESTOPPEL.

1. AN ESTOPPEL CANNOT BE FOUNDED UPON WORDS,
were intended to lead the party who seeks to set u
and he did so act to his injury. *Hallack* v. *Bresna*
2. AN EXECUTOR WHO STATES in his petition for letter
tory of the estate, that certain property belonged
from afterwards claiming such property as his own.
3. DESCRIPTION BY REFERENCE TO MAP—ESTOPPEL.—
tain real estate, describing the same as bounded b
recorded map, and who afterwards receives a dee
description, is estopped to deny the existence of t
Walla Walla v. *Moore.* *Wash.* 214.

See OREGON DONATION

EVIDENCE.

1. DECLARATIONS OF AGENT—HEARSAY EVIDENCE.—
price for which certain flour was sold, evidence
sale, from the declarations of his agent, is inad
idence is hearsay. *Jones* v. *Kearns.* *Or.* 820.
2. ARTICLES OF PERSONAL APPAREL, INTRODUCED
taken by the jury to their consultation room.
cedure does not prohibit such taking. *Doctor*
3. COURTS WILL TAKE JUDICIAL NOTICE OF THE
by the United States. *Richards* v. *Snider.* O
4. EVIDENCE OF CONVERSATIONS BETWEEN CONSP
EFFECT OF.—All matters talked about betwee
subject of the conspiracy was discussed, are
prosecution against one conspirator, for a crim
though such matters, if talked about at a dif
sible. Even if the admission of such eviden
cured if the court struck it out, and instruct
v. *Majors.* *Cal.* 580.
5. PAROL EVIDENCE IS ADMISSIBLE FOR THE ID
of a contract for the sale of land where ther
of the parties on the face of the contract.
6. EVIDENCE OF SURROUNDING CIRCUMSTANCES—
der, the surrounding circumstances, such a
clothing of the person killed were found, a
People v. *Majors.* *Cal.* 580.
7. THE CIRCUMSTANCES SURROUNDING THE E
be shown by parol evidence. *Held*, therefo
tract was executed by a woman in her ow
show that she executed the same as an ex
8. SECONDARY EVIDENCE OF THE CONTENTS
admissible upon proof of the loss of the
Gallick. *Or.* 537.
9. AN AUTHENTICATED COPY OF THE RECOR
of the genuineness, due execution, and d
Chapman. *Cal.* 66.
10. A COPY OF A FORTHCOMING BOND IS ADM
of the original and the correctness of t

11. THE COURT MAY OF ITS OWN MOTION PREVENT THE INTRODUCTION of irrelevant testimony, although no objection is made thereto by the opposite side. *People* v. *Turcott*. *Cal.* 490.
12. THE COURT MAY CAUTION A WITNESS NOT TO GIVE EVIDENCE OF FACTS based on knowledge derived from his client, or by hearsay from others; and may strike out such evidence already given. *Sweetser* v. *Dobbins*. *Cal.* 145.
13. THE REJECTION OF IMMATERIAL EVIDENCE is not error. *Id.*
14. CROSS-EXAMINATION MAY INCLUDE THE ORIGINAL COMPLAINT, although an amended complaint has been filed. *Id.*
15. ERROR IN OVERRULING AN OBJECTION TO A QUESTION ASKED A WITNESS cannot be taken advantage of when the answer was favorable to the appellant. *Id.*
16. A MORTGAGE EXECUTED BY THE DEFENDANT MAY BE INTRODUCED IN EVIDENCE in an action to reform a subsequent deed, when the two instruments form parts of the same transaction. *Id.*
17. IN SUCH ACTION THE SCRIVENER MAY TESTIFY AS TO THE DATA FURNISHED HIM for drafting such mortgage, and that he had compared the same with the *data*. *Id.*
18. THE COURT HAS DISCRETION TO REFUSE A FURTHER EXAMINATION of the same witness on a point on which he has already been examined. *Id.*
19. WHEN A DEFENDANT IS A WITNESS IN HIS OWN BEHALF, the court may instruct the jury that in weighing his evidence they must consider the circumstances under which he testified, and his interest in the result. *People* v. *Wheeler*. *Cal.* 70.
20. AN INSTRUCTION AS TO THE CREDIT THAT SHOULD BE GIVEN TO A WITNESS, and one that the same weight should be given to the testimony of defendant when corroborated as to that of any other witness, invades the province of the jury and is properly refused. *People* v. *Pierson*. *Idaho*, 809.

EVIDENCE.

21. IMMATERIAL DISCREPANCIES IN TESTIMONY.—An instruction that "immaterial discrepancies between the testimony of witnesses to the same point do not necessarily show that one had sworn falsely, and you (the jury) should not regard mere slight variances between witnesses as showing that they have not spoken the truth" is erroneous, as such variances may be sufficient to enable the jury to determine the degree of credit to which each is entitled, and answer such purpose equally as well as contradictions of a graver character.—*State* v. *Swayze*. *Or.* 669.
22. REFUSAL TO ADMIT IMMATERIAL TESTIMONY, and striking out such testimony if already admitted, is not error.—*Lachman* v. *Barnett*. *Nev.* 259.
23. REFUSAL OF THE COURT TO ALLOW A WITNESS TO TESTIFY TO CERTAIN DECLARATIONS and conversations made by and between the parties to the action, although erroneous, will not warrant a reversal when the defeated party was not prejudiced thereby.—*Kelley* v. *Fitzell*. *Cal.* 132.
24. RE-OPENING OF CASE.—After the testimony in a criminal case has closed, and the opening argument for the prosecution has begun, it is a matter of discretion with the court whether it shall allow the defendant do re-open his case, for the purpose of introducing evidence on his plea of once in jeopardy, as to which no evidence had been given.—*People* v. *Ross*. *Cal.* 291.
25. IN A PROSECUTION FOR LARCENY, EVIDENCE of a fact which tends to connect the defendant with the taking of the property named in the information is competent.—*Id.*
26. INTRODUCTION OF EVIDENCE—ORDER OF.—It is not error authorizing a reversal for the trial court, after the defendant has closed, to permit the plaintiff to introduce evidence not in rebuttal, if the defendant makes no effort to contradict the same.—*City of Denver* v. *Dunsmore*. *Col.* 841.
27. A VERDICT OF THE JURY WILL NOT BE DISTURBED when the evidence is conflicting.—*Ralph* v. *Weary*. *Col.* 324.
28. VERDICT WILL NOT BE DISTURBED when there is a substantial conflict of evidence.—*Leahy* v. *S. P. R. R. Co.* *Cal.* 693.
29. JUDGMENT OF THE LOWER COURT REVERSED upon a review of the evidence.—*Martin* v. *Victor Mill and Mining Company*. *Nev.* 666.
30. AN ORDER GRANTING A NEW TRIAL WILL NOT BE REVERSED when there is a substantial conflict of evidence.—*Doolittle et al* v. *Woodcock et al.* *Cal.* 897.
31. WHEN AN OBJECTION TO CERTAIN EVIDENCE AS INCOMPETENT is overruled, it cannot always be presumed that if the ruling had been against the offered evidence, the party offering it might not have proved the same fact by other evidence.—*Id.*

See ACCOUNT STATED, 1, 3, 4; APPEAL, 39, 40, 43, 45; BILL OF EXCEPTIONS, 2; CANCELLATION, 2, 3, 5; DEED, 6, 8; DENVER TOWN SITE, 2; DEPOSITIONS, 1; EMINENT DOMAIN, 4; EQUITY, 1; FINDINGS, 8-13; FORGERY, 2; INJUNCTION, 4; MORTGAGES, 1-3; NEW TRIAL, 8-11; ROBBERY, 3; SALES, 5.

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXECUTIONS.

1. TWO HORSES USED BY A JUDGMENT DEBTOR IN CARRYING ON A FARM ARE EXEMPT from execution, although their owner does not devote himself exclusively to husbandry, and may sometimes use them for purposes other than that of farming. *McCue* v. *Tunstead*. *Cal.* 896.

See HOMESTEAD, 4-6; PLEDGE, 2; SUPPLEMENTARY PROCEEDINGS.

EXECUTORS AND ADMINISTRATORS.

1. CAUSE OF ACTION—WHEN AND WHERE IT ARISES.—A cause of action given by statute to an administrator to recover damages for the death of his intestate, arises out of such death and where it occurred, and not the appointment of the administrator or the place where it was made.—*Lung Chung* v. *N. P. Ry. Co.* (*U. S. Dist. Ct.*) *Or.* 88.

2. NEITHER AN EXECUTOR NOR ADMINISTRATOR IS LIABLE TO PROCESS of garnishment; nor can an allowed and approved claim against the estate of the deceased be levied upon and sold under an execution against the claimant.—*Norton Ex'r etc.* v. *Haydon*. *Nev.* 41.

3. PROBATE COURTS—ACTIONS AGAINST ADMINISTRATOR.—Whether a probate court has jurisdiction of an action at law to recover a judgment against an administrator, and to enforce the same by execution, *quære*.—*Pirea Adm'r etc.* v. *Gallegos*. *N. M.* 423.

4. PURCHASE OF TRUST ESTATE BY EXECUTOR OF CESTUI QUE TRUST.—The maker of a promissory note, secured by a trust deed of land, which authorizes the trustee to sell such lands upon a default in the payment of the note, can not object to a purchase at such sale by the executor of the beneficiary under the trust deed, when such purchase resulted greatly to his advantage.—*Dusing* v. *Nelson*. *Col.* 110.

5. SUBSTITUTION OF ADMINISTRATOR—MANDAMUS TO COMPEL.—Mandamus does not lie to compel the substitution of an administrator in the place of a deceased plaintiff, and to obtain a re-trial of an action in which a judgment of non-suit was entered after the death of the plaintiff. Such judgment is not void on its face, and should be set aside before an application for mandamus is made by the administrator.—*Elliot, Administrator, etc.* v. *Paterson, Judge, etc.* *Cal.* 376.

See ESTATES OF DECEASED PERSONS; ESTOPPEL, 2; GUARDIAN AND WARD, 1, 3.

EXHIBITS.

See EVIDENCE, 2.

FERRIES.

1. FERRIES, JURISDICTION OF COUNTY COURT TO ESTABLISH.—The primary object of the statute conferring jurisdiction upon the county courts to establish roads and license ferries for the transportation of persons and property across streams, which obstruct land travel using public ways, is to secure the public accommodation. For the attainment of this end, but as subordinate to it, when a ferry franchise is granted, the right to take lawful tolls is conferred as an equivalent for the obligations to accommodate the traveling public. Although the taking of such tolls is *privati juris*, and incident to the franchise, a ferry is *publica juris*, and cannot be created without a license, and is a thing of public interest and use. It can only exist in connection with some highway or place where the public have rights. The grant of a ferry franchise over a stream, to and from a place where there is no highway, or in which the public have no rights, would be void and inoperative. *Montgomery et al* v. *Multnomah Railway Company*. *Or.* 640.

2. THE SAME—PRIVILEGES GRANTED BY LICENSE.—When the county court has exercised its jurisdiction by granting a license for a ferry, and a ferry is established, forming a connecting link in the public highway, it has exhausted its jurisdiction as to such highway or places connected, while such franchise exists. Such franchise gives to the person licensed the exclusive privilege of transporting all persons and property between such places. The county court cannot establish another ferry between such places or highways, or between places just outside of or beyond them, designed to accommodate the same traveling public, without violating the exclusive privileges secured by the franchises granted to the ferry already established. *Id.*

3. SALE OF FERRY LICENSE.—Whether a ferry license can be assigned without the consent of the granting power, and whether the county court granting the license has power to give such consent, *quære*. If such assignment is void, the right to object to the same, and to the exercise of the franchise by a party to whom it was not originally granted, can only be exercised by the state officers in an appropriate proceeding. *Id.*

FICTITIOUS GRANTEE.

See DEED, 9.

FINDINGS.

1. THE FINDINGS SHOULD BE CONFINED to the contested facts, and determined from the evidence. Findings as to facts admitted by the pleadings are unnecessary.—*Miles* v. *McCallan*. *Ariz.* 689.

2. FINDING OF FACT, WHEN ESSENTIAL.—Under sec. 180 of the practice act in trials of issues of fact by the court, written findings of fact and conclusions of law, separately stated, must be made and filed before any judgment can be entered. Such findings are the foundation for the judgment, and are as necessary to precede it as a verdict in case of trial by a jury. In the absence of findings there is no presumption that the judgment is sustained by the evidence, when the issues are tried by the court.—*Reich* v. *Rebellion S. Min. Co.* *Utah*, 451.

3. JUDGMENT REVERSED FOR FAILURE TO FIND ON A MATERIAL ISSUE.—*Hawes* v. *Green*. *Cal.* 367.

4. FAILURE TO FIND UPON A MATERIAL ISSUE IS GROUND FOR REVERSAL.—IN THE ABSENCE OF FINDINGS, the appellate court will presume that the same were waived, unless the contrary appears by a bill of exceptions. This presumption cannot arise where the lower court filed a writing designated as its "decision," and intended to be a finding upon a material issue.—*Kimball* v. *Stormer*. *Cal.* 371.

5. FAILURE TO FIND ON ALL MATERIAL ISSUES cannot be taken advantage of in the appellate court unless there has been a motion in the court below to make additional findings to meet the omitted issues.—*Eakin* v. *McCraith*. *Wash.* 785.

6. FAILURE OF A REFEREE TO FIND UPON AN IMMATERIAL ISSUE as to fraud is not error.—*Williams* v. *Gallick*. *Or.* 537.

7. ERRONEOUS FINDING OF THE COURT ON AN IMMATERIAL ISSUE will not warrant a reversal.—*Sweetser* v. *Dobbins*. *Cal.* 145.

8. FINDING OF JURY—WEIGHT OF EVIDENCE.—A verdict of a jury will not be disturbed on the ground that it is contrary to the weight of evidence, although the testimony of the greatest number of witnesses was opposed to such verdict, unless it appears that the jury acted so unreasonably in weighing the testimony as to suggest a strong presumption that their minds were swayed by passion or prejudice, or that they were governed by some motive other than that of doing justice. *Green, Adm'x*, v. *Taney*. *Col.* 531.

9. FINDINGS—CONFLICT OF EVIDENCE.—If the record discloses a substantial conflict of testimony upon a material issue, the appellate court will not interfere with the finding of the jury thereon, although they accepted the testimony of one witness as against those of two. Where, however, such finding is unsupported by the testimony of any witness, the judgment will be reversed. *Rankin* v. *Thompson et al.* *Col.* 873.

10. FINDING OF A REFEREE WILL NOT BE REVIEWED on appeal when there is evidence to sustain it. *Williams* v. *Gallick*. *Or.* 537.

11. FINDING OF THE LOWER COURT WILL NOT BE DISTURBED when there is evidence to support it. *Baker et al.* v. *McAllister*. *Wash.* 690.

12. FINDING OF THE JURY WILL NOT BE DISTURBED when the evidence is conflicting. *Coffman* v. *Brown*. *Col.* 98. *Kelly* v. *Fitzele*. *Cal.* 132. *Hallack* v. *Brisnahen*. *Wy.* 60.

13. FINDINGS HELD SUPPORTED BY THE EVIDENCE. *Collins* v. *Frost*. *Cal.* 590.
14. FINDINGS—SUFFICIENCY OF.—In an action to set aside a sale on the ground of fraud, where the court finds enough to avoid the sale, it is unnecessary to find more, although everything alleged in regard to such transfer is not found on. *Ohleyer, Assignee, etc.*, v. *Bunce*. *Cal.* 142.
15. FINDINGS OF A JURY ON SPECIAL ISSUES SUBMITTED TO THEM, in an action for the reformation of a deed for an alleged mistake, are merely advisory to the court. If, in such action, the court files findings as to all the facts in issue, in which, after reciting that a jury had been empaneled to try special issues, and had rendered a verdict, it is stated, "Now, from said verdict and the testimony adduced in said cause, after due consideration, the court finds the following facts," a judgment entered upon such findings will not be reversed for an erroneous instruction to the jury as to the character of the evidence necessary to warrant the relief asked. *Sweetser* v. *Dobbins*. *Cal.* 145.
16. FINDINGS OF JURY IN EQUITABLE ACTION—SETTING ASIDE VERDICT.—The findings of a jury on issues submitted to them in an equitable action are advisory only. The court may set aside such verdict and find the facts itself. *Johnson et al.* v. *Powers*. *Cal.* 740.
17. AMENDMENT OF FINDINGS.—When trial is by the court, the court may at any time before judgment amend its findings of facts, notwithstanding a motion for a new trial has been made. *Calhoun* v. *Gilliland, Adm'r, etc.* *Wash.* 285.
18. SUPREME COURT CAN NOT INFER ONE FACT FROM OTHER FACTS FOUND.—The only inferences which it can draw from the findings are inferences of law. *De Celis et al.* v. *Porter et al.* *Cal.* 144.
19. JUDGMENT IN DE CELIS V. PORTER, 1 WEST COAST REP. 575, MODIFIED as to the date from which interest should be allowed. *Id.*
20. A FINDING THAT AN ACTION WAS COMMENCED AND THAT JUDGMENT therein was "duly given and made," includes a finding of facts necessary to give the court jurisdiction. *Wetmore* v. *Rupe*. *Cal.* 885.

See ADVERSE POSSESSION, 3; NEW TRIAL, 2; 4.

FORCIBLE ENTRY AND DETAINER.

1. FORCIBLE ENTRY AND DETAINER—APPEAL FROM COUNTY COURT.—An action under the forcible entry and detainer act, originally brought in the justice's court, and thence appealed to the county court, can not be taken to the supreme court on appeal. It must be taken, if at all, on writ of error. Such action does not involve any question as to the title to land. *Brandexburg* v. *Reithman*. *Col.* 774.
2. THE SAME—EJECTMENT.—The statutory action of forcible entry and detainer has not been enlarged by section 267 of the civil code. Such section does not abolish all distinctions between that action and the action of ejectment. *Id.*

FORFEITURE.

See DEED, 8.

FORGERY.

1. FORGERY—INDICTMENT, SUFFICIENCY OF.—Under the latter clause of Section 775 of the general statutes, an indictment for forgery is sufficient which charges that the defendant "did counterfeit and forge the handwriting of another to a certain promissory note, dated, etc., for the sum of, etc., with the intent to damage and defraud such person," etc. Such indictment need not set out a copy of the instrument upon which the forgery is predicated, nor charge the act to have been done falsely or feloniously.—*Cohen* v. *People, etc.* *Col.* 528.
2. THE SAME—EVIDENCE OF PASSING FORGED INSTRUMENT—INTENT.—Under such indictment evidence that the defendant uttered or passed the instrument forged, for the purpose of raising money thereby, is admissible, as tending to show the intent with which the handwriting was forged. *Id.*
3. THE SAME—INSTRUCTIONS.—The court instructed the jury "that if they believed from the evidence that the defendant signed the name, claimed to have been forged, to the note in evidence, with the intention of obtaining money thereon, and did obtain money thereon, they should find him guilty. *Held*, that such charge was erroneous, because it omitted to instruct the jury that they must also believe that such signing was forged or counterfeited, and with intent to damage or defraud. *Id.*

See CANCELLATION, 1.

FORNICATION.

1. AN INDICTMENT FOR FORNICATION IS SUFFICIENT THAT CHARGES that the defendant and a certain woman "did then and there unlawfully live together in an open state of fornication." *King* v. *The People, etc.* *Col.* 307.
2. EVIDENCE IN A PROSECUTION FOR FORNICATION REVIEWED—and held to establish an overt act on the part of the defendant. *Id.*

FORTHCOMING BOND; see PARTIES, 1.

FRANCHISE.

See CORPORATIONS, 6–8; FERRIES.

FRAUD.

1. FORECLOSURE SALE, HOW ATTACKED FOR FRAUD.—A sale by the trustees of a railroad mortgage, under a decree of foreclosure, and in strict compliance with the terms thereof, will not be set aside on motion of a bondholder not a party to the record. If the trustees combine with others to defraud the bondholders, or any of them, or if they did not act in good faith, relief may be had in a suit properly brought for that purpose, in which all the persons interested are joined as parties. *Meyer et al., Trustees, etc.*, v. *Utah, etc., Railway Company.* *Utah*, 471.
2. VOIDABLE PATENT TO MINING CLAIM, ATTACK ON.—A patent from the United States to a mining claim may be avoided in equity for fraud, mistake or misrepresentation practiced upon the government. The validity of such patent, however, cannot be questioned unless the facts constituting the fraud, mistake or misrepresentation are stated in the pleadings. Whether the United States government is a necessary party to an action to set aside a patent on such grounds, *quære.* *Parley's Park Silver Mining Company* v. *Kerr.* *Utah*, 432.
3. FRAUDULENT CONVEYANCE—RESULTING TRUST—DISMISSAL OF SUIT.—A voluntary conveyance from an insolvent debtor to his wife does not create the latter a trustee of the creditors of the former. Such conveyance may be set aside at the instance of the creditors on the ground of fraud. A bill in equity against such grantee to have her declared a trustee for the creditors, and for an accounting of the rents and profits of the land conveyed, should not be dismissed. An amendment to the prayer of such bill should be allowed, and the appropriate relief granted. *Perea et al., Administrators, etc.*, v. *Gallegos.* *N. M.*, 423.
4. FRAUDULENT TRANSFER—EVIDENCE HELD SUFFICIENT TO JUSTIFY the finding that the sale under which the plaintiff claims title was fraudulent and void as to his vendor's creditors. *Wideman* v. *Franks.* *Cal.*, 376.

See ACCOUNTING, 2; CANCELLATION, 1–4; FINDING, 14; PATENTS, 2; PLEADING AND PRACTICE, 12, 13.

FUGITIVES FROM JUSTICE.

1. A FUGITIVE FROM JUSTICE CHARGED WITH A FELONY has no right to be heard on any appeal made in his behalf. *People* v. *Tremayne.* *Utah*, 207.
2. NEITHER AN ORDER FORFEITING A DEFENDANT'S BAIL for failure to appear at the trial, nor an order refusing to entertain a motion to set aside the same while the defendant was still a fugitive from justice, nor an order directing the payment of the forfeited bail money into the treasury are appealable. *Id.*

See CRIMINAL LAW AND PRACTICE, 21.

GRAND JURY.

See JURY AND JURORS: CRIMINAL LAW AND PRACTICE, 3, 4, 6, 9, 10.

GUARDIAN AND WARD.

1. THE DISTRICT COURT HAS JURISDICTION OF AN ACTION for an accounting brought by a ward against the executor of his deceased guardian, although such guardian was appointed in another state. *Ong* v. *Whipple, Executor, etc.* *Wash.* 798.
2. GUARDIAN AND WARD—SETTLEMENT OF ACCOUNTS.—When a ward attains its majority, the office of guardian ceases, and it is the duty of the latter to exhibit to the probate court and settle his account with the ward. Such accounting should only

include transactions during the ward's minority. Transactions subsequent thereto must be settled in an action at law. *In re Allgier. Cal.* 876.

3. ACCOUNTING BY EXECUTORS OF DECEASED GUARDIAN.—The executors of a deceased guardian have no authority to present such guardian's account with his ward to the probate court for settlement, nor has the court authority to receive or act upon it. Such settlement can only be had in a court of equity, by a proceeding against the executors of the deceased guardian and other necessary parties. *Id.*

HABEAS CORPUS.

See CRIMINAL LAW AND PRACTICE, 13.

HIGHWAYS.

See STREETS AND HIGHWAYS.

HOMESTEAD.

1. A HOMESTEAD FOR THE USE OF THE SURVIVING WIFE OF A DECEDENT can not be set apart under section 1465 of the Code of Civil Procedure, so as to include a part of the separate estate of the decedent when there is common property.—*Estate of Lord, deceased. Cal.* 129.
2. A FINDING THAT CERTAIN PARCELS OF LAND OF A DECEDENT, which his widow prays may be set apart to her as a homestead, could not be divided, will not be sustained when the allegations of the petition for the homestead show the contrary. *Id.*
3. WHEN THERE IS NO VALID HOMESTEAD IN EXISTENCE, an order of the Court setting the same aside to an insolvent is a nullity. *Matzen* v. *Shaeffer. Cal.* 126.
4. HOMESTEAD—EXISTING INDEBTEDNESS—EXEMPTION.—A debtor may declare a homestead upon his property, so as to render the same exempt from execution as against an existing indebtedness which has not been reduced to judgment nor become a statutory lien upon the exempted premises by attachment or otherwise, although the effect of allowing the exemption will be to leave the debtor insolvent. —*Barnett et al.* v. *Knight et al. Col.* 864.
5. HOMESTEAD STATUTES, CONSTRUCTION OF.—Homestead exemption is entirely a creature of statute. The statutes authorizing it are not in derogation of the common law, for at common law the creditor had no right to sell the debtor's land. Such statutes should be liberally construed. *Id.*
6. CONVEYANCE BY DEBTOR OF HOMESTEAD IN CONSIDERATION OF FUTURE SUPPORT.—A conveyance by an insolvent debtor of his homestead, the value of which is less than that allowed by statute, is not void as against an existing general creditor, although part of the consideration for such conveyance is an agreement on the part of the grantee to aid in the future support of the grantor. *Id.*

HOMICIDE.

See MURDER AND MANSLAUGHTER.

HUSBAND AND WIFE.

1. COMMUNITY PROPERTY—HUSBAND'S POWER OF DISPOSITION OVER.—Subsequent to the husband-and-wife act of 1879, a husband cannot enter into a valid contract for the sale of community property without his wife joining therein. A vendee under such contract, with knowledge that the subject matter thereof was community property, cannot recover damages for the husband's failure to convey. *Holyoke* v. *Jackson. Wash.* 788.
2. WIFE'S LIABILITY FOR GOODS SOLD FOR FAMILY USE.—A wife cannot be held liable, under section 10 of the act of 1878, in an ordinary action for goods sold and delivered, when such goods were sold upon the order of the husband, although the same were devoted to family use. *Smith* v. *Sherwin. Or.* 813.

HYDRAULIC MINING.

See INJUNCTION, 2.

INDIANS.

1. INDIAN RESERVATIONS—LANDS OF, WHETHER EMBRACED IN TERRITORY.—None of the lands embraced within the boundaries of Idaho territory are excepted out of said territory by the provisions of section 1 of the organic act, except such as, by the provisions of pre-existing treaties with Indian tribes, were not, without the consent of such Indian tribes, to be included within the limits of any state or territory. *Utah & Northern Railway Company* v. *Fisher, Assessor, etc. Idaho*, 180.

2. AT THE TIME OF THE PASSAGE OF THE ORGANIC ACT OF IDAHO TERRITORY, no treaty existed between the United States and any Indian tribe providing that the lands embraced within the Fort Hall Indian reservation should not, without the consent of such tribe, be included within any state or territory; such lands, therefore, became part of Idaho territory upon the passage of said organic act, March 3, 1863, and have not since been withdrawn from or excepted out of said territory. *Id.*

3. THE FORT HALL INDIAN RESERVATION BEING A PART OF AND INCLUDED WITHIN IDAHO TERRITORY and Oneida county, the property of the Utah & Northern Railway Company situated thereon is subject to taxation for territorial and county purposes. *Id.*

See MURDER AND MANSLAUGHTER, 20.

INFORMATION.

CONSTITUTIONALITY OF (note), 296.

See CRIMINAL LAW AND PRACTICE.

INJUNCTION.

1. WRIT OF REVIEW.—AN EX PARTE ORDER FOR AN INJUNCTION cannot be annulled on a proceeding for a writ of review, because an appeal lies from the order granting the injunction. *Golden Gate Consolidated Hy. M. Co.* v. *Superior Court. Cal.* 736.

2. INJUNCTION SUSPENDING WORKING OF HYDRAULIC MINES—AN EX PARTE injunction restraining a hydraulic mining corporation from conducting its business in a manner injurious to the plaintiff is not void, although granted without notice to the defendant. Such injunction does not suspend the general and ordinary business of the corporation. *Id.*

3. SERVICE OF INJUNCTION—RETURN OF.—An affidavit of the service of an injunction, which states that the same was personally served upon the superintendent and managing agent of the defendant, is *prima facie* evidence of such fact, although the affidavit subsequently states that the affiant is informed and believes that the person served was such superintendent and agent. *Id.*

4. THE SAME—REVIEW OF EVIDENCE OF SERVICE OF INJUNCTION ON CERTIORARI.—Conceding that the supreme court will, on an application for a writ of certiorari, look into the affidavits used on a motion to quash the service of an injunction, when the jurisdiction of the court to which the writ issues depends upon such evidence, still when such evidence is conflicting, it will be held that the lower court had jurisdiction. *Id.*

5. NOTICE OF INJUNCTION—WHEN NOT SERVED.—A defendant against whom an injunction has issued, who has actual notice thereof, will be bound thereby, although the same is not served. *Id.*

6. AN INJUNCTION NEED NOT BE SERVED BY A SHERIFF; it may be served by any person authorized to serve a summons. *Id.*

7. INJUNCTION AGAINST EXECUTION OF SHERIFF'S DEED.—A complaint in an action to enjoin a sheriff from executing to the purchaser a deed to certain real property, alleged to belong to the plaintiff, and to have been sold as the property of a third person, under an execution against him, is fatally defective, unless the existence of the judgment under which such execution issued be averred.—*Schuyler* v. *Boughton, Sheriff, etc. Cal.* 890.

See EASEMENT, 4; TAXATION, 6–12; 18; WATER RIGHTS, 10.

INSANE PERSONS.

1. INSTRUCTIONS CONCERNING INSANITY, IF ERRONEOUS, will not authorize a reversal when there was no evidence that the defendant was insane. *People* v. *Wheeler. Cal.* 70.

INSOLVENCY.

1. JURISDICTION IN A PROCEEDING OF INVOLUNTARY INSOLVEN
vice of a copy of the petition of the creditors and the
debtor. In such case no notice to creditors is required
Assignee, etc., v. *Bunce*. *Cal.*, 142.
2. IN SUCH PROCEEDING, WHEN IT DOES NOT APPEAR FROM T
the debts of the petitioning creditors were created after
the appellate court will presume that they were in suppo
der appointing an assignee was duly made and given. *I*
3. ADJUDICATION OF INSOLVENCY, EFFECT ON PENDING ACTI
trict court adjudging the defendant in a pending acti
staying all proceedings against him, does not deprive the
is pending of jurisdiction, so as to make its subsequent
Barnett, v. *Fifth District Court*. *Nev.* 630.
4. A FRAUDULENT DISCHARGE IN INSOLVENCY CANNOT BE TA
itor of the insolvent, when the latter pleads such dischs
mer, who fails to allege that the fraud was unknown t
tice of the same at the time of the adjudication of t
Schnieder. *Wash.* 785.

See HOMESTEAD, 3.

INSTRUCTIONS.

1. INSTRUCTION PARTLY CORRECT AND PARTLY INCORREC
erroneous which contains one correct and one incorre
legal effect of the evidence, and which tells the jury
either proposition the verdict must be in a certain
Col. 508.
2. INSTRUCTIONS GIVEN AT THE REQUEST OF A PARTY ca
of by him. *People* v. *Biggins*. *Cal.* 887.
3. INSTRUCTIONS TO A JURY SHOULD BE GIVEN WITH I
FACTS in a case. If the facts are controverted, the in
hypothetical. If uncontroverted, the court may ass
4. WHEN THE CHARGE AS A WHOLE STATES THE LAW
be disturbed, although some part of the charge, sta
inaccuracy of expression which would be subject to
5. INSTRUCTIONS, CONFLICTING SENTENCES IN.—Senten
read in connection with the context, and if the ins
read, fairly and correctly present the law applicabl
not be reversed merely because there is an app
isolated sentences. This rule applied to an instruc
necessary to prove a justification of a homicide. *P*
6. INCONSISTENT INSTRUCTIONS WILL NOT WARRANT A
the beaten party was not prejudiced thereby. *Ba*
7. INSTRUCTIONS UPON ABSTRACT QUESTIONS OF LAW
and proofs are erroneous, but will not warrant a r
to confuse or withdraw the material issues from th
Utah S. R. R. Co. *Utah* 453.
8. REFUSAL TO GIVE INSTRUCTIONS ASKED IS NOT ERE
erly instructed upon all questions left for their de
Wash. 791.
9. REFUSAL OF THE COURT TO GIVE CERTAIN INSTRUC
the same are given in substance. *City of Seattle*
10. REFUSAL TO GIVE INSTRUCTIONS ASKED FOR will
an exception is taken to the action of the trial co
Cal. 693.
11. INSTRUCTIONS—REVIEW ON APPEAL.—Instructio
viewed on appeal when the transcript fails to co
certificate that those portions included therein v
points covered thereby. *Oregon Ry. and Navig*
552.
12. INSTRUCTIONS.—If the record of a case on appe
and an instruction given to the jury be correct
dence, such instructions must be sustained. *P*

13. PRACTICE—INSTRUCTIONS.—In charging a jury, the court should give only such instructions as are pertinent to the evidence. A refusal, therefore, to instruct the jury as to the weight to be given to circumstantial evidence is not error, when there was no such evidence in the case. *People, etc.*, v. *Ah Too. Idaho*, 171.

See CRIMINAL LAW AND PRACTICE, 20, 21; INSANE PERSONS; MURDER AND MANSLAUGHTER, 4, 6, 9; ROBBERY, 2.

INSURANCE.

1. ASSIGNMENT OF POLICY OF INSURANCE.—The assignment of a policy of life insurance as collateral security for advances made to a third person vests the legal title to the policy in the assignee. The interest of the owner of the policy only extends to what remains of it after such advances have been paid. Until such advances have been paid, the owner of the policy, although he is under no obligation to repay the same, is not entitled to have it surrendered to him, or to receive the amount due thereon. *Gilman* v. *Curtis. Cal.* 135.

INTERPLEADER.

1. BILL OF INTERPLEADER—CONFLICTING CLAIMS FOR RENT.—A TENANT AGAINST WHOM TWO CONFLICTING claims for the rent due are made, may institute a bill of interpleader against such claimants, to determine their respective rights to the rent. In such action the court may determine the ultimate rights of the parties on each side as between themselves. *Schluter* v. *Harvey. Cal.* 730.

JUDGMENT.

1. A JUDGMENT TO BE FINAL MUST SHOW BY THE ENTRY ON THE RECORD, in intelligible language, a determination of the rights of the parties to the action, what relief has been granted, if any, or that the defendant has been dismissed without day. A judgment which does not conform to such requirements will be held to be introductory merely. *Dusing* v. *Nelson. Co.* 110.
2. JUDGMENT IN PROBATE COURT—WHAT IS.—Entries in the docket of the probate court that complaint was filed, summons issued and served, demurrer to complaint filed, and the entry of fees for overruling demurrer and entering default, with various entries of fees, do not constitute a judgment for either party. An appeal from such a judgment to the district court should be dismissed. *Gray, Sheriff, etc.* v. *Cederholm et als. Idaho*, 172.
3. JUDGMENT BY DEFAULT OUT OF TERM.—A judge of the district court has power to render judgment at his chambers, and out of term, in a case where the defendant has made default. *Murne* v. *Schwabacher Bros. & Co. Wash.* 799.
4. ENTRY OF JUDGMENT IN VACATION.—A judgment regularly rendered by a court in the transaction of its judicial business may be entered of record in vacation. *Sieber* v. *Frick. Col.* 98.
5. JUDGMENT ON THE PLEADINGS IN AN ACTION FOR BREACH OF CONTRACT.—In an action to recover damages for breach of contract, where the answer admits the material allegations of the complaint, the plaintiff may move for judgment on the pleadings, or submit the question of damages to a jury. If he adopts the former course, without giving evidence of damages, the court can only award him nominal damages. *Hadlan* v. *Ott et al. Wash.* 565.
6. A PLAINTIFF IS NOT ENTITLED TO JUDGMENT UPON THE PLEADINGS, when any of the material allegations of the complaint are denied by the answer. *Reich* v. *Rebellion Silver Mining Co. et al. Utah*, 451.
7. JUDGMENT FOR THE PLAINTIFF ON THE PLEADINGS can not be rendered when the answer denies any of the material allegations of the complaint, or sets up new matter constituting a defense. *Miles et al.* v. *McCallan et al. Ariz.* 689.
8. COPARTNERSHIP DEBT, MERGER OF IN JUDGMENT AGAINST ONE PARTNER.—The plaintiff sued the defendant in error and several others on a partnership note. The defendant in error's co-defendants defaulted, and judgment was rendered against them. Afterward, and before the trial against the defendant in error, the plaintiff voluntarily amended his complaint, so as to abandon the note and rest the action entirely upon the original indebtedness represented thereby. The trial was had more than two years after the default judgment was entered, and after several terms of the court had intervened. *Held*, that such default judgment was a bar to the continuance of the action against the defendant in error, and should not be set aside

at the request of the plaintiff, and that the court had auth
under section 146 of the code of civil procedure. *Ex*
Ford. Col. 624.

9. THE PAYMENT OF A JUDGMENT MAY OPERATE AS AN EQUI
same to the party making the payment, although the jud
Equity, however, will not keep such judgment alive to t
bona fide purchasers of the premises on which it was
same when it appeared of record that the lien had been
knowledge of any equities existing in favor of the p
judgment. *Persons* v. *Shaeffer et als. Cal.* 128.

10. PLAINTIFF IN AN ACTION OF EJECTMENT IS BOUND BY
action between his grantor and the present defendan
titles to the land in controversy were put in issue. *Eal*

11. JUDGMENTS REGULARLY ENTERED ARE BEYOND THE CO
piration of the term during which they were rendered.
v. *Ford. Col.* 624.

12. PRACTICE—JUDGMENT ROLL.—Papers in a case which
judgment roll, and which would on motion have been
sidered on appeal as a part of the record by stipulatio
Idaho, 169.

13. FACTS STATED IN THE RECITALS OF A JUDGMENT of a co
presumed to have been proven by competent evidence
forms no part of the judgment roll. *Id.*

14. JUDGMENT AND FINDINGS IN FAVOR OF THE PLAINTI
SUPPORTED BY the evidence when the same not produ
Dusing v. *Nelson. Col.* 110.

15. PERSONS NOT PARTIES TO ACTION, DECREE RESERVIN
persons not parties or privies to an equitable action
by the judgment therein. Equity, however, has pov
limitation in such decree the rights of persons in
parties. Such power is conferred by section 16
Buck v. *Webb et al. Cal.* 397.

16. DECREE ENFORCING RESULTING TRUST, RIGHTS OF C
IN.—A Decree in an action to enforce a secret resulti
of a corporation required the company to convey su
and provided that the latter should take the same
"of any and all just debts against the corporation
process of law to be preferred over the claim of th
the effect of such provision was to create a spacific
certain creditors of the company; that such lien w
without notice of the existence of such secret tru
the rendition of such decree, and while the compa
ently the owner of the property; that a single acti
such claim and to enforce the lien, and that in
proper party. *Id.*

17. JUDGMENT, WHEN RELATES TO A FREEHOLD.—An
ground that the judgment appealed from does not
pears from the cross-bill filed by the appellants t
gation directly incolved the title to several mine
presented by the cross-bill were against the ap
105.

18.—JUDGMENT HELD SUPPORTED BY THE FINDINGS
Cal. 572.

19. JUDGMENT DIRECTED TO BE ENTERED in accord
ported in 1 West Coast Rep. 264. *Tucker, Sher*
613.

20. JUDGMENT REVERSED for error of court below in
Martin v. *Hill. Cal.* 895.

JUDGMENT.

See ACCOUNTING, 2; APPEAL, 38, 47: ATTACHMENT
MENT, 1-4: EMINENT DOMAIN, 3; EXECUTORS A
7: REPLEVIN, 2; SURETIES, 1: WATER RIGHTS,

JURISDICTION.

1. REHEARING DENIED IN HUGHES v. CUMMINGS, 1 West Coast Rep. 608. *Hughes* v. *Cummings et al.* *Col.* 121.

See APPEAL, 15, 16, 18; ATTACHMENT, 5; ATTORNEYS, 2; CERTIORARI, 1; EMINENT DOMAIN, 1; FERRIES, 1, 2; FINDINGS, 20; INSOLVENCY, 1, 3; JUDGMENT, 13; JUSTICE COURT, 2, 3; MURDER AND MANSLAUGHTER, 17, 20; PARTITION, 1; PROBATE COURT; USURPATION OF OFFICE, 2; WATER RIGHTS, 4.

JURY AND JURORS.

1. QUALIFICATION OF JURORS, CITIZENSHIP OF.—A juror must be a citizen of the United States. If he is not, a want of such qualification vitiates a verdict of conviction, where there has been no negligence or want of watchfulness on the part of the defendant in failing to discover the disqualification. *People* v. *Reese et al.* *Utah*, 440.

2. WAIVER OF QUALIFICATION.—Where a juror, in answer to a question put to him under the direction of the court, says he is a citizen of the United States, the defendant, if he has no reason to doubt the truthfulness of such statement, may examine such juror as to his other qualifications, without reference to his qualification of citizenship, and if it afterward appears that the juror was not a citizen, the objection to him on such ground will not be waived by failing to examine him as to his qualification in that respect. *Id.*

3. SUMMONING A JURY.—An order of the court directing the clerk "to draw the names of thirty-five good and lawful men," to be summoned from the body of the county, is a substantial compliance with sections 214 and 215 of the code of civil procedure. *People* v. *Wheeler.* *Cal.* 70.

4. SUMMONING OF JURORS.—When jurors have not been drawn or summoned to attend the session at which the action is tried, the court may order a sufficient number to be forthwith drawn and summoned to attend court, or by an order entered on its minutes, direct the sheriff forthwith to summon so many good and lawful men of the county to serve as jurors as might be required. *Leahy* v. *Southern Pacific R. R. Co.* *Cal.* 693.

5. GRAND JURORS—CERTIFICATE OF DRAWING.—Where the certificate of the county clerk, sheriff, and justice of the peace recited that certain named persons were "drawn to serve as grand and petit jurors at the September term of the third judicial district of the territory of Wyoming, to be held at Sweetwater county," the omission of the word "court" from such certificate will not vitiate an indictment found by such grand jurors.—*Donovan* v. *Territory of Wyoming.* *Wy.* 66.

6. PEREMPTORY CHALLENGES BY PROSECUTION AFTER PASSING THE JURY.—After the prosecution has passed the jury, declining to exercise the right of peremptory challenge, and the defendant thereupon peremptorily challenges one juror, it is not error warranting a reversal for the court to allow the prosecution to then peremptorily challenge a juror. At most the action of the court would be a mere irregularity, not affecting any substantial right of the defendant. *People* v. *Majors.* *Cal.* 580.

7. THE DECISION OF THE TRIAL COURT IN OVERRULING A DEFENDANT'S challenge to a juror for actual bias is not reviewable on appeal. *People* v. *Riley.* *Cal.* 364.

8. THE MODE OF SELECTING A JURY IN CRIMINAL CASES, as stated in prior opinions of the court, affirmed. *Id.*

9. ONLY TEN PEREMPTORY CHALLENGES ARE ALLOWED A DEFENDANT on a trial for robbery. *Id.*

10. A CHALLENGE OF A JUROR FOR CAUSE, ON THE GROUND THAT HE HAD SERVED ON A JURY which had tried a prisoner jointly indicted with the defendant, will not be sustained unless such facts appear in the record. *Mooney* v. *People.* *Col.* 322.

11. ERRONEOUSLY SUSTAINING A CHALLENGE OF A JUROR FOR CAUSE is ground for reversal. *Id.*

12. HANDING FORM OF VERDICT TO JURY.—It is neither an error nor an irregularity for the clerk to hand to the jury, when they are leaving the court-room to consider the verdict, various forms of verdict corresponding to those which they were instructed might be brought in. *People* v. *Robinson.* *Cal.* 591.

13. PAYMENT OF JURORS' FEES.—Where a plaintiff is ordered to pay the fees of the jury, the court has no authority, on the mere failure, neglect, or refusal of the plaintiff to comply with such order, to direct that the clerk issue a certificate to all of the jurors of the time and mileage to which each juror is entitled to pay, and that the same be paid out of the county treasury, as is provided in section 28 of the act of March 5, 1870. *Ex parte Makinney.* *Cal.* 286.

14. FACTS CLEARLY PROVEN NEED NOT BE LEFT TO THE JURY to decide. *Brewster* v. *Baxter*. *Wash.* 791.

See MURDER AND MANSLAUGHTER, 19; PLEADING AND PRACTICE, 6; SUPPLEMENTARY PROCEEDINGS, 2.

JUSTICE COURT.

1. ACTION IN JUSTICE'S COURT.—Whether an action in the justice's court be with or without written pleadings, the facts essential to constitute a cause of action must be given in evidence, unless such evidence be waived by the conduct of the defendant, or by the averments or admissions of the answer. *Rio Grande Extension Co.* v. *Coby*. *Col.* 613.

2. JURISDICTION OF JUSTICE'S COURT—SERVICE OF SUMMONS.—A justice's court has jurisdiction, without regard to the residence of the parties, when personal service of the summons is made on the defendant in any precinct in the county, although such precinct is not the one in which the action is brought. Such service may be made by the constable of the precinct in which the action is brought. *Taylor* v. *Jenkins*. *Or.* 817.

3. ACTION IN JUSTICE'S COURT INVOLVING VALIDITY OF TAX, CERTIFICATION OF TO DISTRICT COURT.—A justice's court has no jurisdiction of an action involving a question as to the validity of a tax. Sec. 537 of the practice act, so far as it provides that such action shall be certified to the probate court for trial, is void, for the reason that the legislature could not confer such jurisdiction on the probate court. The justice's court having no jurisdiction to try such action, and there being no law authorizing its transfer to another court, the justice should dismiss the same. He cannot certify it to the district court for trial. *Crismon, Collector, Etc.*, v. *Tufts et al.* *Utah*, 449.

See APPEAL, 16-18.

LACHES.

1. A VENDEE UNDER A CONTRACT FOR THE SALE OF LAND IS NOT GUILTY OF LACHES in not paying the purchase price when the same was not to become due and payable until the vendor had executed him a deed, if such deed has never been executed or tendered. *Richards* v. *Snyder*. *Or.* 282.

LANDLORD AND TENANT.

1. GRAIN RAISED BY A TENANT UNDER A WRITTEN AGREEMENT WITH HIS LANDLORD that the same should be delivered to the latter and remain his property, and in no way subject to the disposal of the former, until certain advances made to him had been repaid, cannot, after such delivery, be attached by a creditor of the tenant, until such advances have been paid. *Howell* v. *Foster*. *Cal.* 743.

2. TENANCY FROM YEAR TO YEAR.—A tenant from year to year ceases to be such when he enters into a lease with his landlord for a definite time. *Brandenburg* v. *Reithman*. *Col.* 774.

See INTERPLEADER, 1; MECHANICS' LIENS, 7, 9.

LARCENY.

1. THE STEALING AT THE SAME TIME OF TWO HORSES, the property of different persons, may be treated as but one offense and charged as such in an indictment. *Heywood* v. *Territory*. *Wash.* 284.

2. AN OBJECTION TO AN INDICTMENT ON THE GROUND THAT MORE THAN ONE OFFENSE IS CHARGED therein comes too late if made after verdict. *Id.*

3. INSTRUCTION AS TO OWNERSHIP.—Where an indictment charges a defendant with stealing a horse, the property of a person unknown, the court may instruct the jury that if the owner of such horse is now unknown, they might assume, in the absence of evidence to the contrary, that such owner was unknown to the grand jury finding the indictment. *Id.*

4. LARCENY OF CATTLE—INSTRUCTIONS.—In a prosecution for the larceny of cattle, where the defendant claims that at the same time of the taking, the cattle were lost and abandoned and had no owner, and there is evidence to sustain such claim, an instruction is erroneous which charges the jury that "the taking of the animals with intent to appropriate the entire dominion over them and convert them to the

takers use, raised a presumption of a guilty and felonious intent. *State* v. *Swayze*. *Or.* 669.

5. THE SAME—NATURAL MARKS—OWNERSHIP.—The finder of personal property lost or mislaid, which has such marks of ownership upon it as will enable him to determine who the owner is, must restore it, and will be deemed guilty of larceny, if with such knowledge of the true owner he takes it with intent to convert it to his own use and deprive the owner thereof. But the natural marks on live animals are not presumed to be marks of ownership. *Id.*

6. LARCENY—NAME OF OWNER OF STOLEN PROPERTY.—Where a defendant is indicted and convicted for the larceny of the property of one H. W., a new trial should not be granted because the true name of such owner was H. W. B., when it appears that he was known by both names, and there was no doubt as to his identity.—*People* v. *Woods*. *Cal.* 495.

7. IN A PROSECUTION FOR LARCENY, WHEN THE TAKING OF THE PROPERTY IS ADMITTED, the intent with which the same was taken is a question for the jury.—*People* v. *Grider*. *Cal.* 290.

See BURGLARY, 1, 2; EVIDENCE, 25.

LEASE.

See LANDLORD AND TENANT; STATUTE OF FRAUDS, 1.

LEGAL TENDER CASE (note), 295.

LIENS.

See MECHANICS' LIENS.

LIQUOR ORDINANCE.

1. PROHIBITION OF SALE OF LIQUORS—CONSTRUCTION OF ORDINANCE.—The provision of the city charter of Logan City granting power to the city council by ordinance to "license, regulate, prohibit or restrain" certain persons, places and business, but which fails to state what acts may be licensed, regulated, prohibited or restrained, does not authorize the passage of an ordinance prohibiting all persons from selling, manufacturing, giving away or disposing of any spirituous liquors. *Logan City* v. *Buck*. *Utah*, 437.

LOCATION OF MINE.

See MINES AND MINING, 2, 3.

MANDAMUS.

See BONDS, 4; EXECUTORS AND ADMINISTRATORS, 5.

MANSLAUGHTER.

See MURDER AND MANSLAUGHTER; CRIMINAL LAW AND PRACTICE, 2.

MARRIAGE CONTRACT.

See CANCELLATION, 1.

MARRIAGE SETTLEMENT.

1. ANTI-NUPTIAL SETTLEMENT, BREACH OF.—Prior to the death of defendant's intestate he and the plaintiff, an unmarried woman, entered into an agreement whereby they mutually promised to inter-marry within a reasonable time. In consideration thereof the agreement provided that "the party of the first part (the defendant's intestate) grants and gives to the party of the second part" certain bonds then in his possession, "all of which he promises to deliver to her on or before the day of their marriage, to be and become her own absolute property." *Held*, that such agreement was an ante-nuptial settlement, the consequences of which could not be avoided by the defendant's intestate refusing to consummate the marriage. That upon his refusal, after a reasonable time, to marry, the plaintiff, having at all times remained

ready and willing to consummate the contract, was entitled to the bonds. That it was not for her to have sought him, but it was his duty to have sought her in marriage. *Connor* v. *Stanley, Administrator, etc.* *Cal.* 749.

MARRIED WOMEN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

1. UNDER A CONTRACT OF EMPLOYMENT WHERE THE WORK IS TO BE DONE BY THE DAY OR MONTH, and nothing is said as to the time of payment for the services to be rendered, the wages of the employee are due and may be demanded at the close of each day or month, as the case may be. After such demand and non-payment, the employee may maintain attachment proceedings to recover his wages. *De Lappe* v. *Sullivan.* *Col.* 107,108.
2. LIABILITY OF THE MASTER FOR THE ACT OF HIS SERVANT.—A master is liable for the act of his servant when done within the scope or general course of his employment, although done contrary to the master's orders. *Heenrich* v. *Pullman Palace Car Company* (*U. S. Dist. Ct.*) *Or.* 303.

MECHANICS' LIENS.

1. MECHANICS' LIEN FOR WORK DONE IN CUTTING LUMBER attaches upon the identical timber cut. *Baxter* v. *Smith et al.* *Wash.* 794.
2. THE MECHANICS' LIEN LAW OF 1877 was intended as a substitute for and repeal of the law of 1873. No lien under the act of 1873 survived such repeal except as the same was continued by the act of 1877. *Seattle & W. W. R. R. Co.* v. *Ah Kowe.* *Wash.* 53.
3. THE TIME WITHIN WHICH A MECHANIC, NOT THE ORIGINAL CONTRACTOR, MAY FILE HIS NOTICE of lien for work done on a railroad is limited by the act of 1877 to thirty days from the completion of the work or from cessation of labor thereon. Unless such notice is filed within such time the right to a lien is lost. *Id.*
4. MECHANICS' LIEN—DESCRIPTION OF PROPERTY.—A notice of a mechanics' lien will be held on demurrer to sufficiently describe the property sought to be charged, when the same is described therein as "a lot of sawlogs marked 'F. & A.,' now lying in" a certain slough. *Wheeler* v. *Port Blakeley Mill Company.* *Wash.* 555.
5. THE SAME—REQUISITES OF STATEMENT OF DEMAND.—The notice of such lien must contain a statement of the full amount of the lienor's demand before any deductions are made, and also the amount thereof after the deduction of all just credits and offsets. Unless each of such amounts is stated, the notice is sufficient.
6. MECHANICS' LIENS—REQUISITES OF STATEMENT OF DEMAND.—Judgment affirmed on authority of Wheeler v. Port Blakeley Mill Co., 2 West Coast Rep. 555. *McLeod* v. *Port Blakeley Mill Company.* *Wash.* 798.
7. MECHANICS' LIENS FOR CONSTRUCTION AND REPAIR AGAINST A LESSOR.—Where the owner of a mill and reduction works leased the same for a term of years, and during the term the lessee made repairs in the mill, in pursuance of a clause of the lease that the lessee "at his own cost and expense should make all necessary repairs and improvements in and about said mill and reduction works," and an agent of the lessor had personal and full knowledge that said repairs were being made by the lessee, and the lessor and his agent failed to give notice, as provided by the statute, that the lessor would not be responsible for the same: *Held*, that under sec. 9 of the lien law, the parties furnishing the materials or labor for said repairs, obtained a lien for the price of such materials and labor upon the estate or interest of the owner and lessor of said mill. *Gould* v. *Wise.* *Nev.* 405.
8. THE SAME—WORK AND LABOR IN "CARRYING ON" A MILL.—Under the same circumstances, by the proper construction of sec. 19 of the same lien law (of 1875), persons who performed work and labor, by the employment of the lessee, in "carrying on" or operating the mill, obtained a lien for the price of such work and labor upon the estate or interest of the owner and lessor of the mill. LEONARD J., dissenting. *Id.*
9. CONSTRUCTION OF STATUTES.—In construing a provision of a statute the word "*on*," although found both in the published statutes and in the enrolled bill, may be treated by the court as a clerical error, and may be read "*or*," when the latter word would give a full, consistent and effectual meaning to the provision, in complete conformity with the general intent of the whole statute, while the word "*on*" would render the provision uncertain, delusive, virtually inoperative, and opposed to the

general intent of the entire statute. This is especially so when the provision is borrowed, without other material change, from previous statutes on the same subject, in all of which the word was "*or*." *Id.*

10. THE SAME.—In the absence of all testimony, and of any objection at the trial, the court will infer that the land used in connection with the mill, and to which the lien was declared to extend, was reasonably convenient for the use of said mill, under the requirements of the statute. *Id.*
11. LEONARD, J., dissented from a portion of this decision, holding that under a correct construction of the whole statute, the estate of the lessor, under these circumstances, was liable only to a lien for materials and labor in repairing or constructing, and not for labor in carrying on or operating. *Id.*
12. MECHANICS' LIEN.—Evidence held sufficient to sustain the findings. *McGuire et al. Logus et al. Or.* 825.

See ADMIRALTY, 18.

MESNE PROFITS.

See EJECTMENT, 4.

MINES AND MINING.

1. WORK ON MINING CLAIM, WHEN MAY BE DONE.—Prior to the act of congress of May 10, 1872, there was no law of Congress requiring annual labor to be done on mining claims in order to hold them. When that act speaks of the amount of work to be performed or improvements to be made each year, it means each year from and after its passage. Consequently, work done on a mining claim prior to May 10, 1872, cannot be considered the first, or any part of the first, annual expenditure required by that act, and the several amendments thereto. *Thompson* v. *Jacobs et al. Utah*, 430.
2. PRIOR LOCATION OF A MINING CLAIM IS NOT INVALIDATED BY A MISTAKE OF THE RECORDER in recording such location by a name somewhat different from that stated in the certificate of location. *Weise* v. *Barker. Col.* 108.
3. A VALID LOCATION OF A MINING CLAIM CAN NOT BE MADE while the same is in the actual possession of other prior locators. The description of a mining claim, as the same appears in the complaint and on the record, held sufficient. *Id.*

See FRAUD, 2.

MORTGAGES.

1. DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE.—Whether a deed given in consideration of the grantee's assuming and paying the debts of the grantor is an absolute sale of the land conveyed, or a mere mortgage to secure the repayment of such debts, depends upon the intention of the parties at the time of conveyance. Such intention may be ascertained by evidence, oral or otherwise, of the situation of the parties, the value of the consideration in connection with the value of the property conveyed, the conduct of the parties before and after the conveyance, and of all the sorrounding circumstances tending to explain the real character of the transaction. The evidence in this case reviewed, and the conveyance in question held to be a mortgage. *Stephens* v. *Allen et al. Or.* 193.
2. DEED ABSOLUTE ON ITS FACE, WHEN A MORTGAGE.—A deed absolute on its face, given by A. to B., for real estate therein described, and a bond given by B. to A., agreeing to convey to A. a portion of the same property at a stipulated time, although given on the same date and for the same price, if not intended to be a mortgage or security for money by the parties themselves, and do not appear to be such on the face of the instruments, will be held to be an absolute bargain and sale, and not a mortgage. *Winters* v. *Swift et al. Idaho*, 184.
3. THE INTENTION OF THE PARTIES IS TO BE LEARNED, first, from the instruments themselves; secondly, from parol testimony; and when ascertained, will be carried out by the courts. *Id.*
4. A MORTGAGE OF CERTAIN PROPERTY OF A CORPORATION, held to be created by a sheriff's sale, and certain contracts made by the defendant with two of the directors of the corporation, in their names, but for the benefit of the corporation. *Pioneer Gold Mining Company* v. *Baker*, (*U. S. Cir. Court*). *Cal.* 383.
5. IN A SUIT BY THE CORPORATION TO REDEEM from such mortgage, the directors who made the contracts are not necessary or indispensable parties, where they claim no individual interest, and no relief is asked against them. *Id.*

6. NOTE SECURED BY MORTGAGE—WAIVER OF REMEDY BY FORECLOSURE.—Where a note and mortgage are both contained in the same instrument, the mortgagee may waive his remedy by foreclosure, and sue on the note and recover a money judgment. *Frank et al. v. Pickle. Wash.* 570.

7. AN UNRECORDED MORTGAGE OF PERSONAL PROPERTY IS ABSOLUTELY VOID as to the creditors of the mortgagor, although such creditors had actual notice thereof. *Baxter* v. *Smith. Wash.* 794.

8. EQUITABLE ASSIGNMENT OF MORTGAGE.—Where, in pursuance of an agreement between a mortgagor and mortgagee, a third party pays off the mortgage debt and takes a conveyance of the mortgaged premises, such transaction will be construed as being an equitable assignment of the mortgage so as to entitle the grantee to priority and protection as against a judgment creditor of the mortgagor whose rights accrued subsequent to the execution of the mortgage, although at the time of such conveyance the mortgagee satisfied the mortgage on the record. *Matzen* v. *Shaeffer. Cal.* 126.

See ATTACHMENT, 11; EVIDENCE, 16, 17; RECEIVER, 2; TAXATION, 19, 21.

MULTIPLICITY OF SUITS.

See TAXATION, 12, 18.

MUNICIPAL CORPORATIONS.

See STREETS AND HIGHWAY, 1–6; TAXATION, 25.

MURDER AND MANSLAUGHTER.

1. MURDER, WHAT IS.—Under the statutes of this territory, the killing of a human being in the commission of an unlawful act, which in its consequences naturally tends to destroy life, or is committed in the prosecution of a felonious intent, is murder. *People* v. *Mooney. Idaho*, 124.

2. MURDER IN THE FIRST DEGREE.—Under the statute all murder committed in the perpetration or attempt to perpetrate robbery is murder of the first degree. *Id.*

3. MURDER—MANSLAUGHTER.—In case of a homicide committed by the defendants where the fatal shot was fired while the deceased was retreating, and after all danger from him was over and while defendant was pursuing him, then the defendant is guilty of murder or manslaughter as the case may be. *People* v. *Pierson. Idaho*, 809.

4. MURDER—INSTRUCTIONS—DUELING.—When there is nothing in the circumstances attending a killing to bring the case within the crime of dueling, an instruction that "when parties by mutual understanding engage in a conflict with deadly weapons, and death ensues to either, the slayer is guilty of murder," is correct. *People* v. *Bush. Cal.* 575.

5. THE SAME—KILLING AFTER QUARREL—QUESTIONS OF FACT.—If, between the quarrel and the killing, there is a space or interval of time sufficient for an ordinary man to cool, that may be deemed a *reasonable time* within the meaning of the rule on the subject. And if, between the quarrel and the infliction of the mortal wound, the mind of the defendant is directed to and is taken up by any other subject not in any manner connected with the cause of the quarrel, it may be reasonably supposed that his attention was called off from the subject of the provocation, and any subsequent killing of his adversary without other provocation and with a deadly weapon would be murder. An instruction to such effect is not erroneous as being an instruction upon matters of fact. *Id.*

6. THE SAME—JUSTIFIABLE HOMICIDE—CONFLICTING INSTRUCTIONS.—A defendant may justify a killing, although he was the assailant, if he, in good faith, endeavors to decline any further struggle before the act of homicide was committed. An instruction to the contrary is erroneous, and is not cured by another instruction, in a different portion of the charge, where the law is correctly stated. In such case it would be impossible to determine under which of the two contradictory instructions the jury acted. *Id.*

7. KILLING AS THE RESULT OF A SIMPLE ASSAULT—MANSLAUGHTER.—The defendant, after an exchange of words with the deceased, struck him several blows on the head or face with his fist. The blows did not seem at the time, or immediately afterwards, to produce any serious results. How severe the blows were did not appear, but they must have been dealt with considerable force, as the deceased was

found dead on the following day from their effect. It did not appear that the defendant had any intention to kill the deceased. *Held*, that such killing amounted to merely manslaughter and not murder. *People* v. *Munn*. *Cal.* 745.

8. THE SAME—DISTINCTION BETWEEN MURDER AND MANSLAUGHTER—MALICE.—In cases of homicide committed by violence, it is important to consider the character of the weapon with which the homicide was committed. If the means employed be not dangerous to life, or if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder. Unless such malice exists the homicide amounts simply to manslaughter. *Id.*

9. THE SAME—INSTRUCTIONS.—An instruction in this case, to the effect that "if a man knowingly and wilfully does an act unlawful in itself, and produces harm, the law conclusively infers that such harm was intended; the law presumes that the natural necessary and even possible consequences were intended by the author of the act; if of sound mind, the natural and proximate consequences; and if the act intended was unlawful, even the possible consequences," is erroneous, as ignoring all distinction between the intent to commit an act amounting only to a misdemeanor, and one that would, if committed, be a felony. *Id.*

10. WHERE THE DEFENDANT SEEKS TO JUSTIFY A HOMICIDE ON THE GROUND that the killing was necessary to protect the person of his wife, evidence on the part of the prosecution tending to show the bad character of the woman alleged to be the wife of the defendant, and that she kept a house of prostitution, with a view of showing that the deceased was upon the premises for purposes other than felonious, is proper. *People* v. *Pierson*. *Idaho*, 809.

11. AN INSTRUCTION, that "if the jury believes from the evidence beyond a reasonable doubt, that the defendant killed deceased on account of a desire for revenge for some real or imagined injury, then defendant is guilty of murder," is proper. *Id.*

12. WHEN THE DECEASED WAS SLAIN WHILE ENDEAVORING TO ESCAPE from the defendant and had succeeded in wholly withdrawing in good faith from the vicinity of defendant and his house, and all danger to the person of defendant, to his habitation or to any one residing therein was over, then the killing can neither be justified, excused or mitigated by declarations of defendant made to another person shortly before the homicide, and evidence thereof was properly refused. *Id.*

13. ACCESSORY AFTER THE FACT—CONCEALMENT OF DEAD BODY.—If a defendant has done no act which would make him responsible for a murder, the fact that he aided in concealing the dead body would render him liable only as an accessory after the fact. For such offense he could not be found guilty under an indictment for murder. *People* v. *Keefer*. *Cal.* 878.

14. CONSPIRACY TO COMMIT MISDEMEANOR—MURDER.—One who simply encourages another to commit a misdemeanor upon the body of a third person, which did not and could not cause death, or any serious injury, is not liable for the murder of such third person by his co-conspirator, when such killing was neither aided, advised nor encouraged by him, nor involved in nor incidental to any act by him aided, advised or encouraged. *Id.*

14. ONCE IN JEOPARDY—NEW TRIAL—MURDER.—A defendant having been once tried upon an indictment for murder, and found guilty of murder of the second degree, who afterwards, on his own motion, has the verdict set aside and a new trial granted him for errors in the admission of evidence, may on such new trial be convicted of murder of the first degree. *Id.*

16. PLEA OF ONCE IN JEOPARDY—MURDER OF TWO PERSONS AT SAME TIME AND BY SAME ACT.—The murder of two persons by the same act, according to the weight of authority, constitutes two offenses, for each of which a separate prosecution will lie, and a conviction or acquittal in one case does not bar a prosecution in the other. But where two persons are directly concerned in the murder of two others, although the killing takes place at the same point of time, it does not follow necessarily that the murder of the two was accomplished by the same act. *People* v. *Majors*. *Cal.* 580.

17. JURISDICTION WHEN DEFENDANT IS UNDER LIFE IMPRISONMENT.—The court has jurisdiction to try a defendant for murder, although he is at the time under sentence of life imprisonment for another crime. *People* v. *Majors*. *Cal.* 580.

18. MOTION FOR NEW TRIAL—PLEA OF FORMER CONVICTION—APPEAL.—The superior court has jurisdiction to try a defendant for the crime of murder, although an appeal has been taken, and is still pending in the supreme court, from an order denying him a new trial on a plea of former conviction. No appeal lies from such order. *Id.*

19. SCRUPLES AGAINST DEATH PENALTY—IMPANELING JURY.—In a prosecution for murder, although such crime is not necessarily punishable by death, still it may be, and, therefore, under subdivision 8 of section 1074 of the penal code, persons who entertain conscientious scruples against inflicting the death penalty can neither be permitted nor compelled to serve as jurors. *Id.*

20. MURDER BY INDIAN—JURISDICTION OF UNITED STATES COURT OVER.—The United States branch of the district court has exclusive jurisdiction of a prosecution for the murder of a white person committed by a Mescalero Apache Indian on the Mescalero Apache Indian reservation. The indictment for such a crime should be in the name of the United States. *United States* v. *Monte.* *N. M.* 265.

21. INVOLUNTARY MANSLAUGHTER.—The testimony of the defendant showed that he knocked down the deceased for assaulting him while the latter was drunk. That after so doing, and while the deceased lay prone and helpless, he jumped with both feet upon his face, and that death ensued from such act. *Held*, that such killing was felonious, that it had none of the elements of involuntary manslaughter, and that the court could so instruct the jury. *People* v. *Biggins.* *Cal.* 887.

22. A JUDGMENT CONVICTING THE DEFENDANT OF MANSLAUGHTER held supported by the evidence. *People* v. *Forsythe.* *Cal.* 288.

23. HOMICIDE—INSTRUCTIONS—INTENT—SELF-DEFENSE.—In a prosecution for a homicide when there is no evidence tending to show that the act producing the death was accidental or done in self-defense, an instruction is not erroneous which omits all reference to the intent with which such act was committed, and is silent upon the law of self defense. *Doctor Jack (an Indian)* v. *Territory.* *Wash.* 780.

24. THE REFUSAL OF THE COURT TO PERMIT THE COUNSEL OF A PRISONER CHARGED WITH MURDER, on cross-examination of a witness for the prosecution, to question him in regard to the desperate character of the deceased, and as to what the witness had told the defendant of threats made by deceased against the defendant, is not error, when none of such matters were gone into on the direct examination. *People* v. *Forsythe.* *Cal.* 288.

See APPEAL, 13, 14; EVIDENCE, 6; WITNESSES, 2.

NAVIGABLE STREAMS

See WATER RIGHTS, 1-8.

NEGLIGENCE.

1. NEGLIGENCE OF RAILROAD, ACTION TO RECOVER FOR.—In an action to recover damages for a loss occasioned by the negligence of a railroad company, when the complaint therein is framed to recover on the common-law liability of the company, the defendant's negligence must be proved. If the plaintiff fails in such proof on the trial he cannot abandon the action as brought and claim a recovery under a statute which makes the company liable as an insurer against a loss such as the one suffered by him. *Davis* v. *Utah S. R. R. Co.* *Utah*, 453.

2. CONTRIBUTORY NEGLIGENCE, INSTRUCTIONS AS TO.—Whether a plaintiff has been guilty of contributory negligence in placing his property, for the destruction of which an action is brought, in a house so constructed and situated as to be subjected to great risk through the ordinary operation of defendant's road, is a question for the jury. An instruction to the contrary, although erroneous, will not warrant a reversal, when it is evident that the jury disregarded it. *Id.*

3. ACT OF THE TERRITORIAL LEGISLATURE OF 1879 PROVIDING FOR THE SCALING OF LOGS by the lumber inspector, is not within the inhibition of section 1889 of the revised statutes. *Crawford et al.* v. *Cochrane et al.* *Wash.* 784.

4. SALE OF LOGS BY AGENT WITHOUT SCALING.—A gratuitous agent for the sale of certain booms of logs, who sells the same without having them scaled by the lumber inspector, is guilty of gross negligence, and is liable to his principal for the damage caused thereby. *Id.*

5. EVIDENCE OF THE CONDITION OF THE REMAINS OF THE DECEASED is admissible in an action for damages for a negligent killing. *Leahy* v. *S. P. R. R. Co.* *Cal.* 693.

See ADMIRALTY, 6; ATTORNEYS, 4; BANKS, 1; STREETS AND HIGHWAYS, 1-5.

NEGOTIABLE INSTRUMENTS.

1. NEGOTIABLE PROMISSORY NOTE, WHAT IS.—The following instrument, "$234. Denver, Colorado, January 12, 1882. On or before March 12, 1882, I promise to pay

to the order of J. O. Allen, two hundred and eighty-four dollars, at the City National Bank, with interest ten per cent. per annum, value received. This note becomes due and payable when (if before March 12, 1882,) Allen, Burke & Co. shall dispose of a part or all of their interest in the New York Hotel, or when the interest of M. C. Burke may be sold or disposed of." [Signed] "M. C. Burke, [and endorsed] "William Kiskadden"—is a negotiable promissory note. It is payable at a day certain, and not upon any contingency. *Kiskadden* v. *Allen*. *Col.* 320.

2. ENDORSEMENT BEFORE DELIVERY TO GIVE THE MAKER CREDIT.—When a promissory note made payable to a particular person, or order, is first endorsed by a third person, such third person is held to be an original promissor, or a guarantor, or an endorser, according to the nature of the transaction and the understanding of the parties at the time the transaction took place. *Id.*

3. THE SAME.—If the endorser put his name on the back of such a note at the time it was made, before its delivery to the payee, or as surety to the maker and for his accommodation, to give him credit with the payee, or, if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. *Id.*

4. PARTNERSHIP IN NOTE, EVIDENCE OF.—A negotiable note, payable to two or more persons jointly, is not evidence that it is owned in partnership; nor is the fact that such note is in the actual manual possession of one of the payees such evidence. The evidence reviewed and held not to establish a partnership in the notes in question. *Haydon* v. *Nicoletti*. *Nev.* 632.

5. ASSIGNEE OF JOINT PROMISSORY NOTE—INDORSEMENT BY ONE PAYEE.—The assignee before maturity of a negotiable promissory note, payable to the joint order of two persons not partners, indorsed by one only of the two joint payees, takes the same subject to all the equities existing in favor of the maker, the same as though it had not been endorsed by either. Such note cannot be transferred except by the joint indorsement of all the payees. *Id.*

CORPORATIONS, 1, 4, 5; COSTS, 3; PLEADING AND PRACTICE, 4; PLEDGE, 1; TIME CHECK. WAREHOUSEMAN.

NEW TRIAL.

1. PRACTICE—FILING STATEMENT FOR A NEW TRIAL—EXTENDING TIME.—When a party, having filed and served a notice of motion for a new trial, suffers more than five days thereafter to elapse without filing a "statement," and without taking any steps to enlarge the time for its filing, he thereby waives the right to move for a new trial, and no power exists in the district court to reinstate this right. An order made by the district court under such circumstances after the expiration of five days, granting the parties ten days' additional time to prepare and file his statement on motion for new trial, is nugatory. *Elder* v. *Frevert et al.* *Nev.* 414.

2. DECISION—FINDINGS—NOTICE OF MOTION FOR A NEW TRIAL.—Under the provision of the practice act requiring the party moving for a new trial to give notice of his intention "within ten days after receiving written notice of the rendering of the decision of the judge," where the action has been tried by the court, the "decision" referred to is the announcement by the court of its judgment, and is separate and distinct from the "findings," which may be made and filed by the court either before or after its decision. The time within which notice of intention to move for a new trial must be given begins to run from the service of notice of the announcement by the court of its judgment, and not from notice of its "findings." *Id.*

3. STATEMENT ON NEW TRIAL, AND ON APPEAL.—A "statement" not filed in time for a motion for a new trial may be treated as a sufficient "statement on appeal," if filed within the time required for such statements. *Id.*

4. NEW TRIAL—JUDGMENT—DECISION.—A motion for a new trial cannot be based on the ground of the insufficiency of the evidence to justify the judgment, or that the judgment is against law. Such motion should be directed at the decision, which consists of the findings of facts and conclusions of law. *Sawyer et al.* v. *Sargent*. *Cal.* 900.

5. STATEMENT ON NEW TRIAL—CERTIFICATION OF.—A statement on motion for a new trial will not be considered by the appellate court, when it is neither signed nor certified by the judge of the lower court. *Id.*

6. MOTION FOR NEW TRIAL, WHEN MUST BE MADE.—Court has no power to extend the time for making a motion for a new trial upon the oral *ex parte* application of the party desiring to move. Such extension can only be made upon written grounds showing how the moving party has been unavoidably detained. The provisions of

the compiled laws governing this subject, sections 308 and 309, are mandatory, and unless they are observed the appellate court acquires no jurisdiction. *McLaughlin* v. *Upton, Assignee, etc.* *Wy.* 57.

7. AN OBJECTION TO A MOTION FOR A NEW TRIAL ON THE GROUND that the same was not made in time is not waived by arguing such motion. *Id.*

8. NEW TRIAL—CONFLICT OF EVIDENCE.—An order granting a defendant a new trial, after a verdict convicting him of embezzlement, will not be reversed, when the evidence is conflicting. *People, etc.* v. *Burt.* *Cal.* 721.

9. WHEN THE EVIDENCE IS CONFLICTING, an order denying a motion for a new trial will not be disturbed on the ground that the same is insufficient to justify the verdict. *People* v. *Forsythe.* *Cal.* 288.

10. WHERE THERE IS A SUBSTANTIAL CONFLICT OF EVIDENCE on a material issue, the appellate court will not reverse an order of the lower court granting a new trial. *Davis* v. *Utah Southern Railroad Company.* *Utah*, 453.

11. NEW TRIAL GRANTED on the ground of newly discovered evidence. *People* v. *Carty.* *Cal.* 591.

See APPEAL, 14, 29; SUPERSEDEAS, 1.

NORTHERN PACIFIC R. R. CO.

See CONTRACT, 4; DEED, 2, 4; EASEMENTS, 3; TAXATION, 13, 17.

NOTICE.

See BONA FIDE PURCHASER, 1, 2; CONSTITUTIONAL LAW, 7, 8.

NUISANCE.

1. NUISANCE—ABATEMENT OF BY MUNICIPALITY.—A city, the charter of which empowers it to "make regulations to secure the general health of the inhabitants, to declare what shall be a nuisance, and to prevent and remove the same," may by ordinance define, classify and enact what things or classes of things, and under what conditions and circumstances such specified things are to constitute and be deemed a nuisance. But it cannot, by a mere resolution, declare a particular thing, such as a water ditch, a nuisance, which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination, and order its summary removal. Whether such ditch is a public nuisance must be judicially determined before it can be lawfully abated, either by the public or an individual. *City of Denver* v. *Mullen.* *Col.* 852.

2. THE SAME—BESIDES THE REMEDY BY INDICTMENT, a civil action lies to prevent or abate a public nuisance, on behalf of the public, by its proper officers. *Id.*

OBLIGATION.

See CONTRACTS, 5.

OREGON DONATION ACT.

1. "OREGON DONATION ACT," TITLE UNDER.—Under this act, by which there "is granted" to every man answering to a certain description, or if married, to him and to his wife in equal parts, a tract of land of specified area, upon certain prescribed conditions of selection, and in consideration of residence and cultivation for a certain period, the United States holds the position of seller and the donee that of purchaser. As soon as the necessary selection has been made, and the prescribed residence and cultivation completed, the transaction is closed, so far as the sale is concerned. Final proof is no part of the consideration which the grantee gives, but is merely evidence to satisfy the land office that the right of the grantee is perfect, and entitles him to a patent. The act, and not the patent, works the transfer of title. The patent is formal and solemn evidence, and when issued relates back as of the date when a fit grantee, rendering full consideration, had appeared. Title under this donation act is always complete before a patent issues, and the patent issues by virtue of a title complete, and not otherwise. *Brague* v. *Schofield et al.* *W. T.* 485.

2. THE SAME—PARTITION BY MINORS—ACQUIESCENCE—ESTOPPEL.—Previous to 1853, Amos Short, who was married, had duly selected, under the Oregon donation act, a tract of land, which is the subject-matter of the present controversy, and with

his wife had resided upon and cultivated it in full compliance with said act, so as to entitle himself and wife to a patent, subject to survey by the United States surveyor. In 1853 he died, leaving a widow and children. All the requirements of said act had been complied with, and the widow and children of Amos Short, held, prior to and in the year 1855, in undivided shares, all disposable interest in and to said tract of land, and were entitled to a patent therefor from the United States. In 1855 they agreed to make, and did make, a parol division or partition of this whole tract into halves; the east half was assigned to the widow, and the west half to the children. This partition was, of course, subject to the survey and division made by the surveyor-general, and to the division line which he might determine. The children, assuming that the west half belonged to themselves, proceeded in 1856 to make a partition of it and to determine their own shares in severalty. To this end, those who were of age applied personally, and those who were minors applied by guardian, to the proper probate court for a partition. Proceedings were thereupon had, by which the probate court, in form at least, decreed a partition of the west half among the children. To this partition all of the children actually and willingly consented by each, either personally or by guardian, taking possession and control of his or her portion in severalty, and by mutually paying and accepting owelty sufficient to fully equalize all the allotments. In 1874 the United States surveyor-general divided the land between the widow and the heirs, and among the heirs themselves, in exactly the same manner in which they themselves had partitioned it in 1856. Under these partitions, G. H. Short, one of the minor children, became entitled to and possessed of a share of said west half, known as lot 7, which is the land in controversy. He held and used that lot as his own until 1865. In that year his guardian, acting under direction of the court of probate, sold said lot to the appellee, Schofield, for a fair price, which, under direction of the court, was applied in paying a mortgage upon the premises and other debts proved and allowed against said minor's estate. G. H. Short became of age in 1866. In 1878, twelve years after attaining his majority, during which interval he had not, by word or act, objected to any of the foregoing proceedings, he gave to the appellant's grantor a quitclaim deed of all his right, title and interest in the said donation claim; and about the same time the other heirs gave to the appellant's grantor similar deeds of their respective interests. At the execution of these latter conveyances, periods varying from eight to twenty-one years had elapsed since each one of the heirs had become of age, during which times none of them had made any objection to the various proceedings above described. Meanwhile the appellees have put upon the premises permanent improvements of great value. *Held*, that even if the proceedings in the probate court for the partition and for the sale were irregular, the said heirs were estopped by their long acquiescence, after attaining their majority, from objecting to the regularity and validity of the partitions which had been made, or of the sale of the land by order of the probate court; and that their quitclaims to appellant's grantor conveyed no right, title or interest in the premises. *Id.*

See PUBLIC LANDS, 8, 9.

OUSTER.

See EJECTMENT, 7.

PARTICULARS.

See BILL OF PARTICULARS.

PARTIES.

1. AN ACTION ON A FORTHCOMING BOND MAY BE BROUGHT in the name of the sheriff, for the use and benefit of the real parties in interest, against the sureties on such bond, without joining their principal, and without showing that judgment has been obtained against the principal or that the plaintiff has exhausted his remedies against him. *Wagner* v. *Romero*. *N. M.* 269.
2. DEFECT OF PARTIES IN ACTION AGAINST PARTNERSHIP.—In an action against a partnership a defect of parties, consisting in a failure to name the individuals composing the firm, is waived by the appearance of the defendants, without specifically objecting to the defect. *Baxter et al.* v. *Scoland et al.* *Wash.* 552.

3. ASSIGNEE—REAL PARTY IN INTEREST.—An assignee of a note and account sued on is the real party in interest, within the meaning of the code of civil procedure, although the consideration for the assignment is a payment to be made to the assignor after recovery in the suit. *Bassett* v. *Inman*. *Col.* 534.

See CANCELLATION, 4; FRAUD, 1-3; JUDGMENT, 15-16; MORTGAGES, 5; PLEADING AND PRACTICE, 13; SUPPLEMENTARY PROCEEDINGS, 3-4; TRUSTS, 1.

PARTITION.

1. PENDENCY OF A SUIT FOR PARTITION IN THE STATE COURTS, such suit being in the nature of a proceeding *in rem*, is a bar to a subsequent suit for partition of the same land in the United States courts, brought by a successor in interest, *pendente lite*, of some of the parties to such former suit against the successors in interest of the other parties. *Martin* v. *Baldwin et al.* (*U. S. Cir. Ct.*) *Cal.* 8.

See OREGON DONATION ACT, 2.

PARTNERSHIP.

1. FINDING AS TO PARTNERSHIP HELD SUPPORTED BY THE EVIDENCE. *Snead* v. *Little*. *Cal.* 496.

See ACCOUNT STATED, 1; ACCOUNTING, 1, 2; ASSIGNMENT FOR BENEFIT OF CREDITORS, 3; JUDGMENT, 8; NEGOTIABLE INSTRUMENTS, 4, 5; PARTIES, 2.

PATENTS.

1. INOPERATING PATENT—REISSUES.—A patent need not be inoperative in its entirety to entitle the patentee to a reissue. If it be inoperative in part, so far as not to secure all that the inventor is entitled to claim, and what he is entitled to claim appears in his specifications, it is inoperative within the meaning of the provisions of the statute, and entitles the patentee to a reissue in such form as to cover his entire invention. *The Giant Powder Company* v. *Safety Nitro Powder Company* (*U. S. Cir. Ct.*) *Cal.* 79.

2. FRAUD IN REISSUE IS A QUESTION FOR THE PATENT OFFICE.—Whether a patentee innocently or fraudulently seeks a reissue of his patent is a question of fact for the officers of the patent office alone to determine; and their decision is conclusive in a collateral attack upon the patent. *Id.*

3. REISSUES IN IDENTICAL LANGUAGE OF A PRIOR PATENT VALID.—The owner of patent 78,317, surrendered it and obtained a reissue in patent No. 5,619. The latter was surrendered and reissued in patent No. 5,799, for the purpose of correcting a clerical error. Reissue No. 5,799 was held by the circuit court of the ninth circuit to be void, as embracing more than was shown or claimed in the original patent. There were conflicting decisions in different circuit courts upon the validity of the last reissue. After it had been adjudged void, the owner surrendered patent No. 5,799, and procured another reissue in the identical language of original patent No. 78,317. *Held*, that the last reissue is not void under the circumstances, in consequence of its being in the identical language of the original patent. *Id.*

4. SUB-COMBINATIONS—INDEPENDENT PATENTS.—Where a patent is issued for an invention consisting of a combination of a number of elements, and there is, at the same time, an invention made by the patentee consisting of a sub-combination of a part of the elements entering into the larger combination, and the patent issued does not embrace such sub-combination, the inventor of both, at the same time, may afterwards obtain an independent patent for the sub-combination, provided he applies therefor within two years after the invention has gone into public use or been on sale. *Cahn* v. *Wong Tong Town On*, (*U. S. Cir. Ct.*) *Cal.* 7.

5. PATENT FOR "REVOLVING DIP-NET."—The patent issued to Thornton F. Williams on August 2, 1881, and numbered 245,251 for an "improvement in revolving dip-nets," declared void for want of both invention and novelty, the same having been invented and put in operation by Samuel Wilson at the Cascades of the Columbia in the spring of 1879, and from which machine the said Williams, in the fall of that year and the spring of 1880, constructed his "revolving dip-net." *Williams* v. *McCord et als.* (*U. S. Cir. Ct.*) *Or.* 503.

PAYMENT.

1. PAYMENT FOR SPECIAL PURPOSE—ACTION FOR MONEY HAD AND RECEIVED.—An action for money had and received lies to recover back money paid by a debtor to his

creditor to be applied in satisfaction of a particular obligation, when the same is not so applied, and the obligation is otherwise discharged. It is not necessary in such action to allege a promise to repay. *Stewart* v. *Phy. Or.* 536.

See BONA FIDE PURCHASER, 1; PLEADING AND PRACTICE, 2, 3.

PERJURY.

1. SUBORNATION OF PERJURY, INDICTMENT FOR.—To sustain an indictment for procuring a person to commit perjury, it is necessary that perjury has in fact been committed. It cannot be committed unless the witness swears to what was false, willfully and knowingly. Consequently the indictment must aver, not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus that the crime of perjury would be committed by him *United States* v. *Evans* (*U. S. Dist. Ct.*) *Cal.* 611.

PILOT.

See ADMIRALTY, 1-5.

PLACE OF TRIAL.

See VENUE.

PLEADING AND PRACTICE.

1. DEMURRER—AVERMENT OF LEGAL CONCLUSIONS.—A complaint need allege only facts sufficient to constitute a *prima-facie* cause of action. If superfluous matters are alleged as legal conclusions, an objection thereto cannot be raised by demurrer. The allegations of the complaint, omitting those objected to by the defendant, *held* to state a good cause of action, and to be free from ambiguity or uncertainty. *Campbell et al.* v. *Taylor. Utah*, 541.
2. DEMAND, WHEN MUST BE MADE AND AVERRED.—Where a demand is necessary to fix the liability of sureties on an undertaking, it is parcel of the contract, and must be made before the commencement of an action for the breach of the undertaking, and in the action itself it must be averred and proved. It cannot be made after the commencement of the action, except as the basis of a new action. *Morgan* v. *Menzies et al. Cal.* 882.
3. A DEMAND FOR PAYMENT IS NOT NECESSARY TO THE STATEMENT of a cause of action by an attorney to recover the reasonable worth of his services. *Gibbs* v. *Davis. Or.* 825.
4. CAUSES OF ACTION, STATEMENT OF.—In an action on several bills of exchange, all bearing the same date, payable to the same party, due at the same time, the better practice is for the complaint to contain a separate statement on each bill. If, however, the complaint contains but a single statement, an order overruling a demurrer thereto will not be disturbed.—*Dawson* v. *Lail. Ariz.* 396.
5. CROSS-COMPLAINT—JOINDER OF CAUSES OF ACTION—DEMURRER.—An objection to a cross-complaint on the ground that several causes of action are unlawfully joined must be taken by demurrer, which specifically states the objection. If such demurrer is overruled, and an exception saved, the right to be heard thereon upon appeal is waived by afterward pleading over. *Green, Administratrix, etc.* v. *Taney. Col.* 531.
6. TRIAL BY JURY, CONSENT OF PARTIES TO.—A trial of issues of fact by a jury, which should have been tried by the court, is error. Such error is waived by the parties consenting to a trial by a jury. *Id.*
7. A DEFENDANT WHO CONSENTS TO TRY A CASE WITHOUT A JURY THEREBY WAIVES his right to afterwards object that the plaintiff's remedy was in law rather than in equity.—*Walla Walla* v. *Moore et al. Wash.* 214.
8. PLEADING CONTRACT FOR CONVEYANCE OF LAND.—In pleading a defense arising out of a contract for the conveyance of land, it is not necessary to allege that such contract was in writing. The statute of frauds has changed the rule of evidence, not the rule of pleading. *Tucker, Executrix, Etc.*, v. *Edwards. Col.* 400.
9. INCONSISTENT PLEAS—WHEN ALLOWABLE.—Under the practice prior to 1877, the several parts of each plea could not be repugnant to each other; but separate special pleas in the same answer might be inconsistent without rendering the pleading obnoxious to demurrer. *Id.*

10. ACCORD AND SATISFACTION—ELECTION—PLEADING.—In pleading his readiness to perform an accord agreement, where the promisee is given the privilege of electing between two alternative promises on the part of the promisor, it is sufficient for the latter to aver his constant readiness and willingness to perform either, at least until the promisee has indicated his choice. An actual tender of performance need not be averred. *Id.*

11. OVERRULING DEMURRER, WAIVER OF EXCEPTION TO.—In an action on a judgment where the defendant pleads *nul tiel record* and an accord and satisfaction, an exception, to the sustaining of a demurrer to each latter plea is not waived by proceeding to trial on the issue raised by the former. *Tucker* v. *Edwards*. *Col.* 400.

12. PLEADING FACTS CONSTITUTING FRAUD.—In an action to annul a conveyance on the ground of fraud, when the facts constituting the fraud are not clearly known by the plaintiff, the same may be alleged in the alternative. *Rasmussen et al.* v. *McKnight et al.* *Utah*, 205.

13. IN SUCH ACTION, WHEN THE FRAUD CONSISTS IN TAKING A DEED in the name of a married woman, and in giving a mortgage to the grantor in the name of her husband, he being the person who committed the fraud, the wife is a necessary and proper party whether she was a *particeps criminis* to the fraud or not. *Id.*

14. VENUE, WHEN MUST BE ALLEGED.—In an action to recover the possession of specific personal property, the jurisdiction of the court must be shown by an allegation in the complaint of the place of detention. A failure to make such allegation can not be taken advantage of after verdict when the sheriff's return shows that the property was taken in the county over which the court had jurisdiction. *Stiles* v. *James*. *Wash.* 212.

15. EQUITABLE DEFENSES MAY BE INTERPOSED to an action at law. *Salisbury* v. *Ellison*. *Col.* 612, 102.

16. DEFENSE NOT PLEADED, WHEN MAY BE TAKEN ADVANTAGE OF.—If a defense, legal or equitable, to which the defendant is entitled to the benefit, be not averred in the answer, but is fully established by the plaintiff in attempting to make out his case in the first instance, the plaintiff will be deemed to have waived the absence of averment, and cannot recover if objection be taken by the defendant. *Id.*

17. PLEA SHOULD PRESENT A SINGLE ISSUE.—The object of a plea, is, to present and try a single issue, which may decide the suit, without putting the parties to the expense of trying all the issues in the case. But one issue can be presented by plea, without leave of the court, and in a suit upon a patent the court will not ordinarily permit a party to present and try upon pleas all the issues that can be raised, except the single issue as to infringement. *Giant Powder Co.* v. *Safety Nitro Powder Co.*, (*C. S. Cir. Court*). *Cal.* 79.

18. DELAY IN ASKING LEAVE TO FILE SEVERAL PLEAS will not be encouraged. *Id.*

19. THE COURT MAY GRANT LEAVE TO FILE AN ANSWER after the time for answering has expired, where no default has been entered. *Sieber* v. *Frink*. *Col.* 98.

20. A DEFENDANT IS BOUND BY AN ADMISSION IN HIS ANSWER as to the amount due from him to the plaintiff, and it is error for the court to order judgment to be entered upon a verdict for a less amount. *Coffman* v. *Brown*. *Col.* 98.

21. PERMITTING COUNSEL IN HIS ARGUMENT TO READ TO THE JURY A PORTION OF AN OPINION OF THE SUPREME COURT is not error sufficient to warrant a reversal. Such practice, however, is not to be commended. *People* v. *Forsythe*. *Cal.* 288.

22. A PLAINTIFF CANNOT DISMISS AN ACTION OF HIS OWN MOTION after the defendant has answered and averred matters upon which affirmative relief is asked, growing out of the transactions set forth in the complaint. *Clarke et al.* v. *Hundley, Judge, etc.* *Cal.* 215.

23. SERVICE OF PAPERS—SECTION 685 OF THE CODE OF CIVIL PROCEDURE OF IDAHO, WHICH PROVIDES that service of papers may be made by leaving the same in the office of an attorney in a conspicuous place, etc., is in derogation of the common law, and must be strictly construed. *Warner* v. *Teachenor et al.* *Idaho*, 21.

24. AN AFFIDAVIT IN PROOF OF SUCH SERVICE must state that all the conditions of the statute authorizing such service have been substantially complied with, or it will be disregarded. *Id.*

25. DISMISSAL OF PARTY—JUDGMENT.—The entry of an order dismissing an action as to a certain defendant, ousts the court of jurisdiction of such person, and a judgment subsequently entered against him, without vacating such order, is void. *Sere* v. *McGovern et al.* *Cal.* 892.

26. A PAPER IS FILED WHEN IT IS DELIVERED TO THE PROPER OFFICER, and by him received for filing, whether the same is indorsed as filed or not. *Wescoat* v. *Eccles*. *Utah*, 446.

See AMENDMENT; APPEAL; ATTACHMENT; BILL OF EXCEPTIONS; BILL OF PARTICULARS; BONA FIDE PURCHASER, 1, 4; COUNTER-CLAIM; DEMURRER; EJECTMENT, 7; EMINENT DOMAIN, 4; FINDINGS; INJUNCTION, 7; INSTRUCTIONS; INTERPLEADER; JUSTICE COURT; NEW TRIAL; PARTIES; PAYMENT; QUIETING TITLE; RULES OF COURT; SUMMONS; WATER RIGHTS, 9.

PLEDGE.

1. PLEDGEE—BONA FIDE HOLDER—NEGOTIABLE NOTE.—A pledgee of negotiable paper as collateral security is entitled to be protected as a *bona fide* holder to the same extent as one who becomes the absolute owner, and may maintain suit thereon in his own name, as the real party in interest. The only difference between the rights of such parties, as against the maker, is that the absolute owner may recover in full, while the pledgee, if there be equities, is restricted to the extent of his advances. *Haydon* v. *Nicoletti et al.* *Nev.* 632.
2. EXECUTION ON PLEDGOR'S INTEREST IN PROPERTY PLEDGED.—The interest of a pledgor in property pledged, with a limited power of sale for the protection of the pledgee, may be levied upon and sold under an execution against the pledgor. The pledgor holds the legal title to the property pledged, and not merely an equitable interest. *Willams* v. *Gallick.* *Or.* 537.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; INSURANCE, 1.

POLICE COURT.

See APPEAL, 15.

POLL TAX.

See TAXATION, 24.

PRE-EMPTION.

See PUBLIC LANDS.

PROBATE COURT.

1. VERIFICATION OF PETITION IN PROBATE COURT—JURISDICTION.—Proceedings in the probate court of Umatilla county, Oregon, are not void for want of jurisdiction because the petition on which such proceedings were founded was unverified. *McCoy* v. *Ayers, Administrator, etc.* *Wash.* 564.
2. PRESUMPTION AS TO THE SITUS OF PERSONALITY.—The fact that a probate court has assumed jurisdiction over certain personal property is *prima facie* evidence that such property is within the jurisdiction of the court. *Id.*
3. THE PROBATE JURISDICTION OF THE SUPERIOR COURT IS SEPARATE AND DISTINCT from the jurisdiction of such court in ordinary civil actions. *In re Algier et al.* *Cal.* 876.

See EXECUTORS AND ADMINISTRATORS, 3; GUARDIAN AND WARD, 2, 3; JUDGMENT, 2; SALES, 6, 7.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See COSTS, 3.

PUBLIC LANDS.

1. THE AFFIDAVIT OF AN APPLICANT FOR THE PURCHASE OF STATE LANDS must set out the facts required by the statute to be stated therein. An affidavit which fails to state whether there are or are not settlers on the land which is sought to be purchased is insufficient. *McCoy* v. *Byrd et als.* *Cal.* 139.
2. MATTERS WHICH THE STATUTE REQUIRES TO BE STATED IN SUCH AFFIDAVIT cannot be held immaterial. *Id.*

3. PURCHASE OF STATE LADNS BY CHINESE.—A citizen and subject of the Chinese empire, who is a *bona fide* resident of the State of Nevada, is entitled, under the laws of the United States and of such State, to locate or purchase any of the public lands belonging to such State. *State ex rel. Fook Ling* v. *Preble. Nev.* 43.

4. SALE OF PRE-EMPTOR'S POSSESSORY RIGHT BY ADMINISTRATOR.—An administrator is entitled to the possession of a tract of land entered under the pre-emption laws by his intestate, and may sell, under direction of the probate court, any right of possession of the land that may have fallen to him by virtue of his administration. Nothing contained in sections 2263 and 2269 of the United States revised statutes prohibits such sale. *Burch, Administrator, etc.*, v. *McDaniel et al. Wash.* 546.

5. SALE OF "SOLDIERS' ADDITIONAL HOMESTEAD SCRIP."—In the absence of a further equitable showing, money paid for the purchase of "Soldiers' Additional Homestead Scrip," cannot be recovered back on the ground of a total failure of consideration. Under sections 2306 *et seq.*, of the United States revised statutes, the right to locate and make entries under such scrip belongs to the soldiers alone, and a contract for a sale thereof is against the policy of the law.—*Mackintosh* v. *Renton, Holmes & Co. Wash.* 777.

6. DISTRICT COURT HAS NO JURISDICTION OF A CONTROVERSY TO DETERMINE the conflicting rights of claimants to a portion of the public domain, when such controversy is already undetermined before the department of the interior. *Hays* v. *Parker. Wash.* 801.

7. DECISION OF THE TIDE LAND COMMISSIONERS.—The commissioners under the acts of 1872 and 1874, to dispose of the state tide lands, were authorized to decide who was entitled, in certain cases, to be preferred as a purchaser thereof, and their determination of the matter cannot be questioned elsewhere, except for an error of law or a fraud extrinsic and collateral to the contest, by which a full and fair hearing of the matter was prevented. *Shively* v. *Welch et al.* (*U. S. Cir. Ct.*) *Or.* 713.

8. SETTLER UNDER THE DONATION ACT.—It does not appear that James Welch was ever a "settler" under the laws of the provisional government or the donation act upon the donation patented to John M. Shively and wife; and if he was, upon his abandonment of all such claims thereto in 1860, and before he was entitled to the grant, his wife had no interest in it or the consideration received therefor.—*Id.*

9. CONVEYANCE TO ONE PERSON UPON A CONSIDERATION MOVING FROM ANOTHER.—In 1860 John M. Shively, in consideration that James Welch abandoned his claim to be a "settler" upon the former's donation claim, conveyed a certain portion thereof to said Welch, and a like portion, including 5 and 13 in "Shively's Astoria," to his wife Nancy. *Held*, that Nancy did not hold said blocks under her husband but the grantor, Shively, and therefore she was entitled under the acts of 1872 and 1874 (Ses. L. 129, 76) to purchase the tide land in front of said blocks, although her husband had quit-claimed the same to Shively in 1850. *Id.*

10. TOWN SITE OF RED BLUFF—STATUTES AFFECTING—CERTIFICATES OF TITLE—TRUST ESTATE—CONVEYANCE BY TRUSTEE.—On May 1st, 1865, Ann Wasson, then a widow with a child by a former husband, the plaintiff here, entered upon and took possession of certain lots forming part of the town site of Red Bluff. She resided there with her child until her marriage, in 1866, to Wasson; thereafter she, her husband and the plaintiff continued to live and occupy said premises as her property until her death in 1867, when she died intestate, leaving surviving her as her heirs at law, her husband and the plaintiff. Said town site had been entered at the office of the register of the land office of the United States, by the county judge of Tehama county, in trust for the several use and benefit of the occupants thereof, under acts of congress providing for the reservation of town sites upon the public lands of the United States. Thereafter said trustee purchased the lands under the provisions of an act of congress applicable to his trust, and on September 29, 1866, a United States patent was issued to the county judge and his successors in office. On March 6th, 1868, the legislature passed an act authorizing the trustee to distribute the town lots held by him in trust, and to issue certificates of title to the inhabitants of said town in accordance with their respective interests. On July 9th, 1868, Wasson, claiming as heir at law of his wife, obtained from the trustee the certificate of title to the premises in dispute, in his own name, which were afterwards conveyed by mesne conveyances to the defendant. *Held*, that the widow, under the aforesaid acts of congress, as the original and *bona fide* occupant of said lots, became vested with an equitable title to the same, as her separate property, which she would have had a right to perfect, had she lived, by obtaining from the trustee, when he came to execute his trust, under the regulations prescribed by the state, a certificate of legal title; upon her death, before such regulations had been prescribed, her interest

vested in her husband and the plaintiff as tenants in common, each entitled to an undivided half of the premises; that the legal title obtained by the husband, and his entry thereunder, inured to the benefit of the plaintiff, and was held by him in trust for her; and that the defendant, who took such land with notice of the equitable rights of the plaintiff, as shown by the county records, could acquire no greater rights therein than his grantor had. *Eversdon* v. *Mayhew*. *Cal*. 726.

See DEED, 1-5; DENVER TOWN SITE, 2; EASEMENTS, 3; OREGON DONATION ACT.

PUBLIC OFFICERS.

1. COUNTY CLERK OF HUMBOLDT COUNTY, SALARY OF.—On February 28, 1876, the offices of county clerk, auditor and recorder of Humboldt county were united in the same person. On that date the legislature passed an act fixing the annual salary of the person filling such offices at five thousand dollars. Subsequently Humboldt county was organized as a county of the second class, and the offices of auditor and recorder were separated from that of county clerk. The annual salary of the county clerk was thereupon fixed by the board of supervisors at two thousand seven hundred dollars. *Held* that the act of February 28, 1876, was intended to regulate the salary of such offices only while they were united in the same person. That when the organization of the county government was changed, and the offices were separated, no one of the three officers was entitled to receive the salary intended for the three; and as the act did not provide for the separation of the three offices, it became inoperative when such separation occurred. *Kinsey, County Clerk, etc.*, v. *Kellogg, etc. Cal.* 368.
2. THE SAME.—As there was no operative law fixing the compensation of the county clerk after Humboldt county became organized as a county of the second class, the board of supervisors had authority to fix the compensation of that officer. *Id.*

See COUNTY CLERK; COUNTY GOVERNMENT, 2.

QUIETING TITLE.

1. ACTION TO QUIET TITLE—ALLEGATIONS OF COMPLAINT.—A complaint to quiet title is sufficient, which alleges ownership in the plaintiff in the land in controversy, and that the defendant claims an estate or interest therein adverse to him, which claim is without right, and that defendant has no estate, right, title or interest. *Rough* v. *Simmons*. *Cal.* 831. *Rough* v. *Booth*. *Cal.* 832.

QUIT CLAIM DEED.

See EJECTMENT, 6.

QUORUM.

See CORPORATIONS, 3, 4.

RAILROADS.

See BONDS, 1; See CORPORATIONS, 13; NEGLIGENCE, 1, 2.

RECEIVER.

1. ORDER SETTLING A RECEIVER'S ACCOUNT WILL BE AFFIRMED when no error appears. *Montgomery* v. *Merrill*. *Col.* 140.
2. OBJECTIONS AND EXCEPTIONS TO THE ALLOWANCE OF A VERIFIED ACCOUNT of a receiver appointed in an action for the foreclosure of a mortgage need not be verified. *Id.*

RED BLUFF TOWN SITE.

See PUBLIC LANDS, 10.

REFERENCE.

1. IN AN EQUITABLE ACTION THE COURT HAS POWER TO REFER THE SAME to a referee to take the testimony, and to decide the action upon the testimony so taken. In reviewing such evidence the appellate court may weigh the same with a view to a just determination, uninfluenced by the proposition that the court below had superior facilities to judge of the credibility of witnesses. *Sieber* v. *Frink*. *Col.* 98.

REFORMATION.

See FINDINGS, 15.

REMOVAL OF CAUSES.

1. REMOVAL OF CAUSES—CITIZENSHIP OF PARTIES.—The petition for the removal of an action on the ground that the parties are citizens of different states must show that such ground of removal existed both at the time of the commencement of the action and at the time of the application for removal. A petition which only alleges that the defendant is, and always has been, a citizen of California, and that the plaintiff *is* a citizen of Missouri is insufficient. *McNaughton* v. *South Pacific Coast R. R. Co.* (*U. S. Cir. Ct.*) *Cal.* 662.

2. THE SAME—AMENDMENT OF PETITION.—The citizenship of the parties, under such circumstances, are jurisdictional facts, and must be alleged in the petition. If such allegations are not made, whether the petition may be amended in the circuit court so as to show them *quære*. If the power to allow such amendments be conceded, it is not a matter which the party removing can demand as a legal right, but only a matter for the exercise of a sound discretion by the court. Such an amendment should not be allowed where, after an amendment of the petition in the circuit court, the record in each court, would show upon its face jurisdiction which would authorize it to proceed to final judgment. *Id.*

3. THE SAME—APPLICATION, WHEN SHOULD BE MADE.—This action was commenced in the fourth district court of the state of California, on August 1, 1879; defendant demurred August 22, 1879. The demurrer was overruled. It answered September 12, 1879. Plaintiff demurred to that part of the answer, setting up new matter as a defense, October 2, 1879. The new constitution of California of 1879 having in the meantime taken effect, the case was transferred into the superior court as the successor of the district court, and on January 23, 1880, was assigned to department No. 7 of the superior court. On March 22, 1880, the demurrer to the answer was sustained. An amended answer was filed April 1, 1880, which put the case at issue. The constitution of 1879, and the statutes passed in pursuance thereof, provide that "the superior courts shall always be open (legal holidays and non-judicial days excepted) and they shall hold * * * regular sessions commencing on the first Mondays of January, April, July and October, and special sessions at such other times as may be prescribed by the judge or judges thereof." On January 21, 1884, the defendant filed a petition to remove the case to the United States circuit court, on the ground that the parties were citizens of different states. *Held*, that under the act of congress of 1875, providing that the application for removal must be made "before or at the term at which said cause could be first tried," the application in this case came too late; that the four general sessions of the superior court required to be held are "terms" within the meaning of the act. *Id.*

4. TRANSFER OF CAUSE TO FEDERAL COURT.—An order of the lower court refusing a motion to transfer the cause to the federal court can not be reviewed on an appeal from the judgment alone. *Rough* v. *Booth*. *Rough* v. *Simmonds*. *Cal.* 72.

5. THE BOND REQUIRED ON SUCH TRANSFER MUST BE SIGNED by the principal. *Id.*

REMOVAL OF COUNTY SEAT.

1. REMOVAL OF COUNTY SEAT—LEGISLATIVE AUTHORITY OVER.—The act of February 11, 1881, regulating the removal of county seats, and providing that "not less than two thirds of all the legal votes cast shall be necessary to effect the removal of the county seat of any county in this state," is not in conflict with section 2, article 14, of the constitution, which declares that "no county seat shall be removed unless a majority of the electors voting on the proposition vote therefor." *Alexander* v. *People*. *Col.* 92.

REPLEVIN.

1. REPLEVIN OF JOINT PROPERTY.—Personal property incapable of division, and owned by two or more joint owners, or tenants in common, cannot be replevied by one or more of such owners from the owners who have the exclusive possession thereof. *Hill et al.* v. *Seager*. *Utah.* 673.

2. ACTION FOR CLAIM AND DELIVERY—JUDGMENT.—Under the code, a defendant who recovers judgment in an action for the claim and delivery of personal property where the same has been delivered to the plaintiff, is entitled to a judgment for a

return of the property; and if all the property cannot be returned, then to a judgment for the value of the whole. In such action, the wrong-doer cannot acquire the privilege of restoring to the owner a particular article of the property wrongfully detained, or of paying instead its value as found by the jury, nor can he complain that the alternative judgment is for less than the value of the property. *Wetmore* v. *Rupe*. *Cal.* 885.

See AMENDMENT, 1.

RESTRICTION ACT.

See CHINESE RESTRICTION ACT.

REVENUE ACTS.

See DUTIES.

RIGHT OF WAY.

See EASEMENTS, 1-3.

ROADS.

See STREETS AND HIGHWAYS.

ROBBERY.

1. TO CONSTITUTE ROBBERY OR LARCENY THE GOODS MUST HAVE BEEN TAKEN *animo furandi*. *People* v. *Keefer*. *Cal.* 878.
2. INSTRUCTIONS IN REGARD TO ROBBERY.—When a defendant is on trial and is convicted of the crime of robbery, erroneous instructions relating to the crime of grand larceny will not warrant a reversal, when the instructions in regard to the crime of robbery are correct. *People* v. *Riley*. *Cal.* 364.
3. ROBBERY—STATEMENT OF PERSON ROBBED—RES GESTÆ.—On a trial for robbery, after the prosecuting witness has testified "that he thought that he had been knocked down and his watch [the property claimed to have been taken] was taken from him without his consent, but of this he was not certain," the prosecution can not give evidence of a statement of such witness, made some time after the alleged robbery occurred, and not in the presence of the defendant, to the effect that he had "been knocked down and robbed." Such statement forms no part of the *res gestæ*. *People* v. *Ehring*. *Cal.* 590.

RULES OF COURT.

1. A COURT CANNOT BY RULE DEPRIVE A PARTY OF A RIGHT given him by statute. *Wescoat* v. *Eccles*. *Utah*, 446.

See APPEAL, 23.

SACRAMENTO BONDS.

See BONDS, 2-4.

SALES.

1. SALE OF REAL ESTATE—COMMISSIONERS—TIME WHEN ESSENCE OF CONTRACT.—The respondents authorized the appellants in writing to sell certain real and personal property for them at a given price, and within a specified time. On the last day of such time the appellants produced as a purchaser one who professed to be able to pay the price agreed upon, and willing to do so if the respondents would allow him a reasonable time to examine the title to the property. This the respondents refused, but tendered him a deed for the property, which he refused to accept, for want of an opportunity to make such examination. *Held*, that the appellants were not entitled to the stipulated commission; that time was of the essence of the contract for the sale; that a reasonable time for the examination of the title could not be implied where the limit for acceptance was definitely fixed by the terms of the offer; that to entitle them to commissions the appellants should have produced a purchaser both able and willing to consummate the purchase within the stipulated time. *Watson et al.* v. *Brooks et al.* *Or.* 815.

2. A SALE OF PERSONAL PROPERTY IN THE POSSESSION OF THE VENDOR carries with it a warranty of title, including a warranty against incumbrances. *Baker* v. *McAllister*. *Wash.* 690.

3. BREACH OF WARRANTY OF TITLE—RECISSION.—Where personal property is sold with warranty of title, and at the time of sale the same is subject to a lien not known to the vendee, by reason of which said property is taken and kept from the vendee, without negligence or fault on his part, such taking will of itself, at the option of the vendee, work a recission of the contract of sale, and be a good defense to an action for the purchase price. *Id.*

4. THE SAME—PAYMENT OF LIEN BY VENDEE.—The vendee under such contract need not discharge the existing lien. If, however, he does so, the amount so paid should be set off against the purchase price. *Id.*

5. IMPLIED WARRANTY—SALE BY WRITTEN CONTRACT.—PAROL EVIDENCE.—The vendor of personal property in his possession warrants his title to the same by implication. Whether such sale be by written bill or sale or oral, the implied warranty of title may be rebutted by parol. The law does not generally imply warranties as to quality. As to such warranties the rule is *caveat emptor*, and the purchaser has no remedy except in cases of express warranty or fraud. If the contract of sale be reduced to writing, nothing which is not found therein, except that which the law implies, forms part of the contract. When such contract contains no warranty, or expresses the waranty that is given by the vendor, parol evidence is inadmissible to show the existence of a warranty in the former case, or to extend it in the latter. *Johnson* v. *Powers*. *Cal.* 740.

6. INFORMALITY IN THE DELIVERY OF PERSONAL PROPERTY SOLD BY AN EXECUTRIX DOES NOT VITIATE the sale so as to render it impossible of subsequent ratification by the probate court. *Id.*

7. A SALE OF THE PROPERTY of an estate without an order therefor by the probate court, may be subsequently ratified by such court, or by the parties interested in such estate, so far as their interest is concerned. *Brewster* v. *Baxter*. *Wash.* 791.

8. A CONDITIONAL SALE, DEPENDENT UPON AN ACT to be done, such as the payment of the consideration within a certain time, which is not done, does not pass the title to the vendee. *Sere* v. *McGovern*. *Cal.* 892.

See CONTRACT, 1; FERRIES, 3.

SAN FRANCISCO.

1. BOARD OF SUPERVISORS OF SAN FRANCISCO—FORMATION OF.—The consolidation act of the city and county of San Francisco regulates and determines the formation of the board of supervisors of such city and county until changed or superseded by proceedings under article XI of the constitution of 1879. *People ex rel. Dougherty* v. *Board of Election Commissioners, etc.* *Cal.* 366.

See STREETS AND HIGHWAYS, 6.

SATISFACTION.

See ACCORD AND SATISFACTION.

SENTENCE.

See CRIMINAL LAW AND PRACTICE, 15.

SOLDIERS' ADDITIONAL HOMESTEAD SCRIP.

See PUBLIC LANDS, 5.

SPECIFIC PERFORMANCE.

1. SPECIFIC PERFORMANCE OF A WRITTEN CONTRACT FOR THE SALE OF LAND will be refused when the description of the land, in the light of surrounding circumstances, is not sufficient to enable the court to determine the precise tract of land intended to be disposed of. *Richards* v. *Snider et al.* *Or.* 282.

2. CONTRACT FOR SALE OF LAND—SPECIFIC PERFORMANCE.—A written agreement for the sale of land, which reserves to the vendor the privilege of foreclosing all the rights of the vendee, in case of the non-payment of the purchase price, may be specifically enforced by the vendor. It is not necessary for him to resort to the remedy of foreclosure. *Wood* v. *Mastick et al.* *Wash.* 549.

STATUTES.

1. CONSTITUTIONAL LAW—TITLES OF STATUTES.—Article V, Section 20, of the Constitution of Colorado—"No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title," etc.—is mandatory, and contains the declaration of an essential condition to the validity of legislative enactments, and so much of any act as is not directly germane to the subject expressed in the title, is without force. *People ex rel. Kellogg* v. *Fleming et als.* *Col.* 315.

2. THE SAME—TITLE OF AN ACT NOT EXPRESSING ITS SUBJECT.—A statute passed February 11th, 1883, is entitled, "An Act to amend Section 78 of Chapter C, of the General Laws of the State of Colorado, entitled, Towns and Cities and especially cities of the second class," and provides for the election of the mayor and other city officers of Leadville on certain days, prescribes their terms of office, and regulates their official duties. Chapter "C," of the General Laws is not entitled "Towns and Cities, and especially cities of the second class," nor is there any other chapter so entitled. Chapter "C" contains several subdivisions, and only one of them contains 78 sections. The section 78 only provides that the mayor of a city shall be the presiding officer of the city council, and that he may vote in case of a tie, but not otherwise. *Held*, that the subject-matter of the said act of February 11, 1883, was not expressed in its title, that no part of it was germane to the subject-matter of said section 78 to which its title referred, and which it purported to amend, and that said act was therefore wholly void. *Id.*

3. THE SAME—REPEALING CLAUSE.—Said statute being void, its repealing clause which provides that "all acts and parts of acts inconsistent with this act are hereby repealed" is also inoperative and void. *Id.*

4. THE SAME—STATUTE VOID FROM REPUGNANCY.—It seems that a statute which provides, with respect to all of the city officials of a certain city, that they "shall be elected on the first Tuesday of April *in each and every year*, and that each of them shall hold his office for the term *of two years*, and until his successor is elected and qualified," is void from uncertainty and repugnancy. *Id.*

See CHINESE RESTRICTION ACT. OREGON DONATION ACT.

CONSTRUCTION OF STATUTES (note), 680.

STATUTE OF FRAUDS.

1. LEASE TO COMMENCE IN FUTURO—STATUTE OF FRAUDS.—A lease of land for a year, to commence *in futuro*, is "an agreement not to be performed within a year," within the meaning of the statute of frauds, and must be in writing; otherwise it is invalid. *White* v. *Holland et al.* *Or.* 671.

See PLEADING AND PRACTICE, 8.

STATUTE OF LIMITATIONS.

1. IDENTITY OF DEBT SUED ON—EVIDENCE OF.—In an action founded on a promise to pay a debt barred by the statute of limitations, evidence to identify the indebtedness with the promise is admissible. *Anthony* v. *Savage.* *Utah*, 674.

See CONVERSION, 1; CORPORATIONS, 5; TAXATION, 28.

STOCK HOLDERS.

See CORPORATIONS.

STREETS AND HIGHWAYS.

1. A MUNICIPAL CORPORATION IS LIABLE FOR INJURIES RESULTING to a private individual, on account of the negligence of its agents in grading a public street. Nor is it relieved from liability by the fact that such grading is done by a contractor, working under the directions of the city surveyor. *City of Seattle* v. *Busby.* *Wash.* 45.

2. LIABILITY OF MUNICIPAL CORPORATIONS FOR NEGLECTING TO REPAIR HIGHWAYS.—When municipal corporations are invested with exclusive authority and control over the streets and bridges within their corporate limits, with ample power of raising money for their construction, improvement and repair, the duty is imposed upon such corporation, from the nature of the powers granted, to keep such highways in

a reasonable safe condition for the ordinary mode of use to which they are subjected, and a corresponding liability rests upon them to respond in damages to those injured by a neglect to perform such duty. *City of Denver* v. *Dunsmore*. *Col.* 841.

3. THE SAME—THE CITY OF DENVER BEING OBLIGED TO KEEP IN REPAIR the streets and bridges within its corporate limits, is impliedly liable for any special damages suffered in consequence of its neglect so to do. *Id.*

4. THE SAME—TO ENTITLE A PLAINTIFF TO A RECOVERY FOR SUCH DAMAGES he must have used reasonable or ordinary care, or such care as is usually exercised, under like circumstances, by persons of ordinary prudence, to avoid the accident. If the plaintiff's own testimony shows that he brought the injury upon himself, by his own carelessness, he must be non-suited; otherwise, the proof of contributory negligence must come from the defendant. *Id.*

5. CONTRIBUTORY NEGLIGENCE—CASE IN JUDGMENT.—The appellant had permitted a bridge in one of its principal thoroughfares to become unsafe for the ordinary use to which it was daily subjected, and with full knowledge of its unsafe condition, had failed to either repair it or give any warning of its unsafe condition. While in such condition the plaintiff attempted to cross the bridge with a load of rocks. In so doing the wheel of his wagon crushed through the floor of the bridge, going down to the hub, and while endeavoring to pry it up, by the use of levers and fulcrums, the timbers gave away and the plaintiff fell and broke his leg. According to the plaintiff's testimony, he did not know that the bridge was unsafe, although he knew that it was much worn and would shake when a load of freight was crossing. *Held*, that whether the plaintiff was guilty of contributory negligence in adopting the means used by him in attempting to extricate his wagon, was a question for the jury. *Id.*

6. ACCEPTANCE OF STREET—SIDEWALKS—ROADWAY.—Under section 21 of the act of 1866 the power of acceptance of a street by the board of supervisors of the city and county of San Francisco is not limited to the roadway, but may include the sidewalk. After the acceptance of a street the expense of repairing the sidewalks thereof must be borne by the city and county. *Bonnet* v. *San Francisco*. *Cal.* 832. *Parker* v. *San Francisco*. *Cal.* 878.

7. ALL ROADS USED AS SUCH FOR A PERIOD OF MORE THAN FIVE YEARS become public highways, under section 2619 of the political code. There is no constitutional inhibition against such legislation. *Bolger* v. *Foss*. *Cal.* 897.

3. A FINDING THAT A CERTAIN ROAD IS A PUBLIC HIGHWAY is not overcome by a further finding that the owner of the land through which it passed had placed gates at the points where it entered upon and emerged from his land. *Id.*

SEE DEDICATION; EMINENT DOMAIN, 4; FERRIES, 1-2; WATER RIGHTS, 1-8.

SUBORNATION OF PERJURY.

See PERJURY.

SUMMONS.

1. CORPORATION—SERVICE OF SUMMONS ON.—In an action against a corporation in the United States circuit court for the district of Oregon, if the summons is served under said subdivision 1 of section 54, on any agent of the defendant other than its president, secretary, cashier, or managing agent, unless it appears that the cause of action arose in the district, such service is illegal, and will be set aside on the application of the defendant. *Lung Chung*, v. *N. P. Ry. Co.* (*U. S. Dist. Court.*) *Or.* 88.

2. RIGHT TO APPEAR SPECIALLY.—A defendant in an action upon whom a summons has been served illegally may appear therein specially, for the purpose of having such illegal service set aside; and there is nothing in sections 61 and 520 of the Oregon code of civil procedure derogatory of such right. *Lung Chung* v. *N. P. Ry. Co.* (*U. S. Dist. Ct.*) *Or.* 88.

3. ACTION IN NATIONAL COURTS.—Subdivision 1 of section 54 of said code, when applied to actions in the national courts, must be construed as if the word "county" read "district." *Id.*

4. FAILURE TO INDORSE THE NAME OF THE PLAINTIFF'S ATTORNEY ON THE BACK OF THE SUMMONS does not invalidate the same when such name is written on the face the summons. *Shinn* v. *Cummins*. *Cal.* 216.

5. THE PENDENCY OF A MOTION TO VACATE A PRETENDED SERVICE OF SUMMONS does not extend the time specified therein for answering. *Id.*

See JUSTICE COURT, 2.

SUPERSEDEAS.

1. NEW TRIAL—WRIT OF ERROR—SUPERSEDEAS.—The pendency of a motion for a new trial operates as a postponement of the time for filing a writ of error and bond for the removal of a cause to the supreme court of the United States, until the disposition of such motion. The filing of such writ and bond within sixty days after the disposition of the motion for a new trial will operate as a supersedeas, although they were not filed within sixty days after the rendition of the judgment complained of. *Nevada Bank* v. *Steinmetz, Treasurer, etc. Cal* 826.

SUPERVISORS, BOARD OF.

See CERTIORARI, 2; SAN FRANCISCO, 1.

SUPPLEMENTAL PROCEEDINGS.

1. PROCEEDINGS SUPPLEMENTARY TO EXECUTION, UNDER CHAPTER XXXV OF THE CODE.—Prior to the adoption of the code, a judgment creditor had a vested right, within five years after the rendition of his judgment, to have execution issue thereon, and to institute supplementary proceeding at any time. A subsequent statute might limit such right to expire at the end of a reasonable time, but it could not summarily take it away. *Murne* v. *Schwabacher Bros. & Co. Wash.* 799.

2. THE SAME—TRIAL BY JURY—AMENDMENT.—The affidavit filed for the institution of such proceedings, may be amended so as to make the description of the judgment conform to the facts. Such proceedings are equitable in their nature, and the defendant therein has no constitutional right to a trial by jury. If upon a trial of the issues raised thereon, it appears that a person, not a party thereto, claims an interest in the property affected thereby, the court should cause him to be brought in. *Id.*

3. NEW PARTY IN SUPPLEMENTARY PROCEEDINGS.—Whether in a proceeding supplemental to execution pending in the district court, the court can direct a new party to be brought in, *quære?* *Murne* v. *Schwabacher Bros. & Co. Wash.* 563.

4. PARTIES IN SUPPLEMENTARY PROCEEDINGS.—In proceedings supplementary to execution to reach certain property in the judgment debtor's possession, the debtor denied that the property was his own, and alleged that it belonged to certain named persons of whom he was an agent. These alleged principals had full knowledge of the proceeding, and on the trial of the issue raised by the judgment debtor they were examined as witnesses concerning the title and ownership of the property in question. *Held*, that an adjudication in such proceeding against the judgment debtor alone, determining that the property was his, and should be paid over to the judgment creditor, was proper; that he was the only necessary party defendant to the proceedings; that the alleged principals were not necessary parties, and need not be brought in as new parties. *Id.*

5. PROCEEDINGS SUPPLEMENTAL TO EXECUTION AGAINST A GARNISHEE are proceedings at law, and on an appeal from a judgment therein only those errors are reviewable that are assigned in the notice of appeal. *Williams* v. *Gallick. Or.* 537.

SURETIES.

1. JUDGMENT AGAINST SURETIES ON APPEAL.—Where the amount of a judgment rendered against an appellant is reduced by the appellate court, on a ground that was not raised in the lower court, and the judgment is affirmed as so reduced, the sureties on the appeal bond given under section 4 of Prince's statutes, page 242, are liable thereon. *Orr et al.* v. *Hopkins. N. M.* 272.

See ATTACHMENT, 10.

SURVEYS.

See EVIDENCE, 3.

SWAMP LAND. RECLAMATION OF.

See CERTIORARI, 2.

TAXATION.

1. IN ORDER THAT A COUNTY ASSESSOR MAY HAVE JURISDICTION to assess property for taxation, he must follow the statute. An assessment made in a manner not authorized by statute, and not in substantial compliance with its provisions, is void and equivalent to no assessment at all. *N. P. R. R. Co.* v. *Carland. Mont.* 326.
2. AN ASSESSMENT THAT VALUES REAL AND PERSONAL PROPERTY IN A MASS IS VOID. *Id.*
3. AN ASSESSMENT SHOULD SHOW A PROPER DESCRIPTION OF THE PROPERTY, and the real estate and personal property should be separately and distinctly assessed and valued. *Id.*
4. AN ASSESSMENT THAT IS IN SUCH A CONDITION THAT IT CANNOT BE EQUALIZED by the board of commissioners, sitting as a board of equalization, is void. *Id.*
5. IN ASSESSING RAILROADS FOR TAXATION, the assessor must follow the provisions of the statute. *Id.*
6. A TAX WILL NOT BE RESTRAINED UPON THE GROUND THAT IT IS IRREGULAR OR ERRONEOUS. *Id.*
7. TO ENTITLE A PARTY TO RELIEF IN EQUITY AGAINST AN ILLEGAL TAX, he must bring his case under some acknowledged head of equity jurisdiction. *Id.*
8. COURTS OF EQUITY WILL ENJOIN THE CASTING OF A CLOUD UPON A TITLE, in cases wherein the cloud itself, when cast, would be removed. *Id.*
9. IF THE RECORD SHOWING THE VALUATION AND LEVY OF TAX IS COMPLETE on its face, such record creates a lien upon the real estate against which the tax is assessed, and is a cloud upon the title of the owner. *Id.*
10. IF A TAX DEED IS MADE PRIMA FACIE EVIDENCE OF THE PURCHASER'S TITLE, and may be introduced in evidence, without showing the regularity of the proceedings up to the delivery of the deed, such deed is a cloud upon the title of the owner, and equity would interfere, when by the averments of the bill it appears that the property is exempt from taxation, or that the assessment was void. *Id.*
11. IF THE ILLEGALITY OF THE TAX APPEARS UPON THE FACE of the proceedings, no cloud is cast upon the title. *Id.*
12. EQUITY WILL ENJOIN THE COLLECTION OF A TAX LEVIED upon property that is exempt from taxation, to prevent a multiplicity of suits, and to afford a complete remedy. *Id.*
13. THE ACT OF CONGRESS INCORPORATING THE NORTHERN PACIFIC RAILROAD IS A CONTRACT between the government and the incorporators and their successors, and it is not within the constitutional power of congress or of a territorial legislature to impair the obligations of this contrac by the imposition of a tax upon such railroad's right of way. *N. P. R. R. Co.* v. *Carland. Mont.* 326.
14. THE FOURTEENTH AMENDMENT TO THE CONSTITTTION OF THE UNITED STATES IS A LIMITATION upon the sovereignty of the States, and was adopted by the people of the United States to secure to the inhabitants of each state equal laws and equal protection of the laws without regard to race, color, or previous condition. *Id.*
15. THIS LIMITATION APPLIES TO THE SUBJECT OF TAXATION, and forbids the states or territories from exempting property from taxation, except in those cases wherein the property is devoted to public uses in which all the people are equally benefitted. *Id.*
16. CONGRESS MAY EXEMPT THE PROPERTY OF THE UNITED STATES FROM TAXATION. The government may dispose of its own property upon such terms and conditions as it deems proper, and congress is the sole judge as to how this property shall be disposed of. *Id.*
17. CONGRESS HAD POWER TO CHARTER THE NORTHERN PACIFIC RAILROAD COMPANY; to grant it to public lands, and exempt its right of way through such lands from taxation. *Id.*
18. MULTIPLICITY OF SUITS.—Equity has jurisdiction to enjoin the collection of a tax levied under an invalid law, when necessary to prevent a multiplicity of suits. *Dundee Mortgage etc., Co.* v. *School District.* (*U. S. Cir. Ct.*] *Or.* 241.
19. IMPAIRING THE OBLIGATION OF A CONTRACT.—At the date of the execution of a note and mortgage, the law of the state required the mortgaged premises to be assessed at their full cash value for taxation; and afterwards an act was passed requiring the note and mortgage to be assessed at its par value for taxation, and exempting so much of the land from taxation. *Held*, that the latter act did not impair the obligation of the contract between the creditor and the debtor. *Dundee Mortgage, etc., Co.* v. *School District* (*U. S. Cir. Ct.*) *Or.* 241.

20. STATE POWER OF TAXATION.—The state has power, so long as it does not trench upon the constitution of the United States, to tax all persons, property, and business within its jurisdiction or reach; and whether any person, property, or business is so within its jurisdiction is not a federal question, and must be determined by the state for itself. *Id.*

21. UNIFORM AND EQUAL TAXATION.—An act of the legislature providing for the taxation of mortgages as land, which in effect exempts all such mortgages from such taxation upon land in more than one county, violates section 1 of article 9 of the constitution of the state, which requires that taxation shall be uniform and imposed according to its value upon "all property" not specially exempt therefrom, and is therefore void and of no effect; and *semble*, that such act is also a "special" one for "the assessment and collection of taxes," and therefore in violation of subdivision 10 of section 23 of article 4 of the constitution of the state. *Id.*

22. DUE PROCESS OF LAW.—The enforcement by the state of a tax levied under a void law is a deprivation of property without due process of law, contrary to section 1 of the fourteenth amendment to the constitution of the United States. *Id.*

23. ASSESSMENT OF PROPERTY IN THE POSSESSION OF A WAREHOUSEMAN.—Where a warehouseman has in his possession property liable to taxation, and on demand refuses to furnish the assessor with the names of the owners, or a description of such property, as required by section 3629 of the Political Code, it is the duty of the assessor to note such refusal on the assessment book, and to make an estimate of the value of the property. *Bode et al.* v. *Holtz, Assessor, etc.* *Cal.* 366.

24. REVENUE ACTS—DISTRIBUTION OF POLL-TAX.—The revenue act of 1872, in so far as the same provides for the distribution of the poll-tax, was not repealed by the revenue act of 1882. Poll-taxes should be paid into the county school fund, and not into the territorial treasury. *Territory, etc.* v. *Luna, Sheriff, etc.* *N. M.* 418.

25. MUNICIPAL CORPORATION, LIABILITY OF FOR GALLON TAX ON DISTILLED SPIRITS.—A municipal corporation is liable to the United States for the amount of the gallon tax upon spirits distilled with its funds, by its officers and legally constituted agents, acting for and in its name, when such spirits are sold and disposed of without paying the duties thereon, and the proceeds thereof are paid to, received and appropriated by the city, although all of such acts were unauthorized by the city's charter, and a part of them were in violation of acts of congress. *Salt Lake City* v. *Hollister.* *Utah*, 441.

26. MONEY PAID UNDER PROTEST BY SUCH CITY IN SATISFACTION OF SUCH DUTIES can not be recovered back. *Id.*

27. NOTES ISSUED FOR CIRCULATION—WHAT ARE.—Orders drawn by a mercantile corporation to pay to certain persons or bearer a certain number of dollars, in merchandise, at retail, issued to those who were willing to take their pay in merchandise, and as a means of convenience in exchange for produce, do not perform the office of money, and are not notes in the sense in which that word is used in the United States statutes providing "that every person, firm, association, other than national bank associations, and every corporation, state bank, or state banking association, shall pay a tax of ten per centum on the amount of their own notes issued for circulation and paid out by them." Supplement to R. S., vol. 1, 1874–1881, p. 133, sec. 19. *Zion Co-operative Mercantile Institute* v. *Hollister.* *Utah*, 202.

28. DELINQUENT TAXES—ACTION AND LIEN FOR WHEN BARRED.—The statute of limitations of California is applicable to an action brought by the city and county of San Francisco, under the acts of 1878, to recover delinquent city and county and state taxes. Such action is barred, under section 338, subdivision 1, of the code of civil procedure, upon the expiration of three years after the cause of action accrues. When an action to collect such tax is barred, an action to enforce the lien thereof, created by sections 3716 and 3717 of the political code, is also barred. *San Francisco* v. *Jones*, (*U. S. Cir. Court*). *Cal.* 772.

See BONDS, 3, 4; EASEMENTS, 3; INDIANS, 3; JUSTICE COURT, 3.

TENANCY FROM YEAR TO YEAR.

See LANDLORD AND TENANT, 2.

TENANTS IN COMMON.

1. TENANTS IN COMMON WHO ARE JOINED AS PLAINTIFFS IN AN ACTION OF EJECTMENT are presumed to have consented to such joinder. *Weise* v. *Barker.* *Col.* 108.

2. ONE TENANT IN COMMON MAY RECOVER POSSESSION OF THE WHOLE of common property, in an action of ejectment, as against an adverse possessor. *Id.*

3. AMENDMENT—JOINDER OF CO-TENANTS.—A complaint in an action of ejectment, brought by a tenant in common to recover possession of his undivided share in certain mining claims, as against an adverse possessor holding under an entirely different source of title, may be amended by joining as plaintiffs the other tenants in common, and seeking the recovery of the entire property. Such an amendment does not change the nature of the original cause of action. *Id.*

See DEED, 7; EJECTMENT, 5-7; REPLEVIN, 1.

TIDE LANDS.

See PUBLIC LANDS, 7.

TIME CHECK.

1. TIME CHECKS, ACTION ON BY ASSIGNEE.—A written acknowledgment of indebtedness in the form of a time check, as follows:

COLORADO SPRINGS, COL., July 17, 1880.

[Time check. Not negotiable. Payable on regular pay day.]

Paymaster Rio Grande Extension Company:

Due Thos. Flinn, for labor in month of July, 188–, as laborer, twelve days at $1 25 per day $15 00

Deduct for board 3 05

Balance due $11 95

Approved, T. S. BLACKBURN,

F. T. GRISWOLD. Foreman.

Is an assignable chose in action, on which an action may be maintained by the assignee, against the company, without an acceptance thereof by it, after proof of the agency of the maker. *Rio Grande Extension Co.* v. *Coby.* *Col.* 613.

TRESPASS.

1. TRESPASS BY CATTLE.—Under the act of March 20, 1878, one who willfully enters with cattle and horses upon land belonging to and in the possession of another, and depastures them thereon, is liable for the damage suffered by the latter. *Martin* v. *Jacobs.* *Cal.* 135.

See EJECTMENT, 4.

TRUST.

1. ACTION TO ENFORCE A TRUST, NECESSARY PARTIES TO.—Where the owners of several mining claims enter into an agreement for the consolidation of their respective claims and the formation of a corporation to which such claims are to be deeded, the stock of which it to be divided among them in certain proportions, in an action by one owner to enforce the delivery of the stock to which he is entitled, or for an accounting of the same, the corporation formed in pursuance of such agreement is properly joined as a defendant. *Reich* v. *Rebellion S. Mining Co.* *Utah.* 451.

See EXECUTORS AND ADMINISTRATORS, 4; FRAUD, 3; JUDGMENT, 16; PUBLIC LANDS, 10.

UNITED STATES.

See APPEAL, 25; ESTATES OF DECEASED PERSONS, 1-3.

USURPATION OF OFFICE.

1. THERE IS NO SUCH OFFICE AS POLICE JUSTICE OF THE CITY OF SAN JOSE, and consequently the same cannot be usurped, intruded into, or unlawfully held or exercised. *People* v. *Veuve.* *Cal.* 894.

2. JUSTICE OF THE PEACE—EXERCISE OF UNAUTHORIZED JURISDICTION.—The exercise by a justice of the peace of a jurisdiction unauthorized by the constitution, is not the exercise of an office. The result of such attempted jurisdiction is to render the acts done in the exercise thereof void. *Id.*

VENDOR AND VENDEE.

See LACHES, 1.

VENUE.

1. PLACE OF TRIAL.—All actions for the causes mentioned in section 48, laws of Washington territory (1877), must be commenced in the county or district in which the subject of the action lies. The court of no other county or district has jurisdiction thereof. *Wood* v. *Mastick*. *Wash.* 549.
2. MOTION FOR CHANGE OF VENUE—COUNTER AFFIDAVITS.—On an application by a defendant in a criminal prosecution for a change of the place of trial, the prosecution may file counter affidavits contesting the grounds for which the removal is asked. *People* v. *Majors*. *Cal.* 580.

See PLEADING AND PRACTICE, 14.

VERDICT.

See EMINENT DOMAIN, 2; JURY AND JURORS.

VERIFICATION.

See PROBATE COURTS, 1; RECEIVER, 2.

WAREHOUSEMAN.

1. WAREHOUSEMAN'S RECEIPT, TRANSFER OF.—In the absence of statutory enactment a warehouseman's receipt is not a negotiable instrument, and an assignment thereof operates merely as a transfer of the property deposited, and passes no better title to the purchaser than the vendor had. *Solomon* v. *Bushnell*. *Or.* 818.

See TAXATION, 23.

WARRANTIES.

See SALES, 2, 3, 5.

WATER RIGHTS, (Editorial).

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Water rights in private streams in California and Nevada, 596, 649, 681, 697, 763, 803, 835.

1. THE WALLAMET RIVER A NAVIGABLE WATER OF THE UNITED STATES.—The Wallamet river, though wholly within the state of Oregon, by means of its connection with the Columbia river, forms a highway for interstate and foreign commerce, and is therefore a navigable water of the United States, and subject, as such, to the control of congress. *Wallamet Iron Bridge Co.* v. *Hatch* (*U. S. Cir. Ct.*) *Or.* 230.
2. NAVIGABLE WATERS IN OREGON ARE COMMON HIGHWAYS.—The act of February 14, 1859, 11 Stat. 383, admitting Oregon into the Union, which declares that the navigable waters therein shall be "common highways, and forever free" to the citizens of the United States, is not a compact made with or condition imposed upon the state in consideration of its admission into the Union, but is, so far, an absolute and valid regulation, made by congress in pursuance of its power over the navigable waters of the United States, as a means of interstate and foreign commerce, which it might as well have enacted before or after as at the time of such admission. *Id.*
3. OBSTRUCTION TO "COMMON HIGHWAY."—Congress, by the act of 1859, having declared the Wallamet river "a common highway," the state can not authorize any one to build a bridge across the same, which, under the circumstances of the case will needlessly impede or obstruct the navigation thereof. *Id.*
4. JURISDICTION OF THE UNITED STATES CIRCUIT COURT.—The Wallamet river being declared "a common highway" by congress, the question of what constitutes a needless and therefore unlawful, obstruction thereto, arises under a law of the United States, and therefore the United States circuit court has jurisdiction to hear and determine a suit involving the same. *Id.*
5. THE ORDINANCE OF 1787.—*Semble*, that the clause in the fourth article of the compact in the ordinance of 1787, concerning the navigable waters of the north-west territory, was not abrogated or superseded by the formation of states therein and their admission into the Union. *Id.*
6. INTERNAL NAVIGABLE WATERS—POWER OF CONGRESS OVER.—Congress has power, under its authority to regulate commerce and establish post-roads, to control for those purposes the internal navigable waters of the various states. As soon as congress legislates in regard to any such navigable waters, its power becomes exclusive, and the states cannot afterward authorize any material obstruction to their navigation; but till congress acts, the legislature of any state has the power to authorize the obstruction of any navigable waters within its borders, by the erection of bridges, dams, or other structures, for the convenience and advantage of commercial intercourse. *Cardwell* v. *American River Bridge Company* (*U. S. Cir. Ct.*) *Cal.* 759.
7. THE ACT OF CONGRESS ADMITTING CALIFORNIA INTO THE UNION, which provides that all the navigable waters within the state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States, without any tax, impost, or duty therefor, it would seem, should be regarded as a valid regulation by congress of the navigable waters of California, which would withdraw them from the operation of state legislation authorizing the construction of a bridge over a navigable stream, such as the American river, that would utterly destroy its navigability. *Id.*
8. THE CASE OF ESCANABA CO. *v.* CHICAGO, 107 U. S. 679, COMMENTED ON, and the points supposed to distinguish it from that case pointed out. *Id.*
9. ACTION BY PRIOR APPROPRIATOR—ESSENTIAL AVERMENTS.—A complaint by a prior appropriator of water, which alleges the ultimate fact of the legal right in the subject-matter of the action as being in the plaintiff, need not allege the subordinate facts tending to prove such ultimate fact, such as the date of the plaintiff's location, or the location, size, grade or capacity to carry water, of any of his ditches. *Lorenz et al.* v. *Jacobs et al.* *Cal.* 722.
10. WRONGFUL DIVERSION OF WATER—INJUNCTION.—Where any one of two or more co-owners in the use of the waters of a stream, which has been appropriated by them for a beneficial purpose, diverts for use a greater quantity of the water than of right belongs to him, so as to perceptibly reduce the volume of water flowing in the stream and to materially diminish the quantity to which the others are entitled, in consequence of which they are damaged and their rights violated, such parties are entitled to an injunction enjoining the wrongdoers from diverting the water to their injury. *Id.*
11. RECORD OF FORMER JUDGMENT—ADMISSIBILITY OF.—In an action where the question at issue is the quantitative interest of the parties in the natural flow of a cer-

tain stream, the record of a former action of partition wherein certain of the present plaintiffs and defendants were parties, and where issue was joined as to their respective interests, is admissible as against such parties. *Id.*

12. SUBSEQUENT APPROPRIATION OF THE WATERS OF A RAVINE, which had been prior appropriated, only extends to the water suffered to go to waste by the prior appropriator. *Brown* v. *Mullin.* *Cal.* 133.
13. A FINDING THAT THE PLAINTIFF WAS ENTITLED TO WATERS of a certain ravine held unsupported by the evidence. *Id.*
14. ABANDONMENT—EVIDENCE OF.—A failure to use water appropriated for a time is competent evidence on the question of abandonment, and if such non-user continues for an unreasonable period, it may create a presumption of intention to abandon. Such presumption is not conclusive, but may be overcome by other satisfactory evidence. *Sieber* v. *Frink.* *Cal.* 98.
15. CHANGE OF POINT OF DIVERSION—EFFECT OF.—An appropriator's rights of priority are not affected by a change of eighty feet in the point of diversion, when both points of appropriation were upon the same stream, and no change was made in the quantity of water diverted, and no one was injured by the removal, and the use and the points of application of such use remained the same. *Id.*
16. APPLICATION OF THE WATER TO SOME USEFUL INDUSTRY is essential to a valid appropriation. Such application must be made within a reasonable time to the business for which the appropriation was made. What constitutes such reasonable time is a question of fact, depending upon the circumstances of each case *Id.*
17. INCREASE IN THE AMOUNT OF WATER APPROPRIATED.—Where a prior appropiator of water subsequently enlarges his ditches, and diverts a larger amount of water than that originally appropriated, his right to the increased flow is taken subject to the rights of other appropriators which attached prior to time of enlargement. *Id.*
18. AN APPROPRIATION OF WATER IS NOT COMPLETE UNTIL THE ACTUAL DIVERSION or the use of the water; but if the appropriator prosecutes his work with reasonable diligence his right of appropriation relates to the time when the first step was taken to secure it. *Sieber* v. *Frink.* *Cal.* 98.

See DEDICATION, 3.

WIFE.

See HUSBAND AND WIFE.

WITNESSES.

1. COMPELLING THE ATTENDANCE OF WITNESSES.—Judgment will not be reversed for the refusal of the trial court to compel the attendance of witnesses who had been subpœnaed and had come to the place of trial, but who had afterwards refused to appear in court and testify unless their fees were first paid, especially where the affidavit used on the motion to compel such attendance failed to set forth what was expected to be proved, or even aver that their testimony would be necessary, pertinent, or in any way material in the case. *People ex rel. Dean* v. *Comms of Grand Co.* *Col.* 112.
2. MURDER—IMPEACHMENT OF WITNESS.—On a trial for murder a witness for the defense was asked in substance whether the prisoner had ever informed her that he intended to kill the deceased. She answered no. Subsequently the prosecution called a witness, who was asked whether the former witness had ever said anything to her about the defendant going to kill the deceased. The defendant objected to the inquiry, first, because the matter upon which it was sought to impeach the former witness was immaterial to the issues, and, second, because a proper foundation had not been laid for the impeachment. The court overruled the objection. *Held*, that the evidence should have been excluded. *People* v. *Bush.* *Cal.* 575.
3. EVIDENCE OF THE GOOD CHARACTER OF A WITNESS CANNOT BE GIVEN UNTIL after such witness's character has been attacked by evidence that his reputation for truth, honesty and integrity is bad. *People* v. *Bush.* *Cal.* 575.
4. AMENDED COMPLAINT—IMPEACHMENT OF WITNESS.—By the verification of an original complaint the plaintiff makes its statements his own. After the filing of an amended complaint the original ceases to perform any office as a pleading, and its averments cannot be used to disprove those of the amended complaint. But where the plaintiff testifies as a witness in his own behalf, the original complaint is admissible in evidence, for the purpose of impeaching him, when the statements contained therein are inconsistent with his statements as a witness. *Johnson* v. *Powers.* *Cal.* 740.

5. DEAF AND DUMB WITNESS—COMPETENCY OF.—A deaf and dumb child, about nine years of age, who has no idea of the nature or sanctity of an oath, and who cannot be made to understand questions asked him, is not competent as a witness. *Territory, etc.*, v. *Duran et al.* *N. M.* 274.

WRIT OF ASSISTANCE.

1. TENANT FOR YEARS—PRIORITY OF OVER SUBSEQUENT MORTGAGEE.—The assignee of an estate for years, claiming under a duly recorded lease, is entitled to priority over a mortgage executed subsequent to the date of the lease, although the assignment of the lease was made after a decree foreclosing such mortgage. If a writ of assistance is asked for under such decree, and if, after the assignee of such estate for years had appeared and opposed such issuance, the court had nevertheless directed the writ to issue, and the assignee had been amoved thereunder, such facts would not have constituted an adjudication of his rights which would have estopped his assertion of them in a subsequent action. Courts will not undertake to settle the conflicting legal or equitable rights of persons, not parties to a foreclosure suit, upon an application for a writ of assistance.—*Enos* v. *Cook.* *Cal.* 733.

WRIT OF ERROR.

See APPEAL AND WRIT OF ERROR.

WRIT OF REVIEW.

See CERTIORARI.

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